Nos. 03-30875 and 04-30522

United States Court of Appeals
FIFTH CIRCUIT

COLISEUM SQUARE ASSOCIATION, INC.;
SMART GROWTH FOR LOUISIANA;
LOUISIANA LANDMARKS SOCIETY, INC.;
HISTORIC MAGAZINE ROW ASSOCIATION;
URBAN CONSERVANCY, INC.,

Plaintiffs-Appellants,

v.

ALPHONSO JACKSON, SECRETARY,
U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT;
HOUSING AUTHORITY OF NEW ORLEANS,

Defendants-Appellees.

AMICUS CURIAE BRIEF OF THE AMERICAN PLANNING ASSOCIATION, NATIONAL TRUST FOR HISTORIC PRESERVATION, SIERRA CLUB, and the INSTITUTE FOR LOCAL SELF-RELIANCE, IN SUPPORT OF APPELLANTS

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December 6, 2004

UNITED STATES COURT OF APPEAL
FIFTH CIRCUIT

COLISEUM SQUARE ASSOCIATION, INC., et al.,	* * *	
Appellants,	* *	**CASE NO. 03-30875 & NO. 04-30522**
V.	* *	
SECRETARY ALPHONSO JACKSON, et al.,	* *	
Appellees.	* *	

****

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of 5th Cir. Local Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*[1]

Amici American Planning Association, National Trust for Historic Preservation, the Sierra Club, and the Institute for Local Self-Reliance are organizations whose members include state, county, and municipal governments and officials, professional planners, as well as citizens, throughout the United States. They each share a concern for the importance of adhering to public review processes provided in the National Environmental Policy Act and the National Historic Preservation Act for the benefit of the public.

SUMMARY OF ARGUMENT

Amici contend that the District Court erred when it found that the U.S. Department of Housing and Urban Development's ("HUD") issuance of an environmental assessment ("EA"), accompanied by a finding of no significant impact ("FONSI"), satisfies the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C). The District Court erred when it concluded that HUD complied with its obligations under Section 106 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f, 36 C.F.R. Part 800. Either one or both of these errors warrant reversal.

An Environmental Impact Statement ("EIS") is required for any proposed

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[1] A complete description of each organization is included in the Motion for Leave to Participate as *Amicus Curiae* in Support of Appellants.

action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). According to the NEPA regulations adopted by the President's Council on Environmental Quality ("CEQ"), the term "significantly" is based on the twin criteria of "context" and "intensity." 40 C.F.R. § 1508.27. *Amicus curiae* believe the District Court erred because it failed to scrutinize HUD's so-called "hard look" at the significant impacts that would result from the project. Neither HUD nor the District Court adequately considered the "context" or "intensity" of the proposed project.

Furthermore, the federal defendants failed to execute and implement a Memorandum of Agreement ("MOA"), as required by Section 106 of the NHPA. The U.S. Department of Housing and Urban Development ("HUD") can only delegate this responsibility in limited circumstances, which were not present in this case. The absence of an MOA is a fatal flaw which requires reversal.

ARGUMENT

I. OVERUSE OF ENVIRONMENTAL ASSESSMENTS UNDERMINES NEPA GOALS.

According to the Council on Environmental Quality ("CEQ"), there is a disturbing trend occurring with NEPA compliance. While the number of draft, revised, supplemental, and final EISs prepared annually has declined from approximately 2,000 in 1973 to 608 in 1995, all signs point to a significant

increase in the number of environmental assessments (EA), perhaps as many as 50,000 EAs are issued annually. Council on Environmental Quality, Executive Office of the President, "The National Environmental Policy Act - A Study of Its Effectiveness After Twenty-five Years" (Jan. 1997) <http://ceq.eh.doe.gov/nepa/nepa25fn.pdf> (last visited Nov. 29, 2004).

The CEQ survey also found that five federal agencies - the Department of Housing and Urban Development, the U.S. Forest Service, the Bureau of Land Management, the U.S. Army Corps of Engineers, and the Federal Highway Administration - produce more than 80% of the EAs. *Id.* at 19. "While some agencies – such as the Department of Energy, Department of the Army, and the U.S. Forest Service – provide for a public comment period on EAs, many do not." *Id*. This finding is disturbing because

> [w]hen the EIS process is viewed as merely a compliance requirement rather than a tool to improve decision-making, mitigated FONSIs may be used simply to prevent the expense and time of the more in-depth analysis required by an EIS. The result is likely to be less rigorous scientific analysis, little or no public involvement, and consideration of fewer alternatives, all of which are at the very core of NEPA's strengths.

Id. at 20.

That is what happened in the present case. Rather than making NEPA a vital part of the decision-making process, HUD sought to avoid or skirt the NEPA process when it issued a Finding of No Significant Impact ("FONSI") supported by

an EA that doesn't pass the blush test. As the CEQ indicated, "NEPA helps managers make better decisions, produce better results, and build trust in surrounding communities. It makes good economic sense, and it is, quite simply, good government," *id.* at 12, -- but only if the agency takes its responsibility seriously.

A. Standard of Review

In reviewing an administrative decision not to issue an EIS, this Court must undertake a two-step analysis. First, the Court must consider whether the agency took a "hard look" at the possible effects of the proposed action. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97-100 (1983). If the court finds the agency has, in fact, taken a "hard look," the court must go one step further to assess whether the agency's decision was arbitrary and capricious. Village of Grand View v. Skinner, 947 F.2d 651 (2d Cir. 1991).

In challenging HUD's decision not to prepare an EIS, Appellants are charged with showing that HUD's action *may* have a significant impact on the environment, not that it *will clearly* have such an impact. Foundation for North American Wild Sheep v. U.S. Dep't of Agriculture, 681 F.2d 1172 (9th Cir. 1982). In the Fifth Circuit, the test for evaluating whether a proposed agency action might have a significant impact on the environment is, and continues to be, "whether there is a possibility, not a certainty, of significant impacts." State of Louisiana v.

Lee, 635 F. Supp. 1107, 1111 (E.D. La. 1986) (quoting Fritofson v. Alexander, 772 F.2d 1225, 1238 (5th Cir. 1985)); *see also* State of Mississippi v. Marsh, 710 F. Supp. 1488, 1502 (S.D. Miss. 1989). In order to determine the significance of the impact, the implementing regulations require examination of both the context and intensity of the impact of the proposed action. 40 C.F.R. § 1508.27.

B. The Context of the Project Merits the Preparation of an EIS

NEPA is a highly localized statute - meaning that projects do not occur in a vacuum or in a generic "Anywhere USA" locale. All projects occur somewhere; and in this case the 200,000 square-foot supercenter retail store (along with 825+ parking spaces) is located on 64 acres in the Lower Garden District, a National Register Historic District located adjacent to downtown New Orleans.

NEPA expects the agency and the reviewing court to look at the context of the proposed project. As used in NEPA,

> context . . . means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

40 C.F.R. §1508.27(a).

Federal agencies must become familiar with the site for the proposed project, the surrounding neighborhood, and the businesses and residents in order to analyze

the impacts of the proposed project within the local context. Will a suburban-scaled, big-box retail store *clearly have* a significant impact if it is plopped into an existing urban neighborhood that is predominantly residential and pedestrian in scale and nationally recognized as historically significant? That is *not* the question before this Court. Is there a *possibility* that such a development *may have* a significant impact if located in this particular neighborhood, in this particular context? That is the question that HUD was required to evaluate. Unless the answer is definitively in the negative, the prudent response would be to determine that additional information and review is required, which is the proper role of the EIS. Decision-makers are handicapped, and the public interest is ill-served, if the environmental review process is short-circuited, as it was in this case.

C. The Intensity of the Project Merits the Preparation of an EIS

NEPA is not only concerned with the context, but also the intensity of the proposed project. 40 C.F.R. § 1508.27(b). Intensity means the degree to which the proposed action will involve one or more of ten factors.[2]

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[2] 1) Adverse effects associated with "beneficial projects",

2) Degree to which the proposed action affects public health or safety,

3) Unique characteristics of the geographic area, such as proximity to historic or cultural resources,

4) Degree to which the effects are likely to be highly controversial,

5) Degree to which the possible effects are highly uncertain or involve unique or unknown risks,

The presence of one or more of these intensity factors should trigger the preparation of an EIS. Anderson v. Evans, 314 F.3d 1006, 1021 (9th Cir. 2002); Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole, 770 F.2d 423, 432 (5th Cir. 1985); Friends of the Earth, Inc. v. U.S. Army Corps of Engineers, 109 F. Supp. 2d 30, 42 (D.D.C. 2000). Arguably, the proposed project in this case involves five of the ten intensity factors (#3, #4, #5, #7, and #8).

Appellants have cited a number of impacts that, either individually or cumulatively, should have merited the preparation of an EIS, including: noise, vibration, lead, drainage, traffic, environmental justice concerns, economic impacts, and the potential effects on historic properties. When Appellants first challenged HUD's decision not to file an EIS, given the proposed destruction of historic resources, the District Court dismissed Appellants' claim because there was evidence of negotiations entered into between HUD and the State's Historic Preservation Officer. The negotiation process itself should not have suggested

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6) Degree to which the action may establish a precedent for future actions with significant effects,

7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts,

8) Degree to which the action may adversely affect districts, sites, ... structures, or objects listed in or eligible for listing in the National Register, or may cause loss or destruction of significant ... cultural or historical resources,

9) Adverse effects to endangered or threatened species or designated critical habitat,

10) Violations of federal, state, or local environmental law. 40 C.F.R. § 1508.27(b).

that the proposed destruction did not rise to the level of significance requiring an EIS; rather, to the contrary, such discussions should have been a clear signal that there *may well be* a significant impact to historic resources in the area. Even smaller-scale redevelopment projects in historic areas have been found to be significant by other courts. See, e.g., Protect Key West, Inc. v. Cheney, 795 F. Supp. 1552 (S.D. Fla. 1992).

NEPA regulations recognize that impacts which may be considered insignificant when looked at individually, may well rise to the level of "significant" when examined cumulatively. 40 CFR § 1508.27(b)(7). When cumulative impacts are significant, an EIS is appropriate. Spiller v. Walker, 2002 U.S. Dist. LEXIS 13194 (W.D. Tex.), *aff'd sub nom.* Spiller v. White, 352 F.3d 235, 2003 U.S. App. LEXIS 25110 (5th Cir. 2003).

The District Court suggested that what was before it was merely a disagreement among experts and, as such, ruled that HUD's decision not to file an EIS was not arbitrary or capricious. (See AR 002613-002614.) However, the District Court erred by failing to recognize the inadequacy of the experts' findings. Astonishingly, the EA checklist indicated that the project is "compatible" with the surrounding area in terms of land use; height, bulk, and mass; building type; and building density. (See AR 00008-00009.) The EA checklist failed to satisfy the blush test for a project of the size and scale as this one in the Lower Garden

District. Other federal courts of appeal are finding that FONSIs unsupported by EAs are a disservice to the decision-makers and the public. See, e.g., National Parks Conservation Ass'n v. Babbitt, 241 F.3d 722 (9th Cir. 2001); Anderson v. Evans, 314 F.3d 1006 (9th Cir. 2002).

The 14,000+ certified planners who are members of APA's American Institute of Certified Planners ("AICP") are bound by the AICP Code of Ethics which states that a planner's responsibility to the public includes special concern for the long-range consequences of present actions; a planner must strive to provide full, clear and accurate information on planning issues to citizens and governmental decision-makers; and planners have "a special responsibility to plan for the needs of disadvantaged groups and persons, and must urge the alteration of policies, institutions and decision which oppose such needs." <http://www.planning.org/ethics/conduct.html>. In the present case, the review process was short-circuited without the preparation of an EIS, to the detriment of the decision-makers and the residents in the community disproportionately impacted by this project.

II. HUD DID NOT MEET ITS OBLIGATIONS UNDER THE NATIONAL HISTORIC PRESERVATION ACT.

The District Court also erred in holding that HUD complied with its obligations under Section 106 of the NHPA. Like NEPA, Section 106 of the

NHPA is a procedural statute. Nonetheless, while Section 106 cannot compel an agency to take a particular course of action, it does require that the agency affirmatively "seek ways to avoid, minimize, or mitigate any adverse effects on historic properties," 36 C.F.R. § 800.1(a), "through consultation," *id*., by "develop[ing] and evaluat[ing] alternatives or modifications to the undertaking . . . ." *id*. § 800.6(a).

A. Section 106 Requires Execution and Implementation of a Memorandum of Agreement ("MOA").

In this case, HUD recognized only belatedly that it had any Section 106 obligations at all. And once it did, HUD also recognized that it had serious compliance problems.

All sides agreed that the St. Thomas redevelopment would have an adverse effect on historic properties. When an adverse effect is found, the agency has only two choices for compliance with Section 106 – executing a Memorandum of Agreement, 36 C.F.R. § 800.6, or, after consulting in good faith regarding the mitigation of adverse effects, "termination" of consultation followed by the formal comments of the full Advisory Council addressed to the head of the federal agency. *Id*. § 800.7. *See, e.g.*, Friends of the Atglen-Susquehanna Trail v. Surface Transportation Board, 252 F.3d 246, 253-54 (3d Cir. 2001); Tyler v. Cuomo, 236 F.3d 1124, 1128-29 (9th Cir. 2000). Here, however, HUD failed to comply with

either one of these options.

The regulations clearly state that "[a] memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with Section 106 and this part and shall govern the undertaking and all of its parts." 36 C.F.R. § 800.6(c). Examining the MOA of October 2000, it is indisputable that the only signatories were HANO, SHPO, and ACHP. HUD was not a signatory to the October 2000 MOA. Furthermore, because HUD did not sign the 2000 MOA, it is impossible, under law, for the MOA to comply with Section 106 with regard to HUD, or to serve as evidence of HUD's Section 106 compliance.

Indeed, when David Blick, HUD's federal preservation officer, became aware of the project, he acknowledged:

> There is some difference of opinion as to whether the orig. [2000] MOA was actually valid to begin with, since HUD didn't sign it, per [24 C.F.R.] Part 50 requirements.
> * * *
> My concerns are: why was HUD not brought into the 106 loop back then? (still remains a mystery); it appears that HRI was in the driver seat the whole time; also, there is minimal evidence of public participation in the 106 process thru 2000.

AR 04662, 04663 (see Appendix A attached hereto). Blick was absolutely right – the 2000 MOA was not legally valid under Section 106, and public participation in the 106 process was virtually nonexistent.

B. HUD Was Not Entitled to Delegate its Section 106 Responsibilities

Federal agencies can only delegate their Section 106 responsibilities in limited circumstances. Indeed, the Advisory Council's regulations make clear that "it is the statutory obligation of the Federal agency to . . . ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for Section 106 compliance . . . ." 36 C.F.R. § 800.2(a). Although Congress has authorized HUD to delegate legal responsibility for compliance with Section 106 with respect to certain HUD programs,[1] that delegation authority does not apply to the HOPE VI program. There is no evidence that HANO had the authority to commit the Federal agency to take appropriate action for a specific undertaking as a result of Section 106 compliance. Id. Indeed, HANO was *dismissed* as a party in this case due to the fact that only a federal agency can violate NHPA and that the private cause of action under NHPA does not extend to actions against nonagency defendants such as HANO. The fact that HANO, the recipient of the HUD funds, was a signatory to the October 2000 MOA is immaterial to HUD's own Section 106 compliance (or in this case, lack thereof). Only by signing the October 2000 MOA, and accepting legal responsibility for the execution of its provisions, could HUD have met its Section 106 obligations in

[1] *See*, *e.g.*, Tyler v. Cuomo, 236 F.3d at 1128, noting that Congress authorized delegation of NEPA and NHPA compliance responsibility under the Home Investment

relation to the entire St. Thomas redevelopment.

Although HUD may suggest that it cured this deficiency by signing the amended MOA in January 2003, such reasoning is no more than an attempt to disguise a significant error with a small concession. The plain language of the amended MOA clearly states that it is intended to address only the *limited* reopening of the 106 consultation process. Amended MOA at 1, line 7. The amended MOA allowed HUD to meet its Section 106 obligations in relation to the Amelia Complex and the retail development, but it did not – and could not – cure HUD's continued lack of Section 106 compliance regarding the remainder of the St. Thomas revitalization project. Indeed, if HUD had met its NHPA obligations in October 2000, *before* allowing the St. Thomas revitalization project to proceed, it is eminently possible the project itself would have been modified to meet more of the very historic preservation goals that Section 106 was designed to achieve. See Vieux Carre Property Owners, Residents & Associates v. Brown, 948 F.2d 1436, 1446-47 (5th Cir. 1991).

C. Appellants Did *Not* Concede the Validity of HUD's Initial Section 106 Review

The District Court erred in ruling that the Appellants conceded the validity of HUD's initial Section 106 review, a fact that, if true, would make the issue of

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Partnerships Program (HOME), at 42 U.S.C. § 12838, but not other HUD programs.

HUD's initial compliance moot on this appeal. While it is true that Counts Four and Five (Complaint for Declaratory Judgment, July 19, 2002, ¶¶ 104-07) contend that HUD violated the NHPA by continuing work during the reopening of the Section 106 review, this was not the *only* claim that the Appellants asserted in relation to HUD's Section 106 compliance. Indeed, Appellants clearly allege that HUD violated the NHPA by failing to undertake the necessary planning and actions to minimize harm to National Historic Landmarks. *Id*. ¶¶ 102-03. Indisputably, one of those necessary actions under federal law is to comply with Section 106 by signing an MOA. As such, Appellants never conceded the validity of the HUD's initial Section 106 review, and this issue thus remains in controversy and eligible for appeal.

The fact that the St. Thomas redevelopment project is well underway does not alleviate HUD's ongoing responsibility to comply with Section 106. Indeed, Section 106 provides meaningful and measurable relief when smaller changes can be made to a substantially completed project that will mitigate adverse effects on historic properties. As this Court has held previously,

> It is impossible for us to know with any degree of certainty just what the end result of the NHPA process would be . . . . Therefore, a district court should not pre-judge the result of the NHPA process by concluding that no relief is possible . . . . Even though [the NHPA] relief may appear to some to be irrelevant, trivial, or prohibitively expensive, a district court should beware of shortcutting the process which has been committed in the first instance to the responsible federal agency.

Vieux Carre Property Owners, Residents & Associates v. Brown, 948 F.2d at 1446-47 (internal citations omitted); *see also* Tyler v. Cuomo, 236 F.3d at 1137. In the instant case, it is still possible for HUD to comply with its initial Section 106 responsibilities, because there are still mitigation remedies upon which HUD can insist.

CONCLUSION

The agency erred in its failure to prepare an EIS as well as when it failed to execute and implement an MOA for the project. The District Court erred when it upheld the agency's failure. For the foregoing reasons, *amicus curiae* American Planning Association, National Trust for Historic Preservation, the Sierra Club, and the Institute for Local Self-Reliance respectfully request that the Court reverse the judgment of the District Court.

December 6, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached *amicus curiae* brief is in compliance with the type-volume limitations of Fed. R. App. Proc. 32(a)(7)(B) and 29(d). This brief is proportionately spaced, has a typeface of 14 points, and contains ______ words.

DATED: December __, 2004

By: ________________________________
Elizabeth S. Merritt

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Amicus Curiae* Brief of the American Planning Ass'n, the National Trust for Historic Preservation, the Sierra Club, and the Institute for Local Self-Reliance, and Motion for Leave to File Amicus Curiae Brief in support of Appellant, were served on the following counsel of record by first-class mail on December 6, 2004:

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