Legal Opinion: GT-0002

Index: 2.230, 2.295, 9.951, 9.954
Subject: Hsg. Project in Area of High Minority Concentration

May 5, 1992

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Dear Alex:

This is in response to the memorandum from Kirk Minckler which you forwarded to our office.

In his memorandum, (at page 2), Mr. Minckler poses the question of whether "a housing project may be considered obsolete if it is located in an area of high concentration of minorities or if its location contributes to that high concentration of minorities". He concludes that location in an area of minority concentration makes a project obsolete as to location under 24 C.F.R. 970.6(a)(2).

In support of his conclusion, Mr. Minckler observes that HUD's regulations at 24 C.F.R. 970.6(a)(2), define obsolescence (for which demolition is allowed) as occurring when there exist environmental conditions as determined by HUD's environmental review in accord with 24 C.F.R. Part 50 which jeopardize the suitability of the site for residential use. He also observes that HUD's Environmental Assessment Handbook 1390.2 contains "demographic/neighborhood characteristics" as a factor to be considered in a Part 50 analysis. He then appears to conclude that under HUD's Part 50 process a finding of an adverse environmental impact could be made on the basis of one social demographic factor alone, without adverse physical effects factors being present. You contend that if the neighborhood is minority concentrated, such a finding would make a project obsolete as to physical location within meaning of Section 970.6.

We disagree, however, that Part 50, which implements the National Environmental Policy Act (NEPA), would permit a finding of an adverse environmental impact on the basis of the presence of minority concentration alone. Therefore, there would never be a situation under Section 970.6(a)(2) where a project could be found to be obsolete simply because the area in which it is located is minority concentrated.

We note, at the outset, that the applicable provision of the United States Housing Act governing demolition, as well as the implementing HUD regulation, states that in order to qualify for demolition a project must, inter alia, be "unusable for housing

purposes." 42 U.S.C. 1437p(a)910; 24 C.F.R. 970.6(a). Mr. Minkler's position would contravene the plain language of these provisions because under his theory a perfectly serviceable building could nonetheless be rendered "unusable for housing purposes" simply because it happened to be located in an area of minority concentration. Given that the purpose of the demolition statute was to control the extent of demolition of public housing, and given that a substantial number of public housing units nationwide are located in areas of minority concentration, it is inconceivable that Congress would have intended to use a definition of "unusable for housing purposes" that would be so easily met.

Nor did HUD, in referring in its regulations implementing the demolition statute to its Part 50 environmental regulations, intend to expand the coverage of the demolition statute in the manner that Mr. Minkler suggests. To the contrary, Part 50, which implements the National Environmental Policy Act (NEPA), would not permit a finding that the presence of a soci-economic condition, such as minority concentration, alone could render a project unusable for housing purposes. Rather, any adverse environmental condition must adversely affect the physical condition of the project.

The law is that socio-economic effects of agency action are not in and of themselves governed by NEPA. They are not impacts which an agency must consider as part of every environmental assessment, nor does their existence require an agency to prepare an EIS. Rather, the law is that socioeconomic impacts are irrelevant unless they are accompanied by physical impacts. In other words, there would never be an adverse finding under NEPA for socio-economic reasons, unless it is accompanied by an adverse finding as to physical effects.

The Council on Environmental Quality has promulgated the following regulation to clarify the point:

> ...economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, than the environmental impact statement will discuss all of these effects on the human environment. See 40 C.F.R. 1508.14 (July 1, 1991).

A leading case concerning the limitations on NEPA review of non-physical effects is Metropolitan Edison Company v. People Against Nuclear Energy 460 U.S. 766, 772-777 (1983). In that case the Supreme Court ruled that NEPA was enacted to protect the

physical environment and does not apply to governmental actions which do not affect the physical environment. See also Nucleus of Chicago Homeowners Assn. v. Lynn, 524 F.2d 225 (7th Cir. 1975) (impacts of scattered site development upon neighborhood residents' safety and the aesthetic and economic quality of their neighborhood are not within the purview of NEPA).

In Wicker Park Historical District Preservation Fund v. Pierce, 565 F. Supp. 1066 (N.D. Ill. E.D. 1982) the District Court followed the Nucleus of Chicago Homeowners' case. In Wicker, a historic preservation group challenged HUD's finding that it was not required to prepare an EIS before it could approve the placement of subsidized rental housing in the district.

The Court ruled as follows:

> ...To the extent that plaintiffs mean physical integration of the proposed project into the existing historic setting ... this Court finds that HUD ... examined and considered the architectural design, structure, and construction materials for the proposed projects vis-a-vis existing structures. If plaintiffs are instead referring to the effect of the project, once inhabited, on demographic qualities of the Historic District, such a factor is not cognizable and need not be considered under NEPA. See Nucleus of Chicago Homeowners'Ass'n v. Lynn, 524 F.2d at 231.(emphasis added).

Accord: Goodman Group, Inc. v. Dishroom, 679 F. 2d 182 (9th Cir. 1982) (HUD did not have to do an EIS addressing the issue of whether its proposed rehabilitation of a project would have an impact on the "cultural environment" of the neighborhood because NEPA does not pertain to economic or social effects on the environment in and of themselves); NAGE v. Rumsfeld, 413 F. Supp. 1224, 1226, 1229 aff'd 556 F.2d 76 (D.C. Cir. 1977) (Army's planned transfer of 752 employees, which plaintiffs claimed would reduce Hispanic portion of the workforce by 6.6%, increase unemployment and negatively affect the local economy cannot be challenged under NEPA because " s ocioeconomic or secondary effects alone are not protected by NEPA"); Image of Greater San Antonio Texas v. Brown, 570 F. 2d 517, 522 (5th Cir. 1978) (Air Force is not required to file an EIS before implementing a RIF which would result in the elimination of jobs held primarily by Mexican Americans because "when the threshold requirement of a primary impact on the physical environment is missing, socio-economic effects are insufficient to trigger an agency's

obligation to prepare an EIS).1

The above cases demonstrate the rule that NEPA was designed to protect the physical environment, and therefore if a proposed agency action does not have any impact upon the physical environment, socio-economic impact is irrelevant.2 Since there

would never be an adverse finding under Part 50 based on socio-economic effects alone, there would never be a situation under