

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

HENRY HORNER MOTHERS GUILD,  
et al.,

Plaintiffs,

v.

CHICAGO HOUSING AUTHORITY  
and the U.S. DEPARTMENT OF  
HOUSING AND URBAN  
DEVELOPMENT,

Defendants.

46,823 P

No. 91 C 3316  
Judge James B. Zagel

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NATIONAL GUARANTEE FUND  
FOR LEGAL SERVICES, INC.

**MEMORANDUM OPINION AND ORDER**

One-for-one replacement housing, a tenet of public housing policy for a few years, is now dead -- killed by Congress and the President. See Pub. L. 104-19, § 1002(a), 109 Stat. 194, 235-36 (the "1995 Rescission Act"). When the Amended Consent Decree (the "Decree") in **this** case was signed on September 1, 1995, the rule of one-for-one replacement was alive and it governed the actions of the parties under Phase I of the decreed plans and operations. Its application to the remaining Phases was subject to doubt because there were strong signs that Congress and the President would repeal the one-for-one rule. The parties agreed that, if repeal occurred, they would try to work out some acceptable compromise covering at least the existing Horner residents (who, given the vacancy rates, could be accommodated with considerably less than one-for-one replacement of demolished housing). Consent Decree at ¶ 24. If **compromise failed,**

plaintiffs could resume prosecution of the underlying lawsuit presumably with respect to the remedies provided under Phases II-V of the Consent Decree. *Id.*,

The Homer Plaintiffs have moved for an order requiring one-for-one replacement for two buildings located at 22 15 and 2245 W. Lake Street. The Chicago Housing Authority (the "CHA") originally agreed to completely or partially demolish these buildings during Phase II of the Decree. Consent Decree at ¶¶ 2.B-C. The Department of Housing and Urban Development ("HUD") has now approved the CHA's request to demolish these buildings and their additional 28 1 units in Phase I. The Homer Plaintiffs argue that HUD has only committed-funds to replace the 466 Homer units originally scheduled for demolition in Phase I. They maintain that HUD must also fund replacement of the 28 1 units that will be destroyed when the 22 15 and 2245 buildings are tom down.

HUD first argues that ¶ 24 of the Decree prevents the Homer Plaintiffs from litigating this matter. I find that ¶ 24 does not apply to housing scheduled to be demolished and replaced in Phase I; it only applies to Phases II-VI. Therefore, in bringing suit to enforce the Decree's Phase I requirements, the Homer Plaintiffs have not violated its, or the Decree's, provisions.

If the 28 1 additional units the Homer Plaintiffs have requested fall within Phase I of the Decree, the Decree's one-for-one replacement requirement applies. Consent Decree ¶ 2.C. This requirement exists notwithstanding Congress' passage of the 1995

Rescission Act. That Act provides for an exception to one-for-one's repeal for units to be demolished pursuant to court orders which antedated one-to-one's repeal. Pub. L. 104-19, § 1002(a), 109 Stat. 194 (the "1995 Savings Proviso"). The parties do not contest that Phase I of the consent decree antedates one-to-one's repeal in the 1995 Rescission Act, invoking the Saving Proviso.

HUD does argue, however, that the 1996 Appropriations Act, Pub. L. 104-134 § 201(b), 110 Stat. 1321 (the "1996 Act") effectively repealed the Savings Proviso, rendering the one-to-one requirement in the Decree void. HUD claims that pursuant to the Decree and the 1996 Act, it is not required to fund one-to-one replacements for buildings provided for in Phase II of the decree. HUD, of course, maintains that 22 15 and 2245 building fall within Phase II, and not Phase I.

To the extent that HUD argues that the one-to-one requirement does not apply to Phase I buildings, I disagree. I do not read the 1996 Act to invalidate the one-to-one requirement for Phase I buildings. The relevant portion is an amendatory and not a repealing act. This requires me to harmonize amendments if possible and to give an amendment reasonable construction. Sutherland Stat. Const. §22.29 (5th Ed. 1993).

In interpreting the 1996 Act, I hold that it does not relieve the Government of its burden to provide one-to-one replacement funding for Phase I buildings that the Decree requires. If HUD were allowed to do so, it could unilaterally change the terms of negotiated agreements, such as the Decree, leading to possible violations of the due

process clause. Heightened scrutiny attaches when the federal government attempts to repudiate its own contractual obligations through legislation, and the goal of saving money does not satisfy the heightened scrutiny requirement. ~~United States Trust v. New Jersey~~, 431 U.S. 1, 25-26 (1977). Therefore, in order to both harmonize amendments and avoid a challenge to the constitutional validity of the 1996 Act's retroactive repeal of the Saving Proviso, I hold that the 1995 Saving Proviso still applies to the Consent Decree's Phase I one-to-one requirements.

This reasoning, however, does not apply if the 22 15 and 2245 buildings are demolished in Phase II; Phase II does not grant the Horner Plaintiffs an unconditional contract right in one-to-one replacements. See Consent Decree at ¶ 24. Instead, ¶ 24 allows the Homer Plaintiffs to reinstate their complaint against HUD and the CHA if, for Phase II-V buildings, HUD is no longer bound by the one-to-one replacement requirement and the parties cannot reach an agreement. Id.

The Homer Plaintiffs argue that the 22 15 and 2245 buildings, designated in the decree as Phase II, become part of Phase I simply because all of the parties agree to their demolition during Phase I. The structure of the decree does not permit this inference. The Decree clearly states that these two buildings are Phase II buildings with Phase II sources of funding. Consent Decree at ¶ 2.B. In order for these Phase two buildings to become Phase I buildings, they must actually be demolished in Phase I. Id. It is important to note that all of the parties must consent to the early demolition of the

buildings; the Homer Plaintiffs can prevent the demolition by refusing to consent to it. (Although I suspect the Homer defendants would consent if they knew the actual demolition would place the buildings in Phase I and one-for-one replacement would apply.) Consent Decree ¶ 30.

Thus the plain language of the consent decree appears to resolve the controversy: if HUD and the CHA insist on actually demolishing the buildings before the end of Phase I, the decree will require them to provide one-to-one replacements for any units they destroy. If, instead, they wait to tear down the complexes, they may proceed safely within the ambit of Phase II of the consent decree, which does not require one-to-one replacements. Of course, the parties may modify the agreement by mutual consent in any way they see fit.

HUD throws a wrench into this relatively straight-forward analysis by invoking the prohibition against unfunded mandates. HUD claims that **if** the CHA were to tear down the 2215 and 2245 buildings before Phase I ended, it would have no additional appropriations for one-to-one replacement of them. It argues that because I cannot require unappropriated funds to be expended, I cannot require HUD to fund one-to-one replacement of the Phase II-become-Phase I units.

It is true that I cannot mandate HUD to undertake projects that Congress refuses to fund. Office of Personal Management v. Richmond, 496 U.S. 414,424 (1990). The

Homer Plaintiffs do not dispute this. However they argue that HUD already has appropriated monies available for one-to-one replacement of Phase I buildings.

The Homer Plaintiffs maintain that HUD may simply allow the CHA to defer repayment of as much as \$7,500,000 that it owes to HUD in repayment for Comprehensive Grant Program ("CGP") funds that HUD paid the CHA in 1994 and 1996. The CHA is content with this proposal, which comes as no surprise. HUD, for its part, reasons that the 1998 Appropriations Act restricts CGP funds to improve existing housing and funds granted for fiscal year ("FY") 1998 or later may not be used to build new residences.

The Homer Plaintiffs do not dispute this in principle. However, they claim that the 1998 Act does not govern \$2.5 million for FY 1997 that the CHA currently owes HUD. These funds, the Homer Plaintiffs argue, could be used to fund one-to-one replacements for the units at 22 15 and 2245 W. Lake Street because they are not subject to the 1998 Act's restriction against new construction. As the Plaintiffs note, HUD does not offer any **proof or explanation of whether the CGP offset occurred or for what it was used.**

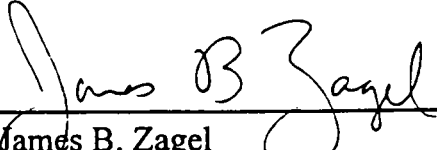
Therefore, I order that, in the event that the 22 15 and 2245 buildings are demolished in Phase I, HUD and the CHA produce an accounting to determine how the FY 1997 \$2.5 million offset was spent and whether any appropriate funds remain. I also order that, if demolition occurs within Phase I, future funds for replacement units be available as Congress permits.

Finally, HUD argues that this entire controversy is mooted because it has already provided the 28 1 replacements units. HUD claims that it has provided the CHA with over 13 1 Section 8 vouchers and 150 replacement units. The Homer Plaintiffs have two problems with HUD's provision. First, the Decree requires HUD to grant 5-year Section 8 Certificates. It expressly states that vouchers granted pursuant to 42 U.S.C. §1437f(o) do not qualify as replacement housing. Consent Decree at ¶ 2C. HUD has not differentiated between its allocation of Vouchers and Certificates, so I cannot determine whether it has provided 140 Certificates to Homer residents. Second, HUD has earmarked only 75 of its 150 replacements units for Homer residents; HUD approved the CHA's request that the other 75 units be occupied by low-middle income tenants. A judicially approved consent decree closely resembles a contract between the parties and are to be interpreted as such. Local Number 93 v. City of Cleveland, 478 U.S. 501, 519 (1986).

Using contract principles in interpreting the Consent Decree as a whole, I find that ¶ 2C of the Decree requires these units to be allocated to Homer residents. See Echo Inc. v. Whitson Co., Inc., 121 F.3d 1099 (7th Cir. 1997)(noting that contracts are to be interpreted as a whole). The Decree was clearly entered, not for the benefit of the CHA, or Chicago's housing stock at large, but for the benefit of the Homer Plaintiffs. Consent Decree at ¶ 2. The CHA cannot comply with its obligations under the Consent Decree by funding housing for families earning 50-80% of the median income if this means that

Homer residents would be barred from those units because they are too poor. Therefore,  
I find that HUD has not provided the 281 units that the consent decree requires if the  
2215 and 2245 properties are demolished within Phase I.

ENTER:

  
\_\_\_\_\_  
James B. Zagel  
United States District Judge

DATE: 3/5/91