FILLING THE PROCEDURAL VOID AFTER SITE ACQUISITION

Shannon and other homeowners and tenants, black and white, of the East Poplar Urban Renewal Area of Philadelphia sought to enjoin the Department of Housing and Urban Development from issuing a contract of insurance[1] and a contract for rent supplement payments[2] for the development of a 221(d)(3) apartment project[3] in their area. The nature of this project differed from that originally conceived in the first Urban Renewal Plan for East Poplar in that the first plan did not provide for the development of any rental units.[4] The original plan was amended on five occasions over a span from 1958 to 1964, when, after a public hearing, federal funds were alloted for the acquisition of the project site.[5] Throughout the amending process, no substantial change was made in the plan with regard to the type of housing to be developed; all units were to be single or multi-family, owner-occupied dwellings, either new or rehabilitated.[6] The commercial developer, who worked under the authority of a non-profit sponsor to build the owner-occupied dwellings, failed to complete even one-third of the new units, and some of those that were to have been rehabilitated had been vandalized.[7] The Regional Administrator of the Department of Housing and Urban Development approved with-

---

1. Housing and Urban Development Act of 1965, 12 U.S.C. § 1715(*l*)(d)(5), § 1717(b).

2. *Id.* § 1701(s)(h)(1)(A).

3. *Id.* § 1715(*l*)(d)(3). For a discussion of the evolution of the 221(d)(3) program through the various federal housing acts *see* F. KAISER, THE REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING: A DECENT HOME 61-65 (1968) [hereinafter cited as KAISER].

4. The original urban renewal plan, adopted in 1959, called for a combination of rehabilitation of structures by property owners in part of the area, and of site acquisition in another part. Within the tract to be required structures deemed non-salvageable were to be cleared, and salvageable structures were to be conveyed to a redeveloper for rehabilitation as single-family and multi-family owner-occupied dwellings. Shannon v. HUD, 436 F.2d 809, 814 (3d Cir. 1970).

5. *Id.* at 813.

6. *Id.* at 814.

7. *Id.*

out a public hearing[8] and without an R215 Report on Minority Considerations,[9] the razing of the vandalized buildings and an offer by the developer to the Local Public Agency (LPA) to construct, in place of the owner-occupied dwellings, a 221(d)(3) project using federal funds for rent supplements and mortgage insurance.

The plaintiffs filed suit, alleging that the location of this type of project on the site chosen would have the effect of increasing the already high concentration of low income blacks and, further, that HUD had no procedures for consideration of such an effect in reviewing and approving this type of project. The District Court of the Eastern District of Pennsylvania entered a final judgment dismissing the complaint.[10] The United States Court of Appeals, Third Circuit, vacated the judgment and remanded the cause for entry of an injunctive order.[11] In its opinion, the appellate court held that the Regional Agency of Housing and Urban Development

> must utilize some institutionalized method whereby, in considering site selection *or type selection,* it has before it the relevant racial and socio-economic information necessary for compliance with its duties under the 1964 and 1968 Civil Rights Acts.[12] (Emphasis added)

In light of the *Shannon* decision, what, if any, are the procedural requirements for a change in a renewal project plan after acquisition of the project site?

The law is not as clear on what procedures are required of the local agency to effect a change in project type as it is in approving plans for the acquisition of sites for federally subsidized renewal programs. Before federal funds may be used to acquire a project site, the LPA must hold a public hearing,[13] the purpose of which is to "give the public in an affected area an opportunity to be heard . . . *before* the

8. "No land for any project to be assisted under this sub-chapter shall be acquired by the local public agency except after public hearing following notice of the date, time, place, and purpose of such hearing." 42 U.S.C. § 1455(d) (1949).

9. An R-215 Report on Minority Group Considerations contains an explanation of the projected effect of the project on minority group families within and without the project area. Urban Renewal Handbook, RHA 7207.1, ch. 5, § 2 (as existed before rescission and modification in Feb. 1970).

10. Shannon v. HUD, 305 F. Supp. 205 (E.D. Pa. 1969), *rev'd,* 436 F.2d 809 (3d Cir. 1970).

11. 436 F.2d 809 (3d Cir. 1970).

12. *Id.* at 821.

13. 42 U.S.C. § 1455(d) (1949).

LPA enter[s] into a contract for federal financial aid."[14] (Emphasis added) The law on its face seems clear that once a public hearing has been held and is followed by the acquisition of the site property, the letter, if not the spirit, of 1455 (d) is fulfilled.[15]

This procedure is not ineffective in fulfilling its purpose of letting the public be heard, and it permits the public to hear the plan.[16] Some of the cases show that substantive issues are formulated at the point of acquisition,[17] a fact which may be attributable to the exposure and exchange of information that occurs at the 1455 (d) hearing. Yet, is that one-time confrontation of competing interests a sufficient procedure for fulfilling the planning obligations imposed upon HUD programs under the policies of the new Civil Rights and Fair Housing acts?[18] Is it a guard against a discriminatory effect?

HUD receives the information used to make its project approvals from the LPA. Therefore, if at the site acquisition hearing, the information conveyed by citizens to the LPA and from the LPA to HUD is considered acceptable from a planning viewpoint, then the site is ac-

14. 436 F.2d at 813.

15. In Green Street Ass'n v. Daley, 250 F. Supp. 139 (N.D. Ill. 1966), *aff'd*, 373 F.2d 1 (7th Cir. 1967), the agency conducted a 1455(d) hearing prior to acquisition of land for an urban renewal project. The letter of the law was thereby fulfilled. It is dubious, however, whether the spirit of the law as expressed by the *Shannon* court and the legislative history of the statute was embraced by the *Green Street* court where the plaintiffs alleged that notice of the hearing was inadequate and that testimony and evidence which they proffered was denied admission. *Green Street* held on the hearing issue that the plaintiffs did not have an interest which was adversely affected by the manner in which the hearing was conducted because they were not the direct recipients of the project funds which constituted the object for which the hearing was being held. While funds are the immediate tangible interest, it is difficult to assume that the project itself is not the ultimate interest of which the plaintiffs are the ultimate beneficiaries, which fact the *Green Street* court admits but does not consider a requisite aspect of the public hearing. What public is more affected than those who live or will live in and around the project area?

16. 24 C.F.R. § 1.9 (1970).

17. *See* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Powelton Civic Homeowners Ass'n v. HUD, 284 F. Supp. 809 (E.D. Pa. 1968); Green Street Ass'n v. Daley, 250 F. Supp. 139 (N.D. Ill. 1966), *aff'd*, 373 F.2d 1 (7th Cir. 1967); El Cortez Heights Residents and Property Owners Ass'n v. Tucson Housing Auth., 10 Ariz. App. 132, 457 P.2d 297 (1969).

18. The *Shannon* court sets out an excellent review of the Civil Rights and Fair Housing policy evolution from a position of neutrality to the present affirmative policy of non-discriminatory effect. *See* 436 F.2d at 816.

quired and federal funding begins.[19] There is a procedural void, however, in a situation like the *Shannon* case, where a planning change occurs *after* the acquisition of the project site.

As the *Shannon* court points out, the Urban Renewal Handbook provides that a modification in the urban renewal plan may require a new 1455 (d) hearing.[20] But the Handbook provision does not make explicit the criteria for determining what magnitude of change is necessary to trigger the holding of a new hearing. There are no other published regulations regarding the time for or manner of conducting 1455 (d) hearings. As a result, the opportunity for a rehearing on the project after a modification in the plan has been made is completely within the discretion of the agency.

In the *Shannon* situation, HUD used, as an alternative to rehearing, a "red line"[21] procedure. By this method, the change in the renewal contract has no public exposure prior to approval by the Regional Administrator of HUD. The court, however, did not find "red lining" to be a sufficient method of plan modification approval.[22]

The procedural due process that is required of HUD officials in urban renewal planning is delineated in *Powelton Civic Homeowners Association v. HUD*.[23] There, the court found that neither the Housing Act[24] which authorized the Urban Renewal Program nor the Constitution explicitly or implicitly requires an adjudicatory or legislative hearing before the HUD Secretary.[25] It did find, however, that,

> [i]f the Secretary's decision is to be truly protective of the public and private interests recognized by the Housing Act, he must afford the plaintiffs an opportunity equal to that available to the Redevelopment authority to submit written and documentary

19. For a general explanation of the approval procedure of the Secretary of HUD, *see* Powelton Civic Homeowners Ass'n v. HUD, 284 F. Supp. 809, 831 (E.D. Pa. 1968).

20. Urban Renewal Handbook, RHA 7206.1, ch. 3 (1970 ed.).

21. The *Shannon* court cited a memorandum dated Dec. 29, 1966, which was sent from HUD Assistant Regional Administration to the LPA which sets out an informal method for approving minor changes in an Urban Renewal Plan. Two criteria are considered before making a "red line" change:

(1) Whether the change constitutes a material alteration in a basic element of the plan; and,

(2) Whether or not the change is acceptable to us from a planning viewpoint. *See* 436 F.2d at 815.

22. *Id.* at 821.

23. 284 F. Supp. 809 (E.D. Pa. 1968).

24. Housing Act of 1949, § 2-114, *as amended,* 42 U.S.C. §§ 1441-1465; particularly § 105(d), *as amended,* 42 U.S.C. § 1455(d).

25. 284 F. Supp. at 813.

> evidence on the legality of the plan. We would not attempt to substitute our planning judgment for that of the Secretary; but we do believe that the Secretary must base his decisions on a complete record expressing the views of all recognizd interests if he is to fulfill his planning function under the Housing Act.[26]

The distinction between *Powelton* and *Shannon* which is noted by the *Shannon* court is that the *Powelton* plaintiffs were challenging the adequacy of relocation procedures specifically provided for in the Housing Act,[27] while in *Shannon* the plaintiffs were challenging the adequacy of HUD procedures generally to prevent racial concentration.[28] In both cases, however, the plaintiffs asked for injunctions against the federal funding of urban renewal projects because of procedural inadequacies in their approval. The real distinction between *Powelton* and *Shannon* is a matter of emphasis. A claim which arises at the point of acquisition compels the question, "What are the effects of putting the project in *this area*?" After acquisition of the site, the question must become, "What are the effects of putting *this project* in the area?"

It is, perhaps, the lack of statutory and regulatory post-acquisition guidelines that caused the *Shannon* court to reject the *Powelton* rule requiring that the residents of an affected area have the opportunity to be heard and to reason that,

> [i]n this case that judgment to be made by HUD is quasi-legislative. So long as it adopts some adequate institutional means for marshaling the appropriate legislative facts the rights of affected residents will be adequately protected, we think, by the opportunity to obtain judical review pursuant to the Administrative Procedure Act after the agency decision.[29]

Shannon, therefore, does not require that HUD provide a hearing for every planning change,[30] nor a minority report,[31] nor does it require that residents in the area be given the opportunity to be heard.[32] The holding does suggest, however, that "appropriate legislative facts" must include "relevant racial and socio-economic" information.[33] If

26. *Id.* at 831-32.
27. *Id.* at 821.
28. 436 F.2d at 812.
29. *Id.* at 821.
30. *Id.*
31. *Id.*
32. *Id.*
33. Note 16 *supra* and accompanying text.

HUD can inform itself on the social and economic ramifications of a particular change in planning without contacting the people affected, that is judicially acceptable according to the *Shannon* ruling. But if there is no procedure for exposing the change publicly to the residents and for receiving their response, it is difficult to perceive how the social factors can be determined. Such a ruling puts a great deal of credence in social statistics and their causal relation to a particular social or racial effect. *Shannon* has tread a tightrope between a flat hearing requirement and total agency discretion under the "red line" procedure. The court concludes that the agency must do more than rely on simplistic memoranda from the LPA.[34] HUD has the affirmative duty to keep itself informed after acquisition on any project change which affects not only land-use,[35] but also social composition or racial concentration.[36] In essence, the agency is to perform a balancing test

> which weighs the alternatives and finds that the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial concentration.[37]

There are two points of wisdom in the *Shannon* decision. First, by not requiring one specific procedure, the court has realistically envisioned the procedural vacuum which could arise from an agency's compliance with the letter of the law (a hearing is held) and noncompliance with the spirit (the agency maintains its deafness in the face of unfavorable hearing evidence). Instead, under the *Shannon* rule, the burden of proof is on HUD to demonstrate that it has considered the "relevant racial and socio-economic factors."[38] Perhaps,

34. 436 F.2d. at 821.
35. *Id.* at 820.
36. Note 16 *supra* and accompanying text.
37. 436 F.2d at 822.
38. Without in any way attempting to limit the agency in the exercise of its own administrative expertise, we suggest that some consideration relevant to a proper determination by HUD include the following:
1. What procedures were used by the LPA in considering the effects on racial concentration when it made a choice of site or of type of housing?
2. What tenant selection methods will be employed with respect to the proposed project?
3. How has the LPA or the local governing body historically reacted to proposals for low income housing outside areas of racial concentration?
4. Where is low-income housing, both public and publicly assisted, now located in the geographic area of the LPA?
5. Where is middle income and luxury housing, in particular middle income

by not explaining the term "relevant," the courts will find HUD even more cautious and thorough in its social fact-finding than if they designate a line of demarcation between relevant and irrelevant. Second, the *Shannon* court carefully avoided encroaching on the agency's expertise in the choosing of methods which yield the "best" planning information. Although such an indefinite procedural standard could lead to unnecessary litigation, it does permit the agency to design its own mode of information gathering according to the particular character of a specific renewal project.

The *Shannon* ruling could also lead to abuse. As it stands, no public hearing or documentation is explicitly required after the 1455(d) hearing is held. Should there be a revision in the development contract, as in the instant case, HUD could make a determination upon consideration of social factors which if exposed in hearing, would show those which seemed to be immaterial, to be material, socially and economically. In many instances, this could mean that by the time HUD has seen its planning error, federal funds would already have been expended between the holding of the "straw" 1455(d) hearing and the realization that the planning change materially affected the racial concentration or some other required planning consideration.[39] A second problem, mentioned above, is that of reliance upon social factors in predicting a specific effect. Here, for instance, the court presumed that a 221(d)(3) program would have the same sound composition as a low income housing project.[40] However, the 221(d)(3) program does not require that all tenants wanting to live

---

and luxury housing with federal mortgage insurance guarantees, located in the geographic area of the LPA?

6. Are some low-income housing projects in the geographic area of the LPA occupied primarily by tenants of one race, and if so, where are they located?

7. What is the projected racial composition of tenants of the proposed project?

8. Will the project house school age children and if so what schools will they attend and what is the racial balance in those schools?

9. Have the zoning and other land use regulations of the local governing body in the geographic area of the LPA had the effect of confining low income housing to certain areas, and if so, how has this affected racial concentration?

10. Are there alternative available sites?

11. At the site selected by the LPA how severe is the need for restoration and are other alternative means of restoration available which would have preferable effects on racial concentration in that area?

Id. at 821-22.

39. *See* El Cortez Heights Residents and Property Owners Ass'n v. Tucson Housing Auth., 10 Ariz. App. 132, 457 P.2d 297 (1969).

40. 436 F.2d at 820.

in the project qualify for rent supplements.[41] Individuals from the public market may also rent in the project. Although HUD presumed a different result than did the *Shannon* court, where an agency is responsible for the effects of its planning decisions, the procedural standards should have more than a presumptive basis.

Richard Hunt Evans

41. KAISER at 62-65.