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OPINION	:	No. 81-308
of	:	AUGUST 12, 1981
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THE HONORABLE WALTER W. STIERN, MEMBER OF THE CALIFORNIA SENATE, has requested an opinion on the following question:

Where a proposed apartment project under the Section 8 Housing Assistance Payments Program for new construction (24 C.F.R. § 880.101, *et seq*.) is to be constructed and owned by a private developer, but where the application for housing is also subject to prior review and approval or objection of local government pursuant to the "section 213 review process" as set forth in 24 C.F.R. section 891.101, *et seq*., is such a project subject to voter approval pursuant to article XXXIV of the California Constitution?

CONCLUSION

Where a proposed apartment project under the Section 8 Housing Assistance Payments Program for new construction (24 C.F.R. § 880.101, *et seq*.) is to be constructed

and owned by a private developer, but where the application for housing is also subject to prior review and approval or objection of local government pursuant to the "section 213 review process" as set forth in 24 C.F.R. section 891.101, *et seq*., such a project is not subject to voter approval pursuant to article XXXIV of the California Constitution, assuming that the private developer contracts directly with a federal agency under the section 8 program, and not with an intermediate state or local agency.

ANALYSIS

In California the establishment of low rent housing projects are constrained by the provisions of article XXXIV, section 1 of the California Constitution which require that the voters in the local area involved first approve such a project at an election. (*California Housing Finance Agency* v. *Patitucci* (1978) 22 Cal. 3d 171, 173–174; *California Housing Finance Agency* v. *Elliott* (1976) 17 Cal. 3d 575, 588.) The operative portion of section 1 of article XXXIV provides:

"No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election. . . ."[1] (See *James* v. *Valtierra* (1971) 402 U.S. 137, affirming the constitutional validity of article. XXXIV.)

Initially it must be noted that not every program for establishing low rent

[1] The balance of section 1 of article XXXIV provides:

"For the purposes of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. . . .

"For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

"For the purposes of this article the term 'state public body' shall mean this State, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State.

"For the purposes of this article the term 'Federal Government' shall mean the United States of America, or any agency or instrumentality, corporate or otherwise of the United States of America."

housing is subject to article XXXIV. (53 Ops. Cal. Atty. Gen. 120, 121 (1970).) By its terms two basic criteria for applicability are specified: (1) the development, construction or acquisition must be by a "state public body" (i.e., "this State, or any city, city and county, county, district, authority, agency, or any other subdivision or public body of this State"); (2) the thing developed, constructed, or acquired must be a "low rent housing project" within the meaning of article XXXIV (i.e., any development of publicly financed or assisted housing units for persons of low income). Accordingly, in *Winkelman* v. *City of Tiburon* (1973) 32 Cal, App. 3d 834, the court concluded that where a private organization was the developer, constructor, and owner of the project (with economic assistance from the housing authority) and where no more than 30% of the units would be rented to low income tenants, the project would not be subject to the referendum requirements of article XXXIV. (*Id*. at pp. 841–844.) Likewise in *Board of Supervisors* v. *Dolan* (1975) 45 Cal. App. 3d 237, a program to rehabilitate depressed residential areas by means of long-term low interest loans, utilizing the revenue produced from city bonds was held not to come within the provisions of article XXXIV because the city was not developing, constructing, or acquiring the housing in question, nor was such housing limited to low income tenants. (*Id*. at pp. 250–25 1; see also *Redevelopment Agency* v. *Shepard* (1977) 75 Cal. App. 3d 453, 461–462.)

However, in *California Housing Finance Agency* v. *Elliott*, *supra*, 17 Cal. 3d 575, the Supreme Court made it clear that direct development, construction or acquisition by a state public body was not a *sine qua non* for the application of article XXXIV. The court held that the state agency will be deemed to be the developer, etc., of the project within the meaning of article XXXIV where that agency "extensive[ly] participat[es]" (*id*. at p. 589) or "closely participates, or assists, in the development of a low-cost housing project," even though a private entity is nominally the owner and developer of the project. (*Id*. at pp. 590–591; accord, *Redevelopment Agency* v. *Shepard*, *supra*, 75 Cal. App. 3d at pp. 460–461; see also 54 Ops. Cal. Atty. Gen. 168, 171–172 (1971).) But two years later despite the same "extensive agency participation" in a project, the Supreme Court in *California Housing Finance Agency* v. *Patitucci*, *supra*, 22 Cal. 3d 171 held that article XXXIV was not applicable to a project that was limited to a minority (no more than 49%) of low income tenants because such a project was not a "low rent housing project" within the meaning of that article. (*Id*. at pp. 178–179)[2]

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[2] In reaching the conclusion, the Supreme Court was guided by the Legislature's interpretation of article XXXIV as manifested in the Public Housing Election Implementation Law (Health & Saf. Code §§ 37000–37002), which was enacted in response to the *Elliott* decision and which provides inter alia that:

> "The term 'low-rent housing project' as defined in Section 1 of Article XXXIV of the State Constitution, does not apply to any [housing] development . . . which meets any one of the following criteria:
>
> "(a)(1) The development is privately owned housing, receiving no ad valorem property tax

Thus, in determining whether article XXXIV is applicable in any given case it becomes necessary to examine the particular facts of such case to ascertain if the project in question is in fact a "low rent housing project" and, if so, whether it is in fact being "developed, constructed or acquired in any manner by any state public body."

The facts specified in the present question indicate that a housing project is to be constructed and owned by a private developer who will receive funds pursuant to a "Section 8 Housing Assistance Payments Program for New Construction." The question raised by such facts is whether the establishment of a housing project under such circumstances requires prior voter approval in accordance with article XXXIV of the State Constitution.

Resolving that question requires at the outset an examination of the pertinent elements of the housing program as delineated by section 8 (42 U.S.C.A. § 14370, which is part of the United States Housing Act of 1937 (42 U.S.C.A. § 1437 *et seq*.) and by the regulations promulgated pursuant to section 8 by the Department of Housing and Urban Development (HUD). (24 C.F.R., Pt. 880, §§ 880.101–880.612 (1980).)[3]

The basic element of the section 8 program is the "housing assistance payments contract" (42 U.S.C.A. § 1437f(b)(2), 24 C.F.R. § 880.501; see also 24 C.F.R. §§ 880.101(b), 880.103(c), 880.201). Under this contract HUD agrees with the housing development owner upon the rent that owner is to receive for each housing unit involved in the program. This rent is based upon a fair market rental figure established by HUD. (42 U.S.C.A. § 1437f(c)(1); 24 C.F.R. §§ 880.201, 880.203, 880.204(b).) Such agreed upon rent is referred to as the "contract rent" (24 C.F.R. §§ 880.101(c); 880.201) and consists of two components. The first is that portion of the rent paid directly to the owner by the low income tenant and referred to as "tenant rent" (24 C.F.R. §§ 880.101(c), 880.201, 880.604) and is fixed at between 15 percent and 25 percent of the tenant's income. (24 C.F.R. § 880.101(c).) The second component is that portion of the tent which makes up the difference between what the tenant pays the owner and the agreed upon contract rent. This

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exemption not fully reimbursed to all taxing entitles; and (2) not more than 49 percent of the dwellings, apartments, or other living accommodations of such development may be occupied by persons of low income." (Emphasis added; Health & Saf. Code § 37001; *California Housing Finance Agency* v. *Patitucci*, *supra*, 22 Cal. 3d at pp. 174, 177–179.)

See section 2 of article XXXIV which provides that: "That provisions of the article shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation."

[3] The above-specified regulations pertain to the new construction segment of the section 8 program, which is the designated subject of the present opinion request. There are several other segments of the section 8 program. Among them are those pertaining to rehabilitated housing (24 C.F.R., pt. 881), existing housing (24 C.F.R., pt. 882), and housing projects involving state agency participation (24 C.F.R., pt. 883).

component, pays the owner and the agreed upon contract rent. This component, which is in effect is a rent subsidy, is referred to as a "housing assistance payment" (24 C.F.R. §§ 880.101(b), 800.102, 800.501(d)(1); see 42 U.S.C.A. § 1437f(c)(3)) and is paid by HUD directly to the owner. (42 USCA. § 1437f(b)(2); 24 C.F.R. §§ 880. 101(b), 880.201, 880.501(c).)[4]

Under a housing assistance payments contract the owner is charged with the assumption of all of the management functions pertaining to the operation of the project (42 U.S.C.A. § 1437f(e)(2); 24 C.F.R. §§ 880.101(f), 880.103(d), 880.601 *et seq*.), such as the responsibility for marketing the units (24 C.F.R. §§ 880.103(d), 880.601(a)), for accepting the applications of tenants and determining their eligibility for low rent housing under the program (24 C.F.R. §§ 880.101(f), 880.603, subds. (a) and (b)), for the selection of tenants and for the termination of tenancy (42 U.S.C.A. §§ 1437f, subds. (d)(1), (e)(2); 24 C.F.R. §§ 880.101(f), 880.103(d), 880.601(b)), for the collection of rent (24 C.F.R. §§ 880.103(d), 880.601(b)), for the periodic reexamination of tenant incomes (24 C.F.R. §§ 880.103(d), 880.601(b), 880.603(d)), and for the maintenance and repair of the project (42 U.S.C.A. § 1437f(e)(2); 24 C.F.R. § 880.601(b)).

However, the owner's performance of each of these functions under the housing assistance payments contract must conform to detailed and comprehensive guidelines as specified in the HUD regulations (see 24 C.F.R. §§ 880.501(a) and 880.601–880.612), and such performance is regularly monitored by HUD. (24 C.F.R. §§ 880.103(c), 880.201, 880.505, 880.612.)

In addition, HUD must first approve the site selected for the housing project which is required to satisfy a number of criteria such as physical adequacy, the avoidance of concentrating minority or low income persons in an area, accessibility to community facilities and services and to employment opportunities. (24 C.F.R. § 880.206.) Likewise, HUD must approve the project's construction plans pursuant to a detailed set of guidelines. (24 C.F.R. §§ 880.102(d), 880.305–880.309; see also § 880.207.)

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[4] The section 8 program also provides for an arrangement whereby HUD provides funds to a state or local government entity refereed to as a "public housing agency" or "PHA" which in turn enters into and administers the housing assistance payments contracts with the owners and disburses the housing assistance payments to such owners. (42 U.S.C.A. § 1437f(b)(1), 24 C.F.R. §§ 880.101(b), 880.201, 880.505(a).) Since the only local agency involvement specified in the present question is one pursuant to those procedures under the so-called "section 213 review process" permitting local government to review and specify its objections, if any, to a proposed project (42 U.S.C.A. § 1439, 24 C.F.R., pt. 891), we are assuming for purposes of this opinion that the projects in question involve direct contracts between HUD and the project owners, as opposed to protects which involve state or local agencies as intermediate contracting parties.

HUD also determines the amount of rent the owner will receive for units covered by the program (24 C.F.R. §§ 880.103(b), 880.204(b)(2), 880.405); its regulations provide for assisting tenants displaced by the project (24 C.F.R. § 880.209), such regulations control and limit the distribution and amount of profits (24 C.F.R. §§ 880.205, 880.601(e)), they establish reserve requirements to fund the repair and the replacement of capital items (24 C.F.R. § 880.602), they determine the income mix of eligible tenants (24 C.F.R. § 880.603(c)), and they specify the terms of the tenant's lease (24 C.F.R. § 880.606) as well as the grounds and the procedures for terminating tenancies. (24 C.F.R. § 880.607.)

It would appear that the pervasiveness of HUD's participation in the realization and operation of a project under a section 8 program reaches at least that level of involvement which was found by the Supreme Court in *California Housing Finance Agency* v. *Elliott*, *supra*, 17 Cal. 3d at pp. 589–591, and by the Court of Appeal in *Redevelopment Agency* v. *Shepard*, *supra*, 75 Cal. App. 3d at pp. 460–461, to render the state public bodies "developers" within the meaning of article XXXIV. As the Supreme Court stated in *Elliott*: "Because the state, through the Agency, not only makes possible but fully regulates the low cost housing project involved here, albeit through private sponsors, we conclude that the Agency must be considered a developer for purposes of article XXXIV, section 1." (*Supra*, 17 Cal. 3d at p. 591; see also *Redevelopment Agency* v. *Shepard*, *supra*, 75 Cal. App. 3d at p. 461.)

However, there is a critical distinction between the situations considered in *Elliott* and *Shepard* and the situation presented here. Such distinction rests in the fact that the agency extensively involved in the present situation is not a "state public body" but is HUD, a department of the federal government. (42 U.S.C.A. §§ 3531–3532.) Thus, assuming state or local agencies are not otherwise extensively involved (see fn. 4, *supra*), article XXXIV is not applicable to projects administered by HUD under the section 8 new construction program because article XXXIV is by its terms confined to projects "developed, constructed or acquired" by "any state public body."

Such limitation upon the applicability of article XXXIV was also recognized by this office in 54 Ops. Cal. Atty. Gen. 168, *supra*. In that opinion we considered the applicability of article XXXIV to, among others, the "236 program," a federal low rent program similar to the section 8 program under consideration here. There we stated:

> "If Article XXXIV were to merely provide that no low rent housing project shall be developed without a referendum, then at least an argument could be made that projects involving substantial federal assistance, and containing a substantial number of dwellings for persons of low income,

> require a vote of the people [fn. omitted]. However, such an argument ignores the initial, operative provision giving rise to the Article XXXIV referendum provision, that is, that the low rent housing be developed, constructed or acquired *by any state public body*. As we have demonstrated in our summary of the various federal programs under consideration herein, the development or acquisition of dwelling units insured and subsidized as provided therein *by a private developer* would in no way require the involvement or a consent of the State or any local agency thereof. A fortiori, Article XXXIV would not be applicable." (*Id*. at p. 170; emphasis in original.)

But this conclusion does not finally determine the issue of article XXXIV's applicability to the program considered here because the present question does propose an element of local government involvement in the project: that which is effected through the so-called "section 213 review process." Thus the issue at this point is whether such review of a project by local government constitutes the type of governmental involvement contemplated by article XXXIV. Accordingly, we examine the nature of the section 213 review process to determine if it mandates such involvement. That review process is specified in the provisions of section 213 of the Housing and Community Development Act of 1974 (88 Stat. 674; 42 U.S.C.A. § 1439), and in the implementing regulations promulgated by HUD (24 C.F.R., pt. 891).

Under these provisions when an application for housing assistance in the form of a preliminary proposal describing a proposed housing project is received by HUD, HUD is required to notify the local government where the assistance will be provided of the fact that such an application has been received and is under consideration. (42 U.S.C.A. § 1439(a); 24 C.F.R. §§ 891.202(a), 891.303(a).) In those communities with a housing assistance plan (a plan setting forth an assessment of the community's housing resources, its housing needs for lower income persons and its housing goals (24 C.F.R. § 570.306)) the local government shall be afforded the opportunity to object to HUD's approving the application on the grounds that it is inconsistent with the community's housing assistance plan (42 U.S.C.A. § 1439(a)(1)(B); 24 C.F.R. §§ 891.203(a), 891.204(b)) or to indicate that it has no objections (24 C.F.R. § 891.204(a)). The local government may also submit other comments relevant to HUD's consideration of the application (24 C.F.R. §§ 891.204(a)(1), 891.205(b)(1)), or it may choose not to respond (24 C.F.R. § 891.204(c)).

Where there is an objection by the local government because of inconsistencies with the housing assistance plan, HUD may not approve the application unless it makes an independent determination that the proposed project is consistent with such plan. (42 U.S.C.A. § 1439(a)(2); 24 C.F.R. § 891.205(b)(2).) HUD may also concur with the locality's objection. (*Ibid*.) In those situations where the response indicates no

local objection or where there is no response, HUD may either approve the application or it may not upon independently determining that it is inconsistent with the local housing assistance plan. (42 U.S.C.A. § 1439(a)(3); 24 C.F.R. § 891.205, subds. (b)(1), (b)(3).)

In those communities without a housing assistance plan, neither the statute nor the rules expressly provide for local objections to proposed projects. However, they do require that the local government be permitted to submit comments or information relevant to HUD's determinations regarding the application. (42 U.S.C.A. § 1439(c); 24 C.F.R. §§ 891.302(b), 891.304.) In such communities HUD shall make an independent determination of the need for housing assistance and whether adequate facilities and services are available and determine accordingly whether to approve or disapprove the application. (42 U.S.C.A. § 1439(c); 24 C.F.R. § 891.305 subds. (b), (c).)

Thus ultimately the determinations leading to the approval or rejection of a proposed project are made by HUD, with the local government merely expressing its approval or disapproval or other views concerning the project. The "213 review process" therefore essentially formalizes what local governments typically do with respect to federal actions affecting their areas: express their concerns or objections to the federal agency involved. In *California Housing Finance Agency* v. *Elliott*, *supra*, 17 Cal. 3d at 590–591, the Supreme Court indicated, in connection with the applicability of article XXXIV, that an agency's performing the ordinary governmental functions of a regulatory body should be distinguished from an agency's closely participating in the development and operation of a housing project. This distinction is reflected in that provision of the Public Housing Election Implementation Law (Health & Saf. Code §§ 37000–37002), interpreting article XXXIV (see fn. 2, *supra*), which declares that:

> "The words 'develop, construct, or acquire, as used in Section 1 of Article XXXIV of the State Constitution, *shall not be interpreted to apply* to activities of a state public body when such body does any of the following:
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> "(e) Provides assistance to a low-rent housing project and monitors construction or rehabilitation of such project and compliance with conditions of such assistance to the extent of:
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> "(1) *Carrying out routine governmental functions*;" (Emphasis added; Health & Saf. Code § 37001.5(e)(d.)[5]

[5] When other provisions of the Public Hawing Election Implementation Law were before the Supreme Court in *California Housing Finance Agency* v. *Patitucci*, *supra*, 22 Cal. 3d 171, the court declared. "We hold that sections 37000–37002 [the Public Housing Election Implementation Law] represent a valid

If anything, when a local government submits, pursuant to the section 213 review process, nonbinding objections or views regarding a proposed housing project, its involvement with that project is even more tenuous than the involvement of a local government carrying out "routine governmental functions" in connection with a project as contemplated by Health and Safety Code section 37001.5(e)(1).

Therefore, especially in view of the Supreme Court's determination in *California Housing Finance Agency* v. *Elliott*, *supra*, at pp. 591–592 that article XXXIV applies "whenever a state agency closely participates, or assists, in the development of a low-cost housing project . . . ," we cannot conclude that merely by presenting its, in essence, advisory views and objections relative to the desirability of a proposed project a local government engages in actions that are tantamount to developing, constructing or acquiring that project. As aptly observed in 54 Ops. Cal. Atty. Gen. 168, *supra*, at p. 171:

> "[T]he giving of local consent to a [federal] rent supplement program for a private development would not amount to the development, construction, or acquisition by a State public body as required by Article XXXIV so as to trigger the referendum provisions of such article. Acquiescence is not the equivalent of acquisition.

Therefore because those activities amounting to developing, constructing or acquiring in connection with the project considered here are not undertaken by a "state public body," and because the involvement of state public bodies pursuant to the 213 review process is not in the nature of the more substantial involvement characterized as such developing, constructing, or acquiring, we conclude that the project is not subject to the local election requirements of article XXXIV.

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interpretation of article XXXIV of the state Constitution, to which interpretation we defer." (*Id*. at p. 179.)