

17 November 1997

Re: NEPA Technical Inquiry 0186 - NHPA Noncompliance Consequences

Dear NEPA Call-In User:

This letter is in response to your October 27, 1997 request for information on the consequences for noncompliance with the National Historic Preservation Act (NHPA). Specifically, GSA is considering a build to suit lease on a site which may contain an historic building, and you have informed the offerer (the county) of GSA's obligations under Section 106 of the NHPA. In order to speed up the award process (by avoiding GSA's obligation to comply with Section 106), the county wishes to demolish the building in question before the award is made. You do not want the county to demolish the building, but would rather GSA have the opportunity to comply with Section 106. You are wondering what the county's obligations are for compliance with the NHPA and the consequences for noncompliance.

SUMMARY OF FINDINGS

The county has no obligation under the NHPA unless there is some type of Federal involvement (such as Federal money, permits, approval, licenses etc.) in their demolition project. As long as the project is not carried out using Federal financial assistance or require Federal permits, approval or licenses, there is no liability to the county under the NHPA for noncompliance. However, according to Section 110(k) of the NHPA, the major consequence is that GSA may not be able to acquire the site if the county demolishes the building. Our detailed findings are provided below.

DETAILED OF FINDINGS

NEPA Call-In contacted Advisor, Cultural Resource Compliance, GSA, for information on the county's obligation to comply with the NHPA. The Advisor stated the NHPA applies to Federal agencies and any non-Federal project which uses Federal money, or requires Federal permits, licenses or approval. Therefore, the county is not bound by the NHPA unless it is receiving Federal monies for the demolition project, or the project requires Federal permits, licenses, or approval. As far as GSA's acquisition of the site, The Advisor cited Section 110(k) of the NHPA and stated that GSA's acquisition of the site may be greatly complicated if not impossible if the county demolishes the building in question. According to Section 110(k) (enclosed):

"Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant."

The Advisor stated that "assistance" as mentioned in Section 110(k) has been interpreted to include GSA's acquisition of a site.

We then contacted the Assistant General Counsel, Office of General Counsel, Advisory Council on Historic Preservation (ACHP). The council concurred with the above assessment, and stated that there is no liability to the county for noncompliance with the NHPA unless the project requires some type of Federal involvement. She agreed that GSA's acquisition of the site may be subject to the requirements of Section 110(k) of the NHPA if it can be shown that the county demolished the building "with intent to avoid the requirements of Section 106 [of the NHPA]." Section 106 requires Federal agencies to consider the effects of their actions on Historic Properties. The Council further stated that for agencies (GSA) and actions subject to NHPA, the consequence for noncompliance is that preservation groups or other interested parties could bring suit against GSA. The outcome of such a suit could stop GSA from proceeding with the project or require mitigation. Lastly, the Council stated there may be State or local laws that the county must comply with pertaining to the demolition of the building.

NEPA Call-In recontacted you to request the city and State of the proposed action, so that we could determine if any State or local laws would apply to the county's demolition of the building. Because you are in the procurement process, you did not wish to divulge the city, but requested that NEPA Call-In determine if there are any State laws governing the county's actions pertaining to historic buildings. You further stated the action is occurring in California.

We then contacted Mr. Dwight Dutshke, Historian, California State Historic Preservation Office, (916) 653-6624, to determine if there were any California historic preservation laws that would apply to non Federal entities. Mr. Dutshke stated while there are no state historic preservation laws which apply to the county, such an action would be subject to the California Environmental Quality Act (CEQA). In the CEQA process, all local permitting and regulatory agencies that have jurisdiction over a project are identified and the permitting application begins. Like NEPA, CEQA seeks to identify significant effects of projects on the State environment and to provide mitigation where possible. If the permitting agencies find there will be significant impacts on the environment, more detailed studies must be prepared before permits are granted. If a project's significant impacts cannot be mitigated below an acceptable level, CEQA can deny the proper permits needed to go ahead with the project.

The materials in this TI have been prepared for use by GSA employees and contractors and are made available at this site only to permit the general public to learn more about NEPA. The information is not intended to constitute legal advice or substitute for obtaining legal advice from an attorney licensed in your state and may or may not reflect the most current legal developments. Readers should also be aware that this response is based upon laws, regulations, and policies in place at the time it was prepared and that this response will not be updated to reflect changes to those laws, regulations and policies.

Sincerely,

(Original Signed)

NEPA Call-In Researcher