GAUTREAUX v. CITY OF CHICAGO: IMPLEMENTATION OF DESEGREGATION ORDERS IN PUBLIC HOUSING

Local governments usually have the power to approve or disapprove the sites a public housing authority selects for its projects. Recently, numerous suits have been brought by public housing tenants alleging that local governments are intentionally choosing sites in areas of racial concentration and thereby purposely perpetuating segregated housing patterns. An increasing number of these suits are resulting in a favorable judgment for the tenants. A favorable judgment, however, does not assure the implementation of an accompanying decree designed to restore racial balance. A federal district court, to facilitate compliance with a previous order against the Chicago Housing Authority (CHA), issued an injunction suspending operation of a state statute[1] that required public housing sites selected by CHA to be approved by the Chicago City Council (Council) before acquisition.[2] On appeal, in *Gautreaux v. City of Chicago (Gautreaux IV)*,[3] the Seventh Circuit held that the district court had power to suspend the statute when it was established that the unjustified delays of the Council in approving sites had the *effect* of preventing CHA's compliance with the previous district court order, notwithstanding the failure of plaintiffs to plead and prove that the Council had, by its inaction, *intentionally* violated plaintiffs' constitutional rights.

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1. ILL. REV. STAT. ch. 67 1/2, § 9 (1971).

2. Gautreaux v. Chicago Housing Authority, 342 F. Supp. 827 (N.D. Ill. 1972).

3. 480 F.2d 210, 214-15 (7th Cir. 1973). In terms of legal theory and this decision's impact on desegregation of public housing, the second issue on appeal is most significant and will be the only issue given full consideration in this Comment. The first issue concerned the district court's granting of plaintiff's motion under Rules 21 and 19(a)(1) of the Federal Rules of Civil Procedure to add the Mayor, the Chicago City Council, and the individual aldermen as defendants for purposes of relief. Brief for Plaintiffs at 18, Gautreaux v. City of Chicago, 480 F.2d 210 (7th Cir. 1973). Prior to *Gautreaux IV*, plaintiffs had named only CHA as defendant. The final issue was whether the district court had abused its discretion in suspending the statute based on assertions by the Council of hardships resulting to certain ethnic groups. Brief

Earlier *Gautreaux* cases had established that CHA used racially discriminatory practices in making site selections.[4] In 1969 the district court enjoined CHA from continuing those practices and, by restricting the locations available to CHA, directed the disestablishment of the segregated public housing that had resulted.[5] In 1971 CHA sub-

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for Defendant Council at 21-30, Gautreaux v. City of Chicago, 480 F.2d 210 (7th Cir. 1973).

It would seem quite easy to dispose of the first issue, but the Seventh Circuit failed to separate the question of joinder of new parties for purposes of relief from the question of whether, once joined, the plaintiffs were then entitled to the relief sought in the supplemental complaint filed under Federal Rule 15(d).

Judge Sprecher, writing the majority opinion, viewed the question as one of whether the "City Council by its earlier discriminatory actions" (Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969)) "and later by its inaction has made itself a party to the discrimination 'as a joint participant.' Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961)." 480 F.2d at 214. Judge Swygert, concurring, did not find joint participation but apparently found that the city failed "to alleviate racial imbalance in housing" and, therefore, was properly joined as a defendant. *Id.* at 216. Judge Pell, dissenting, rejected the finding of joint participation and argued that plaintiffs should have charged that either the Council's inaction was with the intent of violating the Constitution or that the statute was unconstitutional on its face or as applied. *Id.* at 218. Griffin v. County School Bd., 377 U.S. 218, 226-27 (1964), and Bradley v. School Bd., 51 F.R.D. 139 (E.D. Va. 1970), support the district court's granting a motion for joining the city as a defendant without deciding, before joinder, whether once added as defendants, relief should be granted.

The third issue, raised by the Council's allegations that the decree would cause hardships on various individuals and ethnic groups as examples of the district court's abuse of its discretion, was implicitly rejected by the Seventh Circuit.

4. Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907, *enforced*, 304 F. Supp. 736 (N.D. Ill. 1969).

5. Gautreaux v. Chicago Housing Authority, 304 F. Supp. 736 (N.D. Ill. 1969). The order states in part: "This order shall be binding upon . . . those persons, including the members of the City Council . . . in active concert or participation with [CHA] who receive actual notice of this order . . . ." *Id.* at 741. The prior Memorandum Opinion contained similar language followed by referral to Rule 65(d) of the Federal Rules of Civil Procedure. Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907, 914 (N.D. Ill. 1969). This statement may be the basis for the Seventh Circuit's confusion on the issue of joinder and Judge Sprecher's finding of joint participation. *See* note 3 *supra.* A reasonable explanation for such statements was suggested by one student commentator:

> The effect of the Court's order on the City Council is unclear. Certainly the court did not mean either that the City Council approve every CHA plan or in fact any of them. The court probably meant that members of the City Council were bound by the court's general proscription of intentional discrimination and that if they attempted to establish a procedure like the "pre-clearance" procedure used previously, they would be in contempt of court.

83 HARV. L. REV. 1441, 1443 n.13 (1970).

The district court accepted *in toto* plaintiffs' plan for an order against CHA.

mitted sites to the Council under a timetable imposed in *Gautreaux I*.[6] Unexplained delays in consideration and review of those sites by the Council led plaintiffs to seek a means to expedite Council approval.[7] The district court thereafter issued a decree conditioning Chicago's receipt of Model Cities Program funds upon approval by the Council of sufficient sites to meet the 1969 order.[8] The district court based the decree on its finding that the Council had no intention of approving the sites[9] and on the Seventh Circuit's finding in *Gautreaux II* that the Department of Housing and Urban Development had also violated plaintiffs' constitutional rights.[10] The injunction was reversed on appeal in *Gautreaux III* as an abuse of the court's discretion.[11]

Gautreaux IV was plaintiffs' attempt to correct the defects of *Gautreaux III*. A supplemental complaint was filed alleging, basically, (1) that the 1969 order was still unfulfilled, (2) that the statutory requirement of Council approval for public housing sites had the effect of denying that relief, (3) that the Council's failure to approve sites submitted by CHA was without justification, and (4) that because of such an effect upon the 1969 order the statute should be suspended for the limited purpose of allowing CHA to comply with the 1969 decree.[12] After a hearing on the supplemental complaint, the district

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For an excellent discussion of the plan and its various elements see Note, *Public Housing and Integration: A Neglected Opportunity*, 6 COLUM. J.L. & SOC. PROB. 253 (1970). The plan was never appealed because CHA believed it would have impeded the construction of new housing for several years to come. *Id.* at 271 n.98. In fact, no public housing has been built since the 1969 order.

6. Gautreaux v. Chicago Housing Authority, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971).

7. Gautreaux v. Romney, 332 F. Supp. 366 (N.D. Ill. 1971).

8. *Id.*

9. *Id.* at 368-69. The findings are more complicated than such a simple statement would indicate. The Mayor had submitted a letter of intent to HUD assuring the Regional Administrator that the city would process suitable sites for the 1969 order. The court found that the city had no intention of complying with the site approval timetable set forth in the letter of intent, and that the sole purpose of the letter was to induce HUD to grant 26 million dollars for funding the City's Model Cities Program.

10. Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971). The court held that HUD, by its knowing acquiescence in the discriminatory practices of CHA, had violated the due process clause of the fifth amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970). *Id.* at 737.

11. Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972).

12. Brief for Defendant Council at app. A, Gautreaux v. City of Chicago, 480 F.2d 210 (7th Cir. 1973).

court found for plaintiffs on all issues.[13] Agreeing that the effect of the state statute was to "thwart the correction of federal constitutional wrongs" and that the Council's failure to act could not be permitted to produce such an effect, the district court enjoined the operation of the statute.[14]

The "effect" test used by the district court does not seek to answer whether the statute is unconstitutional on its face, as applied, or as construed, thereby obviating the need to apply either equal protection or due process tests to the statute itself.[15] The test seeks only to determine whether the actions of the defendant under that statute result in preventing the correction of constitutional wrongs.[16] The court may resort to this test to prevent the actions or inactions of a defendant, under color of law, from impeding the implementation of a previous decree.[17] In such a case, the court may decree further relief in the exercise of its remedial discretion without holding the statute unconstitutional.[18] The court's inquiry in such circumstances does not include ascertaining the motive, intent or purpose of defendant's actions or inactions;[19] only the *effect* of that commission or omission need be considered.[20]

The Seventh Circuit accepted the district court's application of the effect theory, thereby rejecting the Council's argument that intent, motive or purpose must be established to sustain a finding that plaintiffs' constitutional rights had been violated.[21] The court agreed that the necessity of Council approval for CHA-selected sites had the the effect of denying the relief granted in 1969. It also held that the district court had the power to suspend the statutory requirement,

13. Gautreaux v. Chicago Housing Authority, 342 F. Supp. 827, 829 (N.D. Ill. 1972).

14. *Id.* at 829-30.

15. The effect test has been used to hold a state law or local ordinance unconstitutional, but this was not the holding in *Gautreaux IV*. For cases that do apply the effect test to hold a law unconstitutional see Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967).

16. Wright v. Council of City of Emporia, 407 U.S. 451 (1972).

17. *Id.* at 460.

18. *Id.*

19. *Id.* at 462.

20. *Id.*; Gautreaux v. City of Chicago, 480 F.2d 210, 216 (7th Cir. 1973) (concurring opinion).

21. Gautreaux v. City of Chicago, 480 F.2d 210, 215 (7th Cir. 1973); Brief for Defendant Council at 12-13, *id.*

pointing out that the state policy embodied in the statute must give way when it operates to "hinder vindication of federal constitutional guarantees."[22]

An evaluation of the holding in *Gautreaux IV* must first focus on the federal power of equitable relief, which has been characterized as flexible and as embodying "[t]he qualities of mercy and practicality" that make it an instrument suited for "adjustment and reconciliation between the public interest and private needs . . . ."[23] The Supreme Court has held that when federally protected rights have been invaded, the courts may adjust their remedies to grant the necessary relief.[24] The Court has additionally held that a court has not only the power but also the duty to render a decree that will, as far as practicable,[25] eliminate discrimination.[26] The Court, however, has cautioned that judicial authority enters only upon the default of local authority[27] and only on the basis of a constitutional violation.[28]

Supreme Court cases further hold that state law is not a limitation on the powers of the federal courts to protect a constitutional right.[29] Constitutional rights can neither be nullified openly and directly by a state legislature, executive or judge, "nor nullified indirectly through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' "[30] No matter how innocent on its face, state action is

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22. Gautreaux v. City of Chicago, 480 F.2d 210, 214 (7th Cir. 1973).

23. Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

24. Bell v. Hood, 327 U.S. 678, 684 (1946).

25. Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971). *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971).

26. Louisiana v. United States, 380 U.S. 145, 154 (1965).

27. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

28. *Id.* Orders relating to construction of new facilities are not new to the federal courts in school desegregation cases, and an analogy could be drawn here to public housing. Franklin v. Quitman County Bd. of Educ., 288 F. Supp. 509 (N.D. Miss. 1968); Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, 480-81 (M.D. Ala. 1967), *aff'd sub nom.* Wallace v. United States, 389 U.S. 215 (1967); *see* United States v. Board of Pub. Instruction, 395 F.2d 66 (5th Cir. 1968). *See also* United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir.), *cert. denied,* Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967); Board of Pub. Instruction v. Braxton, 326 F.2d 616 (5th Cir. 1964).

29. Wright v. Council of City of Emporia, 407 U.S. 451 (1972); North Carolina Bd. of Educ. v. Swann, 402 U.S. 43 (1971); Louisiana v. United States, 380 U.S. 145 (1965); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Cooper v. Aaron, 358 U.S. 1 (1958); Smith v. Texas, 311 U.S. 128 (1940).

30. Cooper v. Aaron, 358 U.S. 1 (1958); Smith v. Texas, 311 U.S. 128 (1940).

"unconstitutional and null"[31] if it seeks to subvert a constitutional right, whether directly through an interposition scheme or indirectly through a measure designed to circumvent federal court orders issued to protect such a right.

The effect theory employed in *Gautreaux IV* has also been applied in school desegregation cases. In *Wright v. Council of City of Emporia*[32] the Supreme Court held the effect theory applicable when the district court sought to prevent frustration of its school desegregation order by a county school board. The order had been issued when Emporia was a voluntary participant in the county school system. A supplemental complaint was filed that sought to prevent the city from exercising its power under state law to create its own school system on the ground that to do so would constitute an impermissible frustration of the existing order for desegregation. Emporia argued that because it was a separate political entity, its decision to establish an independent system could be enjoined only upon a finding that the state law under which it acted was unconstitutional, or that the racial composition of the new system would be unconstitutional.[33] The Court did not find that the statute or the planned system's racial composition would be unconstitutional.[34] It concluded, however, that if the "proposal would impede the dismantling of the dual system, then the district court, in the exercise of its remedial discretion, [could] enjoin it from being carried out."[35] Any inquiry into the city's motive was rejected as irrelevant.[36] Arguing that it is difficult or impossible for any court to determine the motive of legislators, the Court stated that the focus must be "the *effect* of the action upon the dismantling of the dual school system . . . ."[37]

In *United States v. Scotland Neck City Board of Education*[38] the Supreme Court explicitly rejected the notion that action of a state legislature affecting the desegregation of a dual school system stands

31. Bush v. Orleans Parish School Bd., 190 F. Supp. 861, 864 (E.D. La. 1960), *aff'd sub nom.* City of New Orleans v. Bush, 366 U.S. 212 (1961).

32. 407 U.S. 451 (1972).

33. *Id.* at 459.

34. *Id.*

35. *Id.* at 460.

36. *Id.* at 462.

37. *Id.*

38. 407 U.S. 484 (1972).

on a footing different from action of a local board.[39] The Court held that if a state-imposed limitation on a school authority operated to inhibit or to obstruct the disestablishment of a dual school system the state limitation must fall.[40]

In essence, the legal theory in *Gautreaux IV* was a fusion of the holdings in *Wright* and *Scotland Neck* applied to a case involving desegregation in public housing. The *Gautreaux IV* courts found that the state statute limited the authority of CHA and thereby operated to repress or delay the desegregation of Chicago public housing.[41] Such a delay in meeting the goals of the 1969 order would not be tolerated, for "state policy must give way when it operates to hinder vindication of federal constitutional guarantees."[42]

It is significant that the courts have not recognized a distinction between segregation in education and in housing. Noting that one school construction case held that location is highly relevant to nondiscriminatory programs, one court analogized "it would, in fact, be totally unrealistic to say that the location of public housing is not relevant to the issue of discrimination."[43] In recognition of this

39. *Id.* at 488-89.

40. *Id.* at 488.

41. Gautreaux v. City of Chicago, 480 F.2d 210, 214 (7th Cir. 1973); Gautreaux v. Chicago Housing Authority, 342 F. Supp. 827, 829 (N.D. Ill. 1972).

42. North Carolina Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971); Gautreaux v. City of Chicago, 480 F.2d 210, 214 (7th Cir. 1973).

43. Hicks v. Weaver, 302 F. Supp. 619, 622-23 (E.D. La. 1969). For discussions of reasons for comparing desegregation of housing and education see Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on* Jones v. Alfred H. Mayer Co., 22 RUTGERS L. REV. 537 (1968); Note, *Public Housing and Integration: A Neglected Opportunity,* 6 COLUM. J.L. & SOC. PROB. 253 (1970); Note, *Low-Income Housing and the Equal Protection Clause,* 56 CORNELL L. REV. 343, 348, 360-61 & n.106 (1971).

One author views the problem of discrimination as related to segregation in the following manner:

> One predicate for the proposition that separate treatment is inherently unequal is the vulnerability of a traditionally disadvantaged group to discrimination once its members are separated from the protective company of those who command governmental respect. This is certainly applicable to residential circumstance. Residents of ghettos are highly vulnerable to second-rate municipal services of all sorts, to disadvantage in the process of education, to functional emasculation of their franchise through gerrymandering, to selective and adverse police practices, and to the abusive tactics of private merchants.

Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent,* 21 STAN. L. REV. 767, 782 (1969). For an example of discrimination in municipal services see Hawkins v. Town of Shaw, 437 F.2d 1286 (1971), *aff'd en banc,* 461 F.2d 1171 (5th Cir. 1972).

fact, equal protection cases in housing have accepted the effect theory as it is applied in school desegregation cases. The Seventh Circuit in *Gautreaux IV* referred to cases expressly holding that, in circumstances involving a long history of discrimination, it is not necessary to prove that the intent, motive or purpose of local officials had been to discriminate.[44] Another court explained the effect theory this way:

> Judicial inquiry into the purpose or effect of governmental action is not limited to the moment that the action occurs. Not only must the "immediate objective" of governmental action be considered, but the "historical context" and "ultimate effect" of such action must be considered . . . . The inquiry must further assess the "reality" of the "law's impact" and consider the "background" against which state action operates to determine that reality. . . . Therefore, relevant to this inquiry are either past or prospective governmental actions which form a part of the background.[45]

Applying this interpretation of the effect theory, the *Gautreaux IV* courts referred to the long history of the district court's efforts to achieve full implementation of its 1969 order as the background from which to view the effect of the Council's unexplained failure to act on CHA sites.

An important practical question is whether the plaintiffs and the district court are now any closer to obtaining full compliance with the 1969 decree. Plaintiffs have sought expeditious desegregation of Chicago public housing, and the *Gautreaux* courts have agreed with that purpose. Significantly, however, the ability of the Council to reject CHA-selected sites involved only one of the Council's supervisory powers over CHA.[46] It must be conceded, at least in theory, that the holding in *Gautreaux IV* only circumvents the Council's authority to reject sites and does not reach the other aspects of

44. Hawkins v. Town of Shaw, 437 F.2d 1286, 1292 (1971), *aff'd en banc*, 461 F.2d 1171, 1172 (5th Cir. 1972), *quoting* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 (2d Cir. 1968).

45. Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669, 694 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). (Footnotes and citations omitted.)

46. *See* 42 U.S.C. §§ 1410(h), 1411(f), 1415(7) (1964). Included in those provisions is the requirement that the City of Chicago sign a Cooperation Agreement with CHA before federal funds can be applied to CHA projects and that the local government waive taxes on the property used for public housing. Of course, these federal statutes do not include the Council's zoning and city planning powers that affect locations available to CHA. Gautreaux v. City of Chicago, 480 F.2d 210, 217 (7th Cir. 1973) (Swygert, J., concurring).

CHA dependence on the Council.[47] Given that concession and the accepted purpose for the *Gautreaux IV* order, the court might well have applied, in conjunction with the effect theory, an independent and supplementary theory wherein the court would have charged the Council with an affirmative duty to take an active, positive interest in aiding CHA compliance with the 1969 order. A similar kind of duty has been found to exist in housing cases by other federal courts.[48] Of equal significance is that the *Gautreaux* courts have in large measure based their conclusions of law on cases in which the Supreme Court has placed an obligation on school authorities actively to pursue desegregation in education.[49] This analogy could be extended to hold that local governments are bound by a similar duty to correct state-imposed segregation in public housing. Authority for the extension would be based on the Supreme Court's acknowledgment that school desegregation cases are not considered to "differ fundamentally from other cases involving the framing of equitable remedies to repair denial of a constitutional right."[50]

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47. Gautreaux v. City of Chicago, 480 F.2d 210, 217 (7th Cir. 1973) (Swygert, J., concurring).

48. Generally, those courts have charged the particular defendant before the court with a duty to act in conformity with the national policy of promoting a balanced and dispersed public housing program. It would not seem unreasonable to charge the Chicago City Council with what is a more limited duty of placing its authority solidly behind meeting the 1969 decree. For a collection of cases that have recognized a national policy of balanced and dispersed public housing see Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F. Supp. 1257, 1267 (N.D. Ohio 1973) and notes 57-59 and accompanying text *infra.*

49. Brown v. Board of Educ., 347 U.S. 483 (1954), 349 U.S. 294 (1955); *accord,* Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

50. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16 (1971). "The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Id.* at 16. *See also* note 43 *supra.*

Those interested in public housing problems will probably agree that the result in *Gautreaux IV* is a positive step in correcting the segregated housing pattern of Chicago. Yet one should always be wary of too easily accepting a "good result." In this regard consider the following:

> While precedent is surely the keystone in delineating the *legal* framework and *constitutional* categories that this [case] might fall under it must be noted that cases of racial discrimination that raise issues of equal protection-due process denial . . . are not fungible pegs that can summarily be slipped, on a factual level, into previously carved precedential slots. Since the crux of this genre of cases depends on the delicate balancing of infringed right against police power any fact unique to a certain case may tip the balance in favor or against one side and, consequently, one must be wary of relying on mere hypotheticals or remote analogies.

Sisters of Providence v. City of Evanston, 335 F. Supp. 396, 399 (N.D. Ill. 1971).

Analysis of this suggested theory begins with the Supreme Court's decision in *Brown v. Board of Education (Brown II)*,[51] which established the affirmative duty of school officials to act with "all deliberate speed" to make a "prompt and reasonable start toward full compliance" with court ordered desegregation.[52] Once a decree is entered, the burden is upon school officials to establish that any additional delay is necessary to the public interest and is consistent with good faith compliance at the earliest possible date.[53] The affirmative duty includes an obligation to take whatever steps might be necessary to eliminate racial discrimination "root and branch."[54] In one school construction case a district court held that all agencies of the state, not just local authorities, are to be charged with an affirmative duty to disestablish state-imposed segregation.[55] Neutrality is to be forsaken for an active, affirmative interest in carrying out constitutional commands.[56]

Lower federal courts have found that this nation is committed by legislative act[57] and judicial decision[58] to an affirmative policy of balanced and dispersed public housing.[59] The courts have charged

51. 349 U.S. 294 (1955).

52. *Id.* at 300-01.

53. *Id.* at 300.

54. Green v. County School Bd., 391 U.S. 430, 437-38 (1968).

55. Franklin v. Quitman County Bd. of Educ., 288 F. Supp. 509, 519 (N.D. Miss. 1968).

56. *Id.*

57. Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970); Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.* (1970); Department of Housing & Urban Development, Low-Rent Housing Manual, § 205.1(g) (1967). In Shannon v. HUD, 436 F.2d 809, 816 (3d Cir. 1970), the court stated: "Whatever were the most significant features of a workable program . . . in 1949, by 1964 such a program had to be nondiscriminatory in its effects, and by 1968 the Secretary had to affirmatively promote fair housing."

58. Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F. Supp. 1257, 1263, 1267 (N.D. Ohio 1973); Banks v. Perk, 341 F. Supp. 1175, 1182 (N.D. Ohio 1972), *aff'd in part, rev'd in part,* 473 F.2d 910 (6th Cir. 1973); Crow v. Brown, 332 F. Supp. 382, 390 (N.D. Ga. 1971), *aff'd,* 457 F.2d 788 (5th Cir. 1972); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), *aff'd,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971); *see* Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969); Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907, *enforced,* 304 F. Supp. 736 (N.D. Ill. 1969), *aff'd as modified,* 436 F.2d 306 (7th Cir. 1970), *cert. denied,* 402 U.S. 922 (1971).

59. Banks v. Perk, 341 F. Supp. 1175, 1179 (N.D. Ohio 1972), *aff'd in part, rev'd in part,* 473 F.2d 910 (6th Cir. 1973); *see* 7 URBAN L. ANN. 336 (1974).

local officials with an obligation to aid that policy unless they can demonstrate a compelling interest not to do so.[60] This policy recognizes that public housing programs can no more confine low-income blacks to a compacted and concentrated residential area than educational programs can confine black children to segregated schools.[61]

In *Gautreaux IV* neither court made reference to any affirmative duty or obligation on any defendant, nor did they acknowledge that other courts have found such a duty to exist.[62] The entire thrust of the decisions was based on the effect theory. The injunction in *Gautreaux IV* only barred one of the Council's potential dilatory actions. By suspending the statute, the courts actually relieved the Council of any responsibility or duty to act. An affirmative duty charged to the Council would arguably require the City in future housing actions, as in school cases, to demonstrate that delay was necessary to the public interest and consistent with a good faith effort to integrate.

The recent case of *Mahaley v. Cuyahoga Metropolitan Housing Authority*[63] demonstrates the concurrent consideration and application of the effect and affirmative duty theories. The Cuyahoga Metropolitan Housing Authority (CMHA) made studies that indicated a need for additional units of low-income housing within its jurisdiction, but the need for this housing was in cities with whom CMHA did not have Cooperation Agreements.[64] CMHA made a concerted effort to negotiate with those communities for such agreements in order to meet the needs of low-income persons by constructing housing in the communities where they resided.[65] Plaintiffs in this suit argued that

60. *See, e.g.*, cases cited note 58 *supra.*

61. Banks v. Perk, 341 F. Supp. 1175, 1179 (N.D. Ohio 1972), *aff'd in part, rev'd in part,* 473 F.2d 910 (6th Cir. 1973); Crow v. Brown, 332 F. Supp. 382, 390 (N.D. Ga. 1971), *aff'd,* 457 F.2d 788 (5th Cir. 1972).

62. Judge Sprecher, writing for the majority, characterized the holding of Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), *aff'd,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971), as requiring the city to take all necessary steps to enable Kennedy Park to proceed with its housing project. It is plausible that in doing so he impliedly acknowledged that some courts have charged local officials with affirmative duties, but it is certain that none were imposed on the Council in *Gautreaux IV.*

63. 355 F. Supp. 1257 (N.D. Ohio 1973).

64. *Id.* at 1260-62; *see* 42 U.S.C. § 1415(7) (1970).

65. Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F. Supp. 1257, 1261-62 (N.D. Ohio 1973).

these municipalities, which had refused to contract with CMHA, had used the Cooperative Agreement requirement to perpetuate racial segregation and that they should be enjoined from doing so.[66] The district court held that in the face of a clear and positive need for public housing within their respective city limits, the suburbs could not refuse to execute such agreements unless they showed a compelling governmental interest.[67] If they failed to provide such a justification, the court would presume the reason to be racial discrimination and would take "appropriate" action.[68]

Although the result in *Mahaley* illustrates a greater reliance on the "constitutional obligation" of the suburbs to cooperate with CMHA[69]

66. *Id.* at 1259.

67. *Id.* at 1269.

68. *Id.*

69. *Id.* at 1268-69. The district court found itself faced with a constitutional dilemma. State officials were clearly acting under color of law and were performing acts that had a discriminatory effect. The law, however, was federal rather than state. The refusal of local officials to sign a federally required document produced the discriminatory effect. The court saw two alternatives. One was to hold the federal statute unconstitutional as applied. The court rejected that conclusion because the statute was not in fact unconstitutional as applied to plaintiffs, but rather had been used in a manner to perpetuate discrimination. *Id.* To avoid that result the court chose a second alternative and ordered CMHA to prepare a plan for the number of scattered site units it had intended to place in each of the suburbs. The suburbs would then enter into Cooperation Agreements or face further court action. *Id.* at 1269.

The district court felt constrained to hold the federal statute constitutional on its face since the case had originated by the convening of a three-judge district court that, upon finding the federal statute constitutional, dissolved itself to allow one judge to decide the remaining issues. Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F. Supp. 1245 (N.D. Ohio 1973).

In Lawrence v. Oakes, 361 F. Supp. 432 (D. Vt. 1973), a three-judge panel upheld the federal requirement of a Cooperation Agreement as constitutional. The court rejected use of a compelling interest test to review the statute, citing Lindsey v. Normet, 405 U.S. 56 (1972) (dicta that adequate housing is not a constitutional right), and James v. Valtierra, 402 U.S. 137 (1971) (holding constitutional a referendum requirement for approval of low-income housing). Instead, the court applied the "minimal scrutiny" test (*i.e.*, if any set of facts can be conceived that would indicate a rational basis for the local approval requirement then the statute is valid) and found two legitimate reasons that support the statute. First, Congress may have been concerned with insuring that low-income housing would be consistent with other housing and development already in effect or planned for the local community. Secondly, Congress may have been concerned with insuring that the possible inflationary effects of public housing would not jeopardize the housing opportunities of people whose income level placed them above public housing eligibility. On the issue of refusal of approval by local officials, the court said, in dicta, that refusal must be based on "legitimate com-

than on the effect of their refusal to execute Cooperation Agreements, the latter was considered a necessary element in the court's legal theory. The district court found ample evidence that the suburbs' failure to contract with the Authority had the clear effect of violating the fourteenth amendment by perpetuating existing racial segregation,[70] and that the suburbs provided no adequate or compelling reason to explain their conduct.[71]

Had such an approach been employed in *Gautreaux IV*, it would have forced the Council to demonstrate a compelling reason for its inaction to approve the sites submitted by CHA.[72] Charging the Council with an affirmative duty to assist CHA in integrating Chicago public housing would include all aspects of CHA's dependence on the Council and therefore would require cooperation by the Council in all phases of the 1969 order. This duty would place a burden on the Council to demonstrate that any delay was necessary to a good faith effort. The effect theory, used alone, only resulted in holding CHA independent of the Council for the purpose of real estate acquisition. As a practical matter, this may not be enough independence in the city that has resisted integration in public housing sites since the early 1950's.[73] There would, of course, be no positive

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munity concerns which necessitate disapproval" and indicated that the reasons for its decision on the issue of constitutionality of the statute suggested valid grounds for a refusal to sign a Cooperation Agreement.

70. Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F. Supp. 1257, 1266-67 (N.D. Ohio 1973).

71. *Id.* at 1266.

72. The compelling interest test as applied to an existing public housing program has yet to be argued before the Supreme Court. Since plaintiffs in *Gautreaux IV* are entitled by the 1969 decree to restoration of equal protection under the law, it would seem logical to apply a compelling interest test to those who are effectively obstructing the court's ability to provide that relief. Such a view would distinguish *Gautreaux IV* from James v. Valtierra, 402 U.S. 137 (1971), in which the Court rejected an equal protection challenge to a state constitutional requirement that a referendum be held to approve low-income housing construction. There, the Court held that plaintiffs had not established that a "law . . . neutral on its face" had the effect of specially burdening a racial minority. *Id.* at 141. The *Gautreaux* courts have already agreed that a constitutional violation exists, and they are seeking to rectify that condition by the *Gautreaux IV* decree.

73. *See* M. MEYERSON & E. BANFIELD, POLITICS, PLANNING & THE PUBLIC INTEREST: THE CASE OF PUBLIC HOUSING IN CHICAGO (1955). This is the classic work on the public policy dimensions of public housing site selection decisions in Chicago. For an overview of the events from 1955 to 1969 see Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969).

guarantee of conformance with the court's order based on an affirmative obligation to aid the national policy of balanced and dispersed public housing, but there would certainly be less room for evasion of the spirit and goal of the 1969 decree.*

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* Recently the Supreme Court denied the petitions for writ of certiorari of defendant Council and defendant CHA. Chicago Housing Authority v. Gautreaux, 414 U.S. 1144 (1974); City of Chicago v. Gautreaux, 414 U.S. 1144 (1974).

The latest district court action, Gautreaux v. Romney, 363 F. Supp. 690 (N.D. Ill. 1973), which denied plaintiffs' request for "a metropolitan plan for relief," *id.* at 690, that would require CHA to build some of the projects necessary under the 1969 order in areas outside the City of Chicago, has been reversed by the Seventh Circuit. Gautreaux v. Chicago Housing Authority, Nos. 74-1048, 74-1049 (7th Cir. Aug. 26, 1974).

The Sixth Circuit has reversed the *Mahaley* case discussed at pages 275-77 *supra.* Mahaley v. Cuyahoga Metropolitan Housing Authority, No. 73-1407 (6th Cir. July 9, 1974).