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SPECIAL PROJECT

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INTRODUCTION*

Private property lay at the heart of the nation that was created

* The authors of the present study would like to express their appreciation to Professor James F. Blumstein, Associate Professor of Law, and James W. Ely, Jr., Assistant Professor

in America in 1788. The American Revolution had been dedicated in no small part to the propositions that liberty and property were virtually indistinguishable and that the proper object of government was to protect both.[1] Indeed liberty and property were conceived to be almost identical, for the fullest expression of a man's liberty could only come through the free enjoyment of his own possessions. In what may have been the single most influential treatise in American law, Sir William Blackstone observed that "so great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no not even for the general good of the whole community."[2] The original draft of the Declaration of Independence had recognized the unusual importance attached to private possessions by declaring that among the certain inalienable rights bestowed upon all men by their creator were "life, liberty and property."[3] The federal constitution further recognized the significance of private property by providing that neither the federal nor later the state governments could arbitrarily deprive citizens of

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of Law, at the Vanderhilt School of Law for their generous and patient help during the research and writing that led to this article. Any errors in the text, however, are of course those of the authors alone.

1. As James Madison later observed in *The Federalist*, "Government is instituted no less for protection of the property, than of the persons of individuals. The one as well as the other, therefore, may be considered as represented by those who are charged with the government." THE FEDERALIST No. 54, at 370 (J. Cooke ed. 1961) (J. Madison).

The importance the leaders of the American Revolution attached to the institution of private property was characteristic of political and legal philosophies current in 18th century England and its American colonies. John Locke exercised a particularly important influence on 18th century views of the function of government, and Locke left no doubt that "The reason why men enter into society is the preservation of their property." Indeed as Locke progressed in the development of his political philosophy he declaimed that "government has no other end hut the preservation of property," an observation that became an axiom of 18th century political theory and was endorsed by such prominent legal authorities as Sir William Blackstone and Lord Camden. J.W. GOUGH, JOHN LOCKE'S POLITICAL PHILOSOPHY 80, 95 n.2 (2d ed. 1973). For discussions of the philosophic importance of private property in 18th century America see R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION 11, 13, 16, 31 (1957); C. ROSSITER, 1787: THE GRAND CONVENTION 61, 67-69 (1966); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 404, 410, 411 (1969). For a modern view of the function of private property that is strikingly similar to that of the 18th century philosophy of property see Reich, *The New Property*, 73 YALE L.J. 733 (1965).

2. W. BLACKSTONE, COMMENTARIES ON THE LAW 74 (B. Gavit ed. 1941). Blackstone further observed that:

> The law will not authorize a violation of the right of property, even for the public good. Thus a new road through private grounds may be beneficial to the community, but it cannot be laid out without the consent of the owner of the land. In vain, may it he urged, that the good of the individual ought to yield to that of the community, for it would be dangerous to allow any private man, or even any public tribunal, to be judge of this common good, and to decide on its expediency. Besides the public good is interested in the protection of every individual's private rights, as modelled by the municipal law.

3. Thomas Jefferson later revised the phrase into the more felicitious and more familiar "life, liberty and the pursuit of happiness." Pennsylvania's constitution of 1776, however, proclaimed that "every member of society hath a right to be protected in the enjoyment of

their property but instead must accord each owner the full due process of law.[4] Although the federal constitution implicitly recognized the power of the state to take private land through the inherent sovereign power of eminent domain, it sought to limit the exercise of eminent domain by requiring that land so taken must be put to some public use and that the landowner must be paid a just compensation for his loss.[5]

Yet from the first years of the new republic, the sanctity of private property appears to have been at least as honored by its breach as by its observation. The governments of the newly formed states were not restricted by the requirements of the federal consitution and were often eager to exercise their sovereign power to enforce the conveyance of land from one private land owner to another.[6] Although Blackstone and other influential jurists observed that the power of eminent domain should be exercised by the legislature only upon some showing of a public necessity for the taking of the land, American state legislatures were normally willing to delegate their condemnation power to private interest groups whose activities were thought to confer some general benefit upon the state. Throughout the 19th century the American states regularly delegated the power of eminent domain to private transportation, manufacturing and mining companies to allow the companies to directly enforce the acquisition of land from other private owners. When at length the United States Supreme Court came to pass upon the states' practice of permitting enforced conveyances of land from one private citizen to another, the court concluded that the practice was a matter for local political discretion to resolve and was not to be obstructed by federal constitutional standards.[7] In the course of the 20th century the court concluded that when the state itself chose to exercise its power of eminent domain as an adjunct to its police power, the

life, liberty, and property" and Virginia's Bill of Rights of 1776 avowed that the "means of acquiring and possessing property" was one of the inherent rights of man that government was established to protect. SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 1764-1788, 149, 164 (2d ed. S. Morison 1965).

4. The fifth amendment provides in part that a person may not be "deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V. The fourteenth amendment provides in part that "Nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

5. Nor should "private property be taken for public use, without just compensation." U.S. CONST. amend. V. The eminent domain clause of the fifth amendment was proposed by James Madison and ratified by the United States Congress without any apparent debate on its purpose or significance. H.R. JOUR. 85, 86 (1789); S. JOUR. 69-72 (1789); H.R. JOURN. 115, 116 (1789); 5 THE WRITINGS OF JAMES MADISON 378 (G. Hunt ed. 1904).

6. BLACKSTONE, *supra* note 2, at 74.

7. Clark v. Nash, 198 U.S. 361 (1905); Mills v. St. Clari County, 49 U.S. 569 (1850).

decision to take private land and the choice of persons to develop it were both political questions that would be accorded the broadest constitutional deference by the federal judiciary.[8] Thus by the middle of the 20th century, Blackstone's observation that the law would not authorize the least violation of private property even for the general good of the community had been supplanted by the law's apparent willingness in a number of circumstances to authorize any "violation" initiated by the legislature.[9] Although the federal constitution continued to require that land acquired by eminent domain be subject to some public use, the question of what constituted a public use within the context of the Fifth Amendment had become a question for the legislature and not the courts to resolve. Similarly, while a deprivation of property could not take place under either the Fifth or Fourteenth Amendments without due process of law, due process in eminent domain cases had come to require primarily that the affected landowner have the opportunity to address the legislature before it made its decision to proceed.[10]

The study which follows attempts to trace, in a necessarily limited fashion, the evolving use of eminent domain on behalf of private interest groups throughout the last century and a half of American legal history. Part One of the study traces the broadening scope of eminent domain in the United States during the 19th and 20th centuries, focusing on the direct use of eminent domain by private interest groups as a key element in the increasing breadth of the power. Part Two delineates the process whereby one modern private interest group—an informal aggregation of American col-

8. Berman v. Parker, 348 U.S. 26 (1954).

9. " 'Regard of the law for private property,' wrote Blackstone, 'is so great . . . that it will not authorize the least violation of it, not even for the general good of the whole community;' and in the eighteenth century, the elder Pitt declaimed that 'the poorest man in his cottage could defy the King—storms may enter; the rain may enter—but the King of England cannot enter.' In sharp contrast, the United States Supreme Court, by upholding in sweeping terms urban redevelopment legislation, has ruled in effect that the King not only may enter, hut may remain, in the name of the general good, indeed for the very purpose of keeping the rain out.' " C. HOOR, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE AND REUSE OF URBAN LAND 1 (1959).

10. Due process in eminent domain proceedings incorporates the fifth amendment requirements of public use and just compensation. In addition it requires notice and an opportunity to be heard by the landowner, either at a judicial or legislative proceeding. 1 NICHOLS EMINENT DOMAIN §§ 4.10, 4.103 (rev. 3d ed. 1970 by J. Sackman; 1973 recomp. by P. Rohen) [hereinafter referred to as NICHOLS]. The right to a hearing on the subject of damages has been well established and while the right to address the legislature before it resolves upon a taking is not so clearly established in the context of eminent domain proceedings, it has been suggested by recent Supreme Court decisions indicating that an individual must be given a hearing before he is deprived of any significant property interest. NICHOLS § 4.103 and cases cited in n.91.1.

leges and universities—succeeded in acquiring access to the states' power of eminent domain through Section 112 of the federal urban renewal program. Although Section 112 has received surprisingly little attention from students of the urban renewal program,[11] within ten years of its inception the statute had been used to generate three quarters of a billion dollars worth of federal matching money for participating communities and to acquire thousands of acres of privately owned urban land for university expansion.[12] Part Three of the present work seeks to trace the process whereby the city of Nashville, Tennessee, sought to participate in just such a Section 112 urban renewal project. The case study of Nashville's experience with Section 112 focuses upon the process by which one community resolved to commit its power of eminent domain to assist the expansion of a private university[13] and the tensions within the community produced by that decision. Although Nashville's experience with Section 112 is by no means necessarily typical of those of the hundreds of other cities that participated in the program, it would seem to indicate that in at least one community, the federal urban renewal process combined with local circumstances to cause those persons who were affected most directly by the project to have the least practical influence in the political and administrative decisions that were eventually to lead to the loss of their property. Moreover, Nashville's experience would seem to suggest that while the use of eminent domain on behalf of private institutions has been an integral part of American legal history, a vocal minority of citizens continues to resist the process on philosophic grounds that recall the attitude of Blackstone and the 18th century legal system towards private property. In large measure because they believed that eminent domain should not be exercised on behalf of a private

11. The only book that deals with § 112 at any length is by Julian Levi, the person principally responsible for drafting the section and for assisting in its passage by Congress in 1959. Levi's book is not a critical evaluation of the program, however, and instead dwells upon the potential benefits of § 112 in Boston. J. LEVI, MUNICIPAL AND INSTITUTIONAL RELATIONS WITHIN BOSTON: THE BENEFITS OF SECTION 112 OF THE FEDERAL HOUSING ACT OF 1961 (1964). The only legal article on § 112 deals with its implications for the constitutional relationship between church and state. Harrison, *Disposition of Urban Renewal Land to Sectarian Institutions of Higher Learning*, 40 NOTRE DAME L. 251 (1965).

12. By 1970 § 112 had generated $774 million in federal cash credits out of a total federal expenditure of $6.367 billion on urban renewal projects as a whole. The amount of private land taken for the § 112 project was estimated at more than 2,000 acres. Letter from John K. Johnson, Assistant for Legislature Affairs, HUD to Congressman Richard Fulton, March 28, 1974.

13. Nashville's original plan also included an expansion area for a private hospital but the hospital later withdrew from the project, leaving the university as the sole institutional sponsor.

university, a small number of persons whose land was to be taken by the Nashville project continued to resist the plan for seven years after its implementation had already begun. Their political and legal struggles were ultimately fruitless, but the time and energy required to reopen and resolve the issue of the project's validity represented a considerable cost to the participants in the struggle as well as to the community as a whole. Nashville's protracted struggle with its Section 112 urban renewal project would thus seem to indicate that a considerable social tension continues to exist between a legal system which recognizes the use of eminent domain on behalf of private institutions and a system of personal values that continues to place a premium upon the inviolacy of private property. The tension between the two and the social struggle it perhaps inevitably creates must, in the end, be recognized as one of the inherent costs of using eminent domain to assist the activities of particular private institutions.

This study does not attempt to trace all the benefits or effects flowing from a Section 112 urban renewal project and the use of eminent domain. The major focus is upon the concerns and social costs to the community, the residents and the private institutions involved. To this end, the authors have attempted to present, objectively, the practical results of the program's implementation as well as the legal results determined by the judicial system.

PART ONE

THE PRIVATE USE OF EMINENT DOMAIN

The characteristic elements of the power of eminent domain were first fully formulated in the United States in the nineteenth century, and, in broad outline, those elements have remained substantially unaltered throughout succeeding years. The right of the sovereign to take land from private owners continues to be regarded as an inherent power of both the state and federal governments, a power which is vested directly in the legislature and is normally exercised by it or through its appointed agent.[14] An attribute of sovereignty,[15] the eminent domain power exists in the sovereign

14. Murphy v. Uhl, 149 A. 566 (Md. App. 1930); State Highway Comm'n v. City of Elizabeth, 102 N.J. Eq. 221, 140 A. 335 (Ct. of Chancery 1928). For discussion of the extent and types of delegations of the power of eminent domain permitted see 1 NICHOLS §§ 3.23 *et seq.*

15. *E.g.*, Adirondack Ry. v. New York, 176 U.S. 335, 349 (1900); Muscoda Bridge Co. v. Worden-Allen Co., 196 Wis. 76, 219 N.W. 428 (1928).

without any formal constitutional grant of authority.[16] Indeed, the legislature is thought to possess the power in absolute and unlimited form unless a positive constitutional limitation is placed upon its use.[17] The fifth amendment to the federal constitution places two such restrictions upon federal condemnations—the landowner must receive "just compensation" for his loss and the land that is taken subsequently must be put to some "public use."[18] Although the fifth amendment initially was held not applicable to takings effected by the several states, state condemnations have been widely held to be limited by similar restrictions derived from state constitutions.[19] Whether the takings are authorized by the federal or state legislatures, however, the troublesome task of determining whether the constitutional requirements of just compensation and public purpose have been fulfilled has long been recognized to be the ultimate responsibility of the judiciary.[20]

While the basic elements of the power of eminent domain are well-settled, the circumstances in which eminent domain might be used have varied considerably and have sparked a continuing legal debate about the legitimate scope of the power. The controversy originated in the nineteenth century and revolved around the limitations attached by the judiciary to the legislature's use of condemnation. The principle problem lay in determining the difference between the taking of land for a public use and a taking for a merely private purpose.[21] While the government unquestionably could take land from a private owner if it were to be put to some public use, it was unthinkable for the state to appropriate land from one owner for another private citizen's own use and enjoyment.[22]

The abstract debate about the distinction between the public

16. "It is, of course, not necessary that the power of condemnation . . . be expressly given by the Constitution. The right to condemn at all is not so given. It results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers." United States v. Gettysburg Elec. Ry., 160 U.S. 668, 681 (1896); Boom Co. v. Patterson, 98 U.S. 403 (1878); Kohl v. United States, 91 U.S. 367 (1875).

17. Kohl v. United States, 91 U.S. 367 (1875).

18. The fifth amendment provides "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

19. Young v. McKenzie, 3 Ga. 31 (1847); Gardner v. Newburgh, 2 Johns. 162 (N.Y. Ch. 1816); Harding v. Goodlett, 11 Tenn. (3 Yerg.) 40, 24 Am. Dec. 546 (1832); Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1930-31). *Contra*, Raleigh & Gaston R.R. v. Davis, 19 N.C. 451 (1837).

20. United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896).

21. Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 BOST. U.L. REV. 615, 618 (1940) [bereinafter referred to as Nichols, *Public Use*].

22. Varick v. Smith, 5 Paige 137, 159 (N.Y. Ch. 1835); New York Housing Auth. v. Muller, 270 N.Y. 33, 1 N.E.2d 153, 156 (1936).

and the private use of expropriated land had a full measure of practical importance. Throughout the nineteenth and twentieth centuries a variety of private interest groups were eager to participate in American economic growth if the legislatures of the individual states would allow them to use eminent domain in pursuit of their activities. At varying points in time, transportation companies, manufacturing corporations, mining industries, and farming interests actively sought the right to use eminent domain.[23] Most state legislatures, responsive to the importance of economic development and the accompanying needs of private enterprise, were quite willing to delegate their expropriation power to groups that would use it to advance the economic best interests of the state.[24] As a result the question whether these companies' activities constituted a public use justifying the exercise of eminent domain became an issue of no little importance to the growth of many states. Although the courts reached different results, there was a common judicial reluctance to impede domestic prosperity by an overly firm insistence upon a narrow construction of public use. Thus as state courts came to approve legislative devolutions of eminent domain upon private enterprise, the state courts' notion of public use grew more and more flexible.[25] As the state definition of public use became more inclusive, it formed the basis for a federal conception of public use that seemed, by the middle of the twentieth century, to include virtually any activity, whether public or private, that contributed to the general welfare of the nation.[26]

I.

PRIVATE INTEREST GROUPS AND THE POWER OF EMINENT DOMAIN: THE NINETEENTH CENTURY

State courts shaped the law of eminent domain in the nineteenth century. Federal courts normally acquiesced in the results. Since the federal government did not exercise its own eminent domain powers until late in the century and since federal courts did not review state expropriations until even later, the federal judiciary

23. For a provocative analysis of the relationship between private interest groups and the power of eminent domain see Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232 (1973) [hereinafter referred to as Scheiber, *Property Law*].

24. For a comprehensive list see 2A NICHOLS § 7.5124-7.672.

25. Nichols, *Public Use, supra* note 21, at 618-24.

26. Berman v. Parker, 348 U.S. 26 (1954); United States *ex rel.* Tennessee Valley Authority v. Welch, 327 U.S. 546 (1946); Marquis, *Constitutional and Statutory Authority to Condemn*, 43 IOWA L. REV. 170 (1958).

seldom had occasion to pass upon eminent domain cases.[27] The state courts on the other hand were presented regularly with condemnation questions by local legislatures anxious to exercise their powers. In determining when the state could take private lands, the state courts were bound only by the state constitutions, not the federal bill of rights.[28] Most state constitutions, however, contained no explicit restrictions on state use of eminent domain. While in theory, then, the state legislatures possessed an unfettered right to seize private property, in practice, the state judiciaries almost uniformly determined that "natural law" imposed upon the states the same restrictions contained in the fifth amendment.[29] The state therefore could exercise eminent domain powers only upon payment of just compensation and only if the land were taken for a public use or public purpose. Yet while the state courts of the early nineteenth century imposed the familiar requirements of compensation and public use upon state takings, they did so in a way that permitted state legislatures to devolve eminent domain upon private enterprises in order to encourage private entrepreneurial expansion.[30]

A. *1800-1850*

The first half of the nineteenth century was characterized by an understandable willingness on the part of state courts to defer to legislative delegations of eminent domain to private corporations. It was an era of unprecedented economic expansion in a country with very little surplus capital. As the American nation began to expand across the continent, individual states sought to establish swift and certain methods of communication as well as local manufacturing industries. The states, however, lacked a tax base and tax revenues sufficient to support an expansive program of public development.[31] This "nagging consciousness of scarcity of fiuid capital,"[32] coupled with the need for internal developments, induced state legislatures to rely upon private corporations to raise capital for projects the states could not finance by themselves. Accordingly, state legislatures chartered private corporations to build such transporta-

27. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSPECTIVES IN AM. HIST. 329, 360, 376-81 (1971) [hereinafter referred to as Scheiber, *Road to Munn*].

28. Barron v. Baltimore, 32 U.S. (7 Pet.) 242 (1833); Scheiber, *Road to Munn* at 360-61.

29. Grant, *supra* note 19.

30. Scheiber, *Property Law* at 237-40.

31. Scheiber, *Road to Munn* at 365.

32. J. HURST, LAW AND ECONOMIC GROWTH 182 (1964).

tion facilities as bridges, canals, turnpikes and railways. The privileges granted to these transportation companies varied widely from state to state but one privilege almost uniformly granted by the state legislature was the power to condemn land for rights-of-way and other facilities.[33] Absent such power, the companies would have been at the mercy of any stubborn landowner who decided to hold out for a high price. With it the companies were virtually assured control of desirable routes and could attend to the difficult details of raising capital investments, implementing the project, and supervising the daily activities of the company.

The devolution of eminent domain upon turnpike, bridge, canal, and railroad companies occurred in every state during the 1820's and 1830's.[34] The usual pattern was for the legislature to grant the power to ineividual companies which in turn would exercise it directly upon private lands if negotiated sales with the owners were not successful. The private companies, rather than the state, initiated and concluded the condemnation proceedings and the land taken was used directly by the company in furtherance of its corporate activities. Since the ultimate objective of the company was to reap profits for its shareholders by assessing a charge on the traveling public for use of company facilities, dispossessed landowners argued that the land had been taken for the private purpose of realizing a return on an investment. With striking uniformity the state courts rejected the landowners' view and upheld the delegation of eminent domain powers to private companies.[35] The courts reasoned that where land had been taken for construction of new modes of transportation open to the public upon payment of a fee, the taking was for a public use, even if it did serve to generate private profits for the company.[36]

33. Scheiber, *Road to Munn* at 365.

34. 2A NICHOLS §§ 7.672, 7.5124, 7.5131, 7.521; Scheiber, *Property Law* at 237.

35. By 1831 Delaware, Kentucky, Maryland, Massachusetts, New York, Pennsylvania, Virginia and the District of Columbia had authorized railroads to exercise eminent domain. Beekman v. Saratoga & S.R.R., 3 Paige 50, 62 (N.Y. Ch. 1831). Massachusetts upheld the use of eminent domain by turnpikes in 1834. Commonwealth v. Wilkinson, 33 Mass. (16 Pick.) 175 (1834). By the mid-1870's the courts of Connecticut, Indiana, Kansas, Massachusetts, New Hampshire, New Jersey, Tennessee, and Wisconsin had approved commercial milldam acts. Hazen v. Essex, Co., 66 Mass. (12 Cush.) 475 (1853); Ryerson v. Brown, 35 Mich. 333, cases cited at 336-37 (1877); Scudder v. Trenton Del. Falls Co., 1 N.J. Eq. 694 (1832); Newcomb v. Smith, 2 Pin. 131 (Wis. 1849).

36. Chancellor Kent concluded that "Turnpike roads are, in point of fact, the most public roads or highways that are known to exist, and *in point of law, they are made entirely for public use*, and the community has a deep interest in tbeir construction and preservation." (emphasis added) Rogers v. Bradshaw, 20 Johns. 735, 742 (N.Y. Ct. of Err. 1823). *See* Bonaparte v. Camden & A.R.R., 3 F. Cas. 821, 829 (Case No. 1, 617) (C.C.D.N.J. 1830) (nonbinding decision).

The verbal formulae used by the courts to differentiate between a legitimate public use and an unconstitutional private purpose varied widely from state to state. One court suggested that the legislature was vested with broad discretion in determining what constituted a public use and was free to employ or to delegate its power of eminent domain "not only where the safety, but also where the interest or *even the expediency* of the state is concerned."[37] At the other extreme were some judges who insisted that the eminent domain power should be used only where necessary, not merely when expedient.[38] The dominant view, however, seemed to be that a corporate taking might be regarded in law as for a public use if the project for which the land was taken would merely benefit the public in some manner.[39] Under this broad approach public use meant public benefit, and where the taking was for a new toll road or canal or bridge or railroad, the benefit to the public in a state with inadequate transportation facilities was apparent. Yet whatever the ostensible judicial formula for determining a permissible public use, the only cases in which state courts actually refused to uphold legislation delegating eminent domain powers to private transportation companies were a handful of situations involving strictly private access roads.[40]

In addition to devolving eminent domain upon transportation corporations, a number of states delegated the power to private manufacturing companies seeking to acquire river sites for power mills producing textiles and other goods.[41] In one case involving the delegation of condemnation powers by the New Jersey legislature to a private company seeking to develop seventy power mill sites on a six mile stretch of the Delaware River, the displaced owners attacked the legislation as "the first attempt, in this state, to take private property for private use." They argued that failure to invalidate the delegation would render the public use limitation totally ineffectual.[42] The New Jersey Court rejected the owners' arguments and upheld the delegation. Even if the corporation's primary purpose was private profit, the court found that "what shall be considered a public use or benefit, must depend somewhat on the *situation*

37. Beekman v. Saratoga & S.R.R., 3 Paige 50 (N.Y. Ch. 1831).

38. Boston and Roxbury Mill Dam Corp. v. Newman, 39 Mass. (12 Pick.) 467 (1832); Bloodgood v. Mohawk & H.R.R., 18 Wend. 9 (N.Y. Ct. Corr. of Err. 1837).

39. Giesy v. Cincinnati W. & Z. R.R., 4 Ohio St. 308 (1854); Nichols, *Public Use, supra* note 21, at 617; Scheiber, *Road to Munn* at 368.

40. Taylor v. Porter, 4 Hill 140 (N.Y. 1843); Scheiber, *Road to Munn* at 369.

41. Note 35 *supra*.

42. Scudder v. Trenton Del. Falls Co., 1 N.J. Eq. 694, 712 (1832).

and wants of the community for the time being."[43] Since the needs of the New Jersey community at the time would be served by an expansion of industry, the company's use of eminent domain was for a public not a private purpose. Although some states refused to expand their concept of the public use requirement to permit condemnation for general manufacturing purposes,[44] others followed the New Jersey court on the ground that waterpower development would, as a critic observed, "largely conduce to the prosperity of the state."[45]

In addition to permitting state legislatures to delegate eminent domain to private transportation and manufacturing companies, state courts were inclined to interpret the "just compensation" requirement in a manner that was advantageous to private enterprise. In an era when capital was scarce, the duty to compensate the owner of a condemned parcel of land would impose a genuine practical limitation on widespread use of eminent domain. The state legislatures and courts, however, developed a measure of compensation that markedly reduced actual cash payments for expropriated land. The condemnor would calculate the loss caused the former landowner by the deprivation of his property and then deduct from it the presumed benefits that accrued to any remaining portions of the owner's tract by virtue of the construction of the public enterprise in question.[46] This offset formula was widely and generously used in determining just compensation and in one case permitted the acquisition of a railway right of way at virtually no cost to the corporation.[47]

In allowing state legislatures to delegate the power of eminent domain to transportation companies and manufacturers and by normally equating public use with a generalized benefit to the public, the state courts of the first half of the nineteenth century gave sympathetic approval to legislative plans for achieving public growth through private activities. By granting eminent domain to

43. *Id.* at 726-28 (emphasis added).

44. Alabama, Georgia, New York and Vermont rejected delegations to commercial mills. Ryerson v. Brown, 35 Mich. 333, 336-37 (1877).

45. Ryerson v. Brown, 35 Mich. 334, 337 (1877).

46. Chesapeake & O. Canal Co. v. Johnson, 5 F. Cas. 563, 564 (Case No. 2,649) (C.C.D.C. 1829); H. SCHEIBER, OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820-1861, 277-78 (1969); Horwitz, *The Transformation in the Conception of Property in American Law 1780-1860*, 40 U. CHI. L. REV. 248, 274-75 (1973); Scheiber, *Property Law* at 237; Comment, *Eminent Domain: Set-off of Benefits Against Damages to Remaining Land Denied*, 43 IOWA L. REV. 303 (1958).

47. Scheiber, *Property Law* at 237.

private interest groups the legislature sought to encourage and subsidize their activities without spending tax money on them. Also, by finding that such activities were a public use and by allowing such groups to measure just compensation through the offset formula,[48] the state courts helped underwrite broad public and private use of the eminent domain power.[49] Nonetheless, in giving such freedom to the legislature, the courts ran the risk of ignoring the interests of those whose land actually was taken. It was hardly surprising then that a period in which the interests of landowners were largely obscured should be followed by a period when their interests were championed more vigorously.

B. *A Period of Reaction 1850-1870*

The liberal use of eminent domain on behalf of private enterprise that characterized the first half of the nineteenth century produced a noticeable reaction in judicial philosophy in the decades before and after the Civil War. The source of the reaction apparently was in the fear that internal improvements were being subsidized at the expense of private property rights.[50] As one writer observed, "At no time has there been such a spirit of improvement pervading the country . . . . The vast plans, for *turnpikes, canals, railroads, bridges* and other means to facilitate internal communications, are almost without number." He went on to warn that "attempted encroachments upon private property by a state [were likely to increase] in an age and in a country, where the expediency, if not the necessity of public improvements is constantly presenting itself to the attention of legislative bodies."[51]

In an effort to preserve the rights of property owners, the courts had earlier begun to develop a more strict concept of public use. Rather than equating public use with a benefit received by the public as a whole, many courts began to require a showing that the land actually would be open to use by the public as a matter of

48. Professor Morton Horwitz argues persuasively that the courts also encouraged economic expansion by limiting recoveries in damage actions against favored business activities. *See* Horwitz, *Did the Legal System Subsidize Economic Growth in Ante Bellum America?* (unpublished ms.).

49. Professor Scheiber argues strongly for the proposition that expropriation was purposefully used to allocate resources, to influence the structure of entrepreneurial opportunity and to provide subsidies for favored types of business enterprise. Scheiber, *Property Law* at 232-34. For a different view of the era see Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914).

50. Nichols, *Public Use, supra* note 21, at 617-18.

51. *Restrictions Upon State Power In Relation to Private Property*, 2 U.S. Law Intell. 4, 5 (1829) (emphasis in original).

right.[52] For example, a railroad available for use by anyone who chose to pay a fare constituted a suitable public use of condemned land.[53] A power mill to be used exclusively by the mill owner, however, would be considered a private use and beyond the scope of eminent domain.[54] By the 1870's the Michigan Supreme Court went beyond even this narrow "use by the public" test and required that any exercise of eminent domain must be justified constitutionally by "necessity of the extreme sort."[55]

In addition to narrowing the definition of "public use," some states amended their constitutions to require that just compensation be determined irrespective of any benefit accruing to the owner of land from improvements.[56] Revealing the temper of the time in its celebration of a court decision that reversed a damages award for being too small an Ohio journal observed that "[h]eretofore when they [corporations] have wanted the property of individuals to aid them in their splendid schemes of speculation, it had been seized and appropriated under the false and lying pretext that it was for public use, and little or nothing paid for it." It proclaimed that "a brighter day seems to be dawning—a day when courts will not aid in riding roughshod over individuals."[57] The dawning, however, seems to have been limited to the east and midwest. Farther west, the newest states in the union embarked upon an exercise of eminent domain that was more expansive than in the days of the transportation revolution.

C. *1870-1910*

While eastern and midwestern states may have been concerned with establishing limits on the use of eminent domain, the Western

52. Nichols, *Public Use, supra* note 21; *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 603 (1949). The New York courts seem to have taken the lead in advocating the narrow construction. Bloodgood v. Mohawk & H. R.R., 18 Wend. 9, 60 (N.Y. Ct. Corr. of Err. 1837) (Sen. Tracy's concurring opinion); Taylor v. Porter, 4 Hill 140 (N.Y. 1843).

53. Bloodgood v. Mohawk & H.R.R., 18 Wend. 9 (N.Y. Ct. Corr. of Err. 1837).

54. See cases cited in Ryerson v. Brown, 35 Mich. 333, 336-37 (1877).

55. *Id.* at 340-41.

56. The Ohio Constitution of 1851 provided that a jury of 12 men should determine just compensation in corporate condemnation cases and that the offset formula could not be used in arriving at a fair figure. The Ohio provision was adopted by Iowa in 1857 and by Kansas in 1859. Ohio State Constitutional Convention of 1850, 1 *Reports and Debates*, 883-93; McCormick, *The Measure of Compensation in Eminent Domain*, 17 MINN. L. REV. 492-93 n.116 (1933); Scheiber, *Property Law* at 241-42.

57. As quoted by Horwitz, *Did the Legal System Subsidize Economic Growth in Ante-Bellum America?* 372 (unpublished ms.).

states were more concerned with using condemnation as liberally as possible in order to exploit their natural resources quickly. Western state legislatures were more than willing to delegate eminent domain powers to miners, farmers, and lumbermen as well as to railroads and power mills. Condemnations by private enterprises became so common in the years from 1870 to 1910 that one scholar has characterized the period as the "heyday of expropriation as an instrument of public policy designed to subsidize private enterprise."[58]

In an effort to forestall the judiciary from delimiting the scope of the public use concept, the constitutional conventions of the new western states frequently inserted into the state constitutions provisions which explicitly declared enterprises such as mining, irrigation, lumbering, or manufacturing to be public uses. The Colorado constitution of 1876 provided that private property might be taken for *private use* "for private ways of necessity, . . . reservoirs, drains, flumes or ditches on or across the lands of others, for *agricultural, mining, milling, domestic or sanitary* purposes."[59] In the Idaho constitutional convention of 1889 the debate on expropriation led to a bitter clash between farming and mining interests that were eager to gain the power of eminent domain in order to exploit common resources. The heated discussions between the two factions at last resulted in a compromise constitutional provision which declared all condemnations of land for irrigation and drainage purposes as well as for the draining and workingof mines to be a "public use".[60]

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58. Scheiber, *Property Law* at 243.

59. COLO. CONST. art. II, § 14 (1876) (emphasis added). A similar provision may he found in the Arizona Constitution which declares that private property cannot be taken for private use "except for private ways of necessity, and for drains, flumes or ditches, on or accross the lands of others for mining, agricultural, domestic or sanitary purposes." ARIZ. CONST. art. II, § 17.

60. Of all the state constitutions, the Idaho Constitution contained the most comprehensive declaration of puhlic uses. Public use included

>]t]he necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and suhject to the regulation and control of the state.

IDAHO CONST. art. I, § 14. Other constitutions have declared a public use in the taking of private property for a railroad, for logging or lumbering purposes (CAL. CONST. art. I, § 14); or for milling purposes (COLO. CONST. art. II, § 14); or for rights of way over lands of others for all ditches, drains, flumes, canals and aqueducts (MONT. CONST. art. III, § 15).

Moreover, the western state legislatures were not slow to follow the example of the constitutional conventions. The legislatures of Arizona, Colorado, Montana, Nevada, New Mexico, and Washington delegated eminent domain to any farmer who wished to condemn part of his neighbor's land in order to run an irrigation canal across it.[61] Other legislatures authorized miners to take private lands if the taking would assist in the exploitation of the claim.[62]

Although some courts were reluctant to sanction such wholesale delegations to private organizations, many others upheld such statutes. In passing favorably upon its own state's panoramic devolution statute,[63] the Idaho Supreme Court held that nothing was wrong with the statute's breadth and stated that unless the eminent domain powers were very broad "complete development of the material resources of our young state could not be made."[64] Other courts in mining areas found that development of local mineral resources constituted "an interest of great public benefit to the community,"[65] which warranted the delegation of eminent domain to mining companies. Agricultural states found similar merits in statutes allowing farmers to expropriate land for irrigation purposes.[66] Whether the land was taken to aid a miner working his claim or a farmer watering his crops, the western courts had little difficulty perceiving that such a use was public since it contributed to the material prosperity of the state as a whole.[67]

The western states' use of the power generated some of the first eminent domain cases to receive direct review by the United States Supreme Court. The Court had ruled in 1896 and 1897, that the fourteenth amendment, which prohibited the states from depriving a citizen of his property without due process of law, implicitly defined due process in terms of the public use and just compensation requirement of the fifth amendment.[68] Thus in order for a state to

61. Oury v. Goodwin, 3 Ariz. 255, 26 P. 376 (1891); Scheiber, *Property Law* at 246-47.

62. *E.g.*, Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394 (1876).

63. The statute is quoted in Potlatch Lumber Co. v. Peterson, 12 Idaho 769, 781, 88 P. 426, 429-30 (1906).

64. *Id.* at 431.

65. Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394 (1876).

66. Oury v. Goodwin, 3 Ariz. 255, 26 P. 376 (1891); S. WIEL, 1 WATERRIGHTS /N THE WESTERN STATES 148-57 (3d ed. 1911).

67. *E.g.*, Butte, A. & P. Ry. v. Montana Union Ry., 16 Mont. 504, 41 P. 232 (1895).

68. In 1833 the Supreme Court had ruled that the requirements of the fifth amendment did not apply to expropriation by the states hut only to federal condemnations. Barron v. Baltimore, 32 U.S. (7 Pet.) 242 (1833). In 1896 and 1897 the Court held that the due process clause of the fourteenth amendment required the states to pay just compensation and to observe the public use requirement. Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897); Missouri P. Ry. v. Nebraska, 164 U.S. 403 (1896).

deprive any citizen of his lands, the state would have to demonstrate as a matter of federal constitutional law that the taking was for a public use and in return for just compensation. For the first time state condemnatons were subject to direct federal review to determine whether the just compensation andpublic use requirements had been met.

At this time the western view of public use seemed to be particularly ripe for federal scrutiny. In a period when most states defined public use in terms of either a strict "use by the public" test[69] or a broad "public benefit" standard,[70] the western states seemed to be evolving a new criteria that verged on the edge of simple public expediency.[71] Those cases holding the use of eminent domain on behalf of a farmer's irrigation ditch seemed most suspect since the benefit to the farmer was obvious but the advantage to the public as a whole seemed so general as to be without meaningful limitation. The Supreme Court, however, was not eager to invalidate eminent domain devolution statutes for lack of an appropriate public purpose.[72] On the contrary the Court largely upheld local practices and granted a wide discretion to the state legislatures in determining what constituted a federal constitutional public use. In broadest terms the Court found that if a taking was "essential or material for the prosperity of the community"[73] it was for a public use. Thus it upheld a California law permitting water companies to condemn private land for irrigation purposes,[74] validated Utah's statute authorizing an individual to expropriate a neighbor's land in order to convey water to his own,[75] and upheld an eastern railway's taking of private property to construct a spur line to the warehouse of a larger shipper.[76] Rather than serve as a check on the aggressive use of eminent domain by private groups, the Supreme Court served to

69. "It is sufficient that the general public, or any considerable portion thereof, should have a right to the use." Jacobs v. Clearview Water Supply Co., 220 Pa. 388, 393, 69 A. 870, 872 (1908).

70. "[E]verything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the State" [constitutes a public use]. Talbot v. Hudson, 82 Mass. 417, 425 (1860).

71. Notes 59 and 60 *supra*.

72. In 1850 the Supreme Court ruled that even if the facts showed that a state condemnation blatantly violated the public use requirement of the state constitution "it rests with state legislatures and state courts to protect their citizens from injustice and oppression of this description." Mills v. St. Clair County, 49 U.S. (8 How.) 569, 585 (1850).

73. Clark v. Nash, 198 U.S. 361 (1905).

74. Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896).

75. Clark v. Nash, 198 U.S. 361 (1905).

76. Hairston v. Danville & W. Ry., 208 U.S. 598 (1908).

ratify the state legislature's determinations of who should have access to the power of condemnation.

The Supreme Court's attitude towards state condemnation questions was characteristic of much of the nineteenth century. Although the period was marked in part by a concern for the interests of individual landowners,[77] the courts of the day were more inclined to sustain rather than question the legislature's use of eminent domain. Thus the courts permitted legislative delegations to groups formed to build turnpikes, bridges, canals, and railroads; to private textile manufacturers; to mining companies; to individual farmers and even to lumberjacks to secure places to store their logs. In a young nation preoccupied with rapid expansion and committed to swift economic growth, it was perhaps only natural for legislatures and courts to unite in perceiving that the best interests of private enterprise represented the best interest of the public as a whole. The result of that perception was to establish eminent domain as a flexible power that could be used freely by either the legislature or private groups selected by it. Moreover, as both the state and federal courts came to accord greater respect to the legislature's perception od the public interest, the nation's judiciary became inbued with the habit of deferring to the legislative definition of public use.

II. The Broadening Scope of Eminent Domain in the Twentieth Century

Although the nineteenth century witnessed the rise of a broad use of eminent domain prompted by the needs of private enterprise, a more narrow view of the power in many jurisdictions continued to exist into the twentieth century. Typically, these courts retained the view that the public use requirement implied that condemned land had to be subsequently used by the public as a matter of right in order to justify the use of eminent domain.[78] The courts would therefore scrutinize the intended use of the land to ascertain whether the public would have access to it but they would not consider the broader purposes of the authorizing statute.[79] Thus the first court to rule on a statute delegating the eminent domain power to a pri-

77. *See* text at notes 36-43 *supra*. Professor Corwin maintained that the era's most enduring accomplishment was its assertion of the importance of vested property rights. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 Mich. L. Rev. 247, 275 (1914); *accord*, Philbrick, *Changing Conceptions of Property in Law*, 86 U. Pa. L. Rev. 691, 723 (1938). *Contra*, Horwitz, *The Transformation in the Conception of Property in American Law*, 1780-1860, 40 U. Chi. L. Rev. 248 (1973); Scheiber, *Property Law* at 232-33.

78. Nichols, *Public Use*, *supra* note 21, at 624.

79. *Id.* at 626.

vate college struck the statute down on grounds that the college could deny use of the land to members of the public at large.[80] Yet whatever vitality this narrow view of public use may have had at the beginning of the twentieth century, as a matter of national practice, it was dissipated almost entirely within fifty years.

Whereas industrial growth and economic expansion spurred courts to take a liberal view of public use in the nineteenth century, urban development programs came to serve a similar function in the twentieth century.[81] As the nineteenth century ended, the United States underwent a transformation from an agricultural to an urban nation. The shift of population from country to city, however, coincided with a decline in the quality of urban life and urban housing. At the height of national prosperity in 1929, a government survey of real property in sixty-four cities revealed that only thirty-eight percent of all dwellings were in good condition. Much of the nation's housing was described as obsolete and one expert estimated that about ten million people lived in conditions that endangered their "health, safety and morals."[82] By the mid-1930's the federal government recognized that the growth of urban slums and the declining supply of adequate housing were problems of national magnitude. In 1937, therefore, Congress approved a housing act providing federal grants to states that would condemn slum areas, clear the slums, and replace them with homes for low-income families.[83] Underfinanced and interrupted by war, the Housing Act of 1937 was supplanted by the much more ambitious Housing Act of 1949.[84] While the 1937 Act had provided for slum redevelopment by government agencies, the 1949 program specified that the cleared land could be sold to private enterprise for redevelopment in accordance with a master plan for the area. Under either Act, however, the task of assembling parcels of slum land for clearance was assigned to state housing agencies. Although the agencies were directed to attempt land acquisitions through negotiation, they were delegated

80. Connecticut College for Women v. Calvert, 87 Conn. 421, 88 A. 633 (1913); "[T]he vital question is whether . . . the public will have a common right upon equal terms, independently of the will or caprice of the corporation, to the use and enjoyment of the property sought to be taken." *Id.* at 430, 88 A. at 637. *Compare* University of S. Calif. v. Robbins, 1 Cal. App. 2d 523, 37 P.2d 163 (1934).

81. Nichols, *Public Use* at 629; Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 607-08 (1949); 68 HARV. L. REV. 1422 (1955).

82. Bellush & Hausknecht, *Urban Renewal: An Historical Overview*, in URBAN RENEWAL: PEOPLE, POLITICS AND PLANNING 4 (1967).

83. United States Housing Act of 1937, 42 U.S.C. § 1401 (1970).

84. United States Housing Act of 1949, 42 U.S.C. § 1441 (1970).

the power of eminent domain for use in the event negotiations failed.

Inasmuch as landowners were likely to refuse to sell, or at the very least to hold out for the highest possible price, the success of the 1937 and 1949 Acts depended in large part upon whether eminent domain could be used by state agencies to acquire, clear, and redevelop slum areas. Under a narrow view of public use, however, both Acts seemed to authorize condemnation for private purposes.[85] The 1937 Act provided that the low-income housing constructed in the place of slums were to be made available for rental only to families of moderate means. Furthermore, the 1949 Act provided that cleared lands might be sold for commercial and industrial sites for private businesses. Either program, therefore, might easily encounter difficulties in a jurisdiction that defined public use as use by the public. Yet state and federal courts gave full constitutional sanction to both Acts and in doing so marked the end of any narrow limitations that may once have existed upon the use of eminent domain.

The state courts took the lead in asserting the constitutionality of the 1937 Housing Act. In *New York City Housing Authority v. Muller*,[86] the New York Court of Appeals authoritatively determined that condemnation for slum clearance and public housing was for a public purpose. The *Muller* court specifically repudiated the narrow doctrine that public use meant use by the public. Since slums were an ancient evil which menaced the people of the state, slum removal was viewed as a broad benefit enjoyed by the public as a whole. In reaching its decision, the court articulated a new approach for determining public use. Stating that the purpose of government was to protect the health, safety, and welfare of the people, the court noted that the government could protect these interests through a trinity of powers— the power to tax, the police power, and the power of eminent domain. Whenever an adverse condition such as a dangerous slum arose to threaten the public health, safety or welfare, it became the duty of the state to employ one of these three powers to eliminate the threat. If the menace was serious enough to warrant public action and the power applied was reasonably calculated to remove it, the court reasoned that it was constitutionally immaterial which of the three were actually employed.[87] By implication,

85. In 1935 a federal court had used the narrow view of public use to declare that condemnation for slum clearance and housing was for a private use. United States v. Certain Lands in Louisville, 9 F. Supp. 137 (W.D. Ky. 1935).

86. 270 N.Y. 333, 1 N.E.2d 153 (1936).

87. *Id.* at 341, 1 N.E.2d at 155.

therefore, a public use appeared to be any governmental program within the ambit of governmental authority that was reasonably calculated to protect the public.

Within six years after *Muller*, twenty-two jurisdictions had followed New York's lead in rejecting the narrow view of public use and replacing it with a broad definition based on the benefits derived from slum clearance.[88] Moreover, several courts adopted the New York rationale that eminent domain powers could be invoked whenever necessary to protect the public's health, safety, or welfare.[89] The police power—the power of the sovereign to regulate private property for the public welfare—came to be the key element in defining the scope of public use. Thus, if the object of a statute was within the traditional scope of the police power, the object was necessarily a public use for which eminent domain might then be used. The Pennsylvania Supreme Court upheld a state law similar to the 1937 Housing Act on the ground that the housing provisions were merely ancillary to the act's main purpose of eliminating dangerous and unsanitary slums, an obviously legitimate object under the police power. The court stated further that when the power of eminent domain is thus called into play "as a handmaiden to the police power and in order to make its proper exercise effective, *it is necessarily for a public use.*"[90]

State judicial acceptance of the Housing Act of 1937 marked the repudiation of the narrow view of public use. In embracing the Housing Act of 1937, the state courts focused on the public policy underlying the condemnation rather than the subsequent use of the expropriated land. Since the policy that lay behind the taking was the determinative factor in deciding public use, the only remaining question was whether that policy was a proper subject for governmental action. If the policy helped to protect the welfare of the public, then it was a legitimate governmental action and a permissible public use. "Public use" appeared to have become synonomous with "public welfare."

Federal courts adopted the same approach in passing upon the constitutionality of using eminent domain to effectuate the more expansive Housing Act of 1949. Unlike the 1937 Act, the 1949 Housing Act contemplated turning expropriated slum land over to private developers for construction of commercial and industrial facili-

88. See cases collected in McDougal & Mueller, *Public Purpose in Public Housing: An Anachronism Reburied*, 52 YALE L.J. 42, 46 n.13 (1942).

89. Dornan v. Philadelphia Housing Auth., 331 Pa. 209, 200 A. 834, 840 (1938).

90. *Id.* at 226, 200 A. at 842. (emphasis added).

ties. Since the effect was to take land from one private owner for the use and enjoyment of another, the Act was quickly subjected to attack by affected landowners. In one famous instance, a businessman whose department store had been condemned as part of a slum clearance program in the District of Columbia challenged the use of eminent domain on the grounds that his property subsequently was to be resold to yet another businessman for private commercial use. Upholding the condemnation in the landmark case of *Berman v. Parker*,[91] the United States Supreme Court centered its attention on the congressional policy underlying the taking. Since the slum clearance and urban renewal purposes of the condemnation were within the traditional police powers of Congress, it could select whatever means it deemed appropriate to achieve the desired ends. Eminent domain was one means to that end; private redevelopment was another.

The Court went even further in giving Congress broad authority in eminent domain cases. In the past, the question of defining what constituted a public use ultimately had been a judicial issue. In a previous case, however, the Court had indicated that a legislative determination of public use was "entitled to deference until it is shown to involve an impossibility."[92] Reiterating the same theme of extreme deference to the legislature the *Berman* Court stated: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs . . . ."[93] Precisely what these specific constitutional limitations were supposed to be was by no means clear. As one commentator observed, the only specific constitutional limit on land use was the third amendment's prohibition against quartering troops without the consent of the owner and even it would not prohibit the condemnation of private property for the purpose of constructing barracks.[94]

The practical effect of the *Berman* case was to give judicial approval to a federal urban renewal program that was operative in many cities of America during the 1950's and 1960's. The legal effect of *Berman* was to extend the fifth amendment's requirement of

91. 348 U.S. 26 (1954). The contested taking was authorized by the District of Columbia Redevelopment Act of 1945, D.C. CODE ANN. §§ 5-701 to -719 (1951), an act which closely resembled the Housing Act of 1949.

92. Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925).

93. Berman v. Parker, 348 U.S. 26, 32 (1954).

94. Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 68.

public use to encompass any taking that would further a legitimate governmental policy. Whether land was taken from one private owner for the benefit of another was constitutionally inconsequential provided that the taking furthered a program that lay within congressional authority. The scope of eminent domain literally had become almost as broad as the scope of government itself; aside from the just compensation obligation, its only limit was the limit on governmental action. Barring unnamed "specific constitutional limitations," it was for the legislature not the judiciary to determine what policies were in the public interest and therefore what programs constituted a public use.[95]

Although some commentators have demonstrated that the public use requirement still has vitality in a few state courts that define it narrowly as a matter of state constitutional law,[96] most writers have taken the position that the public use doctrine no longer imposes a meaningful federal limitation upon the exercise of eminent domain powers.[97] Thus after nearly two hundred years of using eminent domain on behalf of private transportation companies, manufacturers, mining concerns, and farming interests, American legislatures have achieved the federal right to employ eminent domain on behalf of any group whose activities subserve a legitimate governmental purpose. Moreover, the legislatures have established their power to transfer land from one private owner to another and from one business to another in the pursuit of governmental objectives.

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95. The *Berman* case has received extended critical comment. Among the best are Dunham, *supra* note 81, and Marquis, *Constitutional and Statutory Authority to Condemn*, 43 IOWA L. REV. 170 (1958). A series of interesting essays have explored the implications of Justice Douglas' remark that it is within the congressional power to make a city beautiful as well as safe. Gormley, *Urban Redevelopment to Further Aesthetic Considerations: The Changing Constitutional Concepts of the Police Power and Eminent Domain*, 41 N.D.L. REV. 316 (1965).

96. Note, *State Constitutional Limitations on the Power of Eminent Domain*, 77 HARV. L. REV. 717 (1964); Note, *"Public Use" as a Limitation on the Exercise of the Eminent Domain Power by Private Entities*, 50 IOWA L. REV. 799 (1965); 1969 LAW AND THE SOCIAL ORDER 688.

97. Public use "bas been stretched to such an extreme position that the requirement of public use no longer exists." Gormley, *supra* note 95, at 320. "If there is a doctrine that property cannot be condemned from one person to be transfered [sic] to another, it has some large exceptions." Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 599 (1972).

It is so widely conceded that the public use doctrine no longer has vitality that the focus of scholarly attention has shifted to distinguishing between police power regulations of property which do not require compensation and eminent domain takings which do. F. BOSSELMAN, P. CALLIAS, J. BAUTA, THE TAKING ISSUES: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATE-OWNED LAND WITHOUT PAYING COMPENSATION TO OTHERS 194 (1973); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. CAL. L. REV. 1 (1971).

As a practical matter then the state legislature has become the only source of limits placed on eminent domain. If the American legal history of the past several hundred years is an accurate guide, those limits will not be made for inconvenience to private interest groups actively soliciting the public power of eminent domain.

PART TWO

UNIVERSITY EXPANSION THROUGH EMINENT DOMAIN SECTION 112 OF THE FEDERAL URBAN RENEWAL ACT

In 1959 a small group of distinguished private universities successfully petitioned the United States Congress for the benefits flowing from the use of eminent domain. Their proposal was artfully constructed. Rather than request a direct delegation of the eminent domain power, spokesmen for the universities instead proposed an amendment to existing legislation that would have the effect of encouraging state agencies already endowed with the power to employ it on behalf of universities in their area. As an incentive to exercising condemnation in such cases, participating agencies would generate otherwise unobtainable federal funds for local expenditures on streets, sewers, and other community improvements. The university spokesmen emphasized that the effect of the proposed legislation would be to take a measured step towards the solution of two problems that were of immediate congressional concern—the elimination of urban slums and the expansion of American educational facilities. The proposal of the universities was enacted into law on September 23, 1959, as Section 112 of the Housing Act of 1949.[98]

I. The Origin of Section 112

Section 112 represented an ingenious and well-intentioned attempt to provide a common solution to two related problems of national concern. The first problem was the continuing need to cleanse and restore those portions of almost every American city that were in obvious and often dangerous states of decline. The second was the less obvious but equally real need of many urban universities to expand their campuses by acquiring and razing the commercial and residential areas surrounding them on every side. The two problems were related by an accident of location. Many urban universities were situated in or near the older parts of town

98. Section 112 of the Housing Act, as added by § 418 of the Housing Act of 1959, 42 U.S.C. § 1463 (1970).

most affected by slums or blight. Consequently, most universities needed to expand into those areas of the city most in need of thorough renewal.[99]

In passing the 1949 and 1954 Housing Acts,[100] Congress had recognized and attempted to solve the problem of urban deterioration. Taken together, the two acts committed the nation to a program of slum clearance and rehabilitation through a coalescence of governmental action and private enterprise. Under the 1949 Act, local government agencies acquired and demolished predominantly residential slum properties, invoking the power of eminent domain when necessary. The cleared land was then sold below cost to a private redeveloper who constructed standard quality housing upon the site.[101] The net cost of the project—the cost of acquisition and demolition less the price received from the private redevelopers—was underwritten by both the federal government which would pay up to two-thirds the net cost, and the local sponsoring government, which would pay the remaining one-third either through cash or through improvements in the project area.[102] Under the 1954 Act, the local agencies could sponsor commercial as well as residential redevelopments[103] and, in those areas which did not require clearance, federal funds were allocated for the rehabilitation of existing structures.[104]

While Congress had confronted the problem of urban blight, it had not been quick to perceive the needs of urban universities. Educational institutions such as Columbia and the University of

99. *See Hearings on § 112 of the Housing Act Before the Senate Committee on Banking and Currency*, 86th Cong., 1st Sess. 501-19 (1959) (statements by Julian Levi, Executive Director, South East Chicago Commission, and George F. Baughman, Vice President of N.Y.U.).

100. Housing Act of 1949 § 2, 42 U.S.C. § 1441 (1970); Housing Act of 1954. In addition to the federal provisions, most states independently have enacted some form of urhan renewal legislation. *See, e.g.*, ALA. CODE tit. 25, § 106 *et seq.* (1958); CAL. HEALTH & SAFETY CODE § 33000 *et seq.* (West 1973); GA. CODE ANN. § 69-1101 *et seq.* (1967); ILL. ANN. STAT. ch. 67 1/2 § 1 *et seq.* (1959); N.Y. GEN. MUN. LAW § 500 *et seq.* (McKinney 1965); TENN. CODE ANN. § 13-822 *et seq.* (1973).

101. *See* J. WEICHER, URBAN RENEWAL: NATIONAL PROGRAM FOR LOCAL PROBLEMS 5 (1972).

102. *See* notes 148-51 *infra* and accompanying text.

103. Under one provision of the amendment, 10% (later increased to 35% in 1965) of the authorized federal capital grant funds could he used for nonresidential projects. 42 U.S.C. § 1460(c) (Supp. 1954), *as amended*, 42 U.S.C. § 1460(c) (1970).

104. Although the original 1949 Act provided for demolition and redevelopment as the only means for eliminating slums, the 1954 amendment added the additional tool of "rehabilitation." Included in the definition of an "urban renewal project," it was intended to permit the elimination of blight in the area by private enterprise through rehabilitation, so that structures will be conserved before reaching the stage where demolition becomes necessary. 42 U.S.C. § 1460(c) (1970).

Chicago were surrounded by declining areas and unless those areas were included in urban renewal programs by the cities, the universities lacked any means to protect the quality of life in their immediate neighborhoods. As blighted areas began to engulf the campuses, some schools seriously considered abandoning their urban locations in favor of new sites in the suburbs.[105] Nevertheless, even as their oppressive surroundings induced some university leaders to consider a flight from the city, other pressures induced them to stay and even to expand their urban sites. By the early 1950's a sharp rise in student enrollments had underscored the need of many American colleges to enlarge their campus facilities. Before World War II, one million students had enrolled in colleges and universities. Immediately after the war the figure had risen to two million and by 1959, with the first wave of the war years' baby boom reaching college age, enrollment had climbed to three million with an estimated peak of six million students by 1970.[106] An expansion of facilities and in many cases an expansion in the size of the campus itself were necessary to absorb an increase of three million students in a decade. While the strain was felt by all universities, both public and private, private universities in urban areas were in a particularly precarious situation. Unlike state schools, which could prevail upon the legislature to exercise condemnation powers in their behalf, private institutions could only acquire land for expansion through private negotiations. Major acquisitions inevitably were impeded by private owners holding key tracts who either demanded exorbitant prices for their land or refused to sell altogether.[107]

As the leaders of America's urban universities became cognizant of the implications of their position, they turned to one another for assistance. The University of Chicago, which had previously taken steps to preserve its neighborhood and to expand its campus, provided the initial leadership.[108] In April of 1957, the Chancellor of the University of Chicago met with the presidents of Harvard, Yale, the University of Pennsylvania, and the Massachusetts Institute of Technology to explore the dimension of their common problems.[109] As a result of their meeting, the Chicago administration organized

105. *See Hearings*, note 99 *supra*, at 523 (Temple University considered but later abandoned plans to move from Philadelphia).

106. *See id.* at 519, 521 (statement of John L. Moore, Business Vice President of the University of Pennsylvania).

107. *See id.* at 516-19 (statement of George Baughman, Vice President of N.Y.U.).

108. *See generally* J. ABRAHAMSON, A NEIGHBORHOOD FINDS ITSELF (1959); P. ROSSI & R. DENTLER, THE POLITICS OF URBAN RENEWAL (1961).

109. *See* J. KLOTSCHE, THE URBAN UNIVERSITY: AND THE FUTURE OF OUR CITIES 73 (1966).

and directed a detailed survey of sixteen major universities, which included among others New York University in the east, the University of California in the west, and Vanderbilt University in the south.[110] Conducted under the auspices of the American Association of Universities, the survey was completed in 1958 and demonstrated conclusively that the lack of available land for expansion was one of the most acute problems facing each university surveyed.

On the basis of the survey results, the University of Chicago sponsored the drafting of what was to become Section 112 and, along with representatives from other universities, presented the draft on January 26, 1959, to the Senate Committee on Banking and Currency.[111] The bill was designed to overcome the universities' inability to acquire land for expansion by allowing them to participate in urban renewal projects. The proposal provided that state housing agencies would acquire slum lands near university areas by negotiated sales or condemnations and then turn the land over to the university for academic redevelopment. Alternatively, the university could purchase land directly, relying upon state condemnation when necessary, and redevelop it in accordance with a plan approved by the city.[112] In either case, the cost to the university of acquiring the land could be treated as if it were the city's own contribution to the cost of the project. It was thus possible for the city to receive two dollars in federal money for every one dollar spent by the university without contributing anything to the project from its own funds. The university therefore not only would finance its own expansion program, but also would help clear the slums near campus and raise federal funds for the city in the process.

The proposed bill was presented to the Senate Committee on Banking and Currency by university spokesmen who emphasized the importance of eminent domain to university expansion and the wisdom of fostering a national policy of university growth. George Baughman, the Vice President of New York University, clearly summarized the value of eminent domain to a university surrounded by commercial and residential lots:

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110. Levi, *Expanding the University of Chicago*, in CASEBOOK ON CAMPUS PLANNING AND INSTITUTIONAL DEVELOPMENT 108, 124 (1962). The universities participating in the study were: Harvard University; Massachusetts Institute of Technology; Tulane University; Vanderbilt University; University of California; George Washington University; Washington University; St. Louis University; University of Minnesota; Johns Hopkins University; Northwestern University; University of Indiana; University of Illinois; Columbia University; University of Pennsylvania; and University of Chicago.

111. *See Hearings*, note 99 *supra*, at 501.

112. *See* note 158 *infra* and accompanying text.

> Very often in our building programs we have been unable to assemble adequate plottages within an area made up of many small landholdings. At such times the advantage of eminent domain would have saved us many precious months and many (equally precious) thousands of dollars.
>
> Gentlemen, it comes to this: *without the right of eminent domain, our institutional planning and development could be totally blocked for the future.*[113]

Representing the University of Chicago, Julian Levi, the dominant figure behind the proposed bill, chose to emphasize that the national interest lay in permitting private as well as public universities to rely upon eminent domain. Since private universities were nonprofit organizations operated for the benefit of the nation, the measures being proposed were not to be judged in terms of financial gain or loss to the universities, but rather in terms of gain or loss to the nation's students, whom the bill was ultimately intended to serve. By providing an economically attractive method of financing community improvements incident to university expansion, Congress could therefore induce individual cities to commit themselves on a local basis to a goal of national significance.[114]

The universities presented a good case for the indirect delegation of eminent domain on their behalf. The members of the Senate Committee to whom they appealed received them with respect and sympathy, induced perhaps in part by the presence on the committee of Senator Douglas of Illinois, who for twenty-eight years before his election to the Senate had taught at the University of Chicago. When the proposal was later debated on the Senate floor, Senator Douglas served as one of its principal advocates. Despite the existence of some fears that the bill might result in windfall credits to local agencies, no Senator raised the important issue whether eminent domain should be used on behalf of private universities in the first place.[115] On September 23, 1959, Congress approved the bill as originally drafted by the universities and thereby determined that the taking of private land for redevelopment by a private university was a desirable, as well as constitutional, public use.[116]

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113. *See Hearings*, note 99 *supra*, at 516, 517 (emphasis added).

114. *See id.* at 504, 505, 527.

115. 105 CONG. REC. 16157-58 (1959) (remarks of Senators Bennett, Bush, Clark, & Douglas).

116. Section 112 of the Housing Act of 1949, 42 U.S.C. § 1463 (1970), presently reads in relevant part as follows:

> (a) In any case where an educational institution or a hospital is located in or near an urban renewal project area and the governing body of the locality determines that, in addition to the elimination of slums and blight from such area, the undertaking of an urban renewal project in such area will further promote the public welfare and the proper

II. The Mechanics of Urban Renewal

Section 112 was engrafted upon an urban renewal program that was already plagued by organizational complexities. By 1959 urban renewal consisted of two different kinds of projects executed by three principal parties. The two programs consisted of the rehabilitation of blighted neighborhoods and the outright clearance of overt slums.[117] The three parties involved in carrying out the rehabilitation and clearance programs were the local city government, which formally initiated the project; the local administrative agency, which actually executed each plan, and the federal agency, which ultimately approved each project for federal funding. The relationships between the three parties were delineated by state and federal laws and in their mixture of legislative and administrative duties,

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development of the community (1) by making land in such area available for disposition, for uses in accordance with the urban renewal plan, to such educational institution or hospital for redevelopment in accordance with the use or uses specified in the urban renewal plan, (2) by providing, through redevelopment of the area in accordance with the urban renewal plan, a cohesive neighborhood environment compatible with the functions and needs of such educational institution or hospital, or (3) by any combination of the foregoing, the Secretary is authorized to extend financial assistance under this subchapter for an urban renewal project in such area without regard . . . to the predominantly residential character or predominantly residential reuse of urban renewal areas. The aggregate expenditures made by any such institution or hospital (directly or through a private redevelopment corporation or municipal or other public corporation) . . . . shall be a local grant-in-aid in connection with such urban renewal project: *Provided*, that no such expenditure shall be eligible as a local grant-in-aid in any case where the property involved is acquired by such educational institution or hospital from a local public agency which, in connection with its acquisition or disposition of such property, has received, or contracted to receive, a capital grant pursuant to this subchapter: *Provided further*, That no such expenditure shall be deemed ineligible as a local grant-in-aid in connection with an urban renewal project, to the extent that the expenditure is otherwise eligible, if the facilities, land, buildings, or structures with respect to which the expenditure is made are located within one mile of the project.

. . . .

(c) The aggregate expenditures made by any public authority, established by any State, for acquisition, demolition, and relocation in connection with land, buildings, and structures acquired by such public authority and leased to an educational institution for education uses or to a hospital for hospital uses shall be deemed a local grant-in-aid to the same extent as if such expenditures had been made directly by such educational institution or hospital.

(d) As used in this section—

(1) the term "educational institution" means any educational institution of higher learnings, including any public educational institution or any private educational institution, no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(2) the term "hospital" means any hospital licensed by the State in which such hospital is located, including any public hospital or any nonprofit hospital, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

117. *See* note 105 *supra*.

those relationships were by no means clearly drawn.

In essence, however, urban renewal was a local program which, if properly designed, received a heavy federal subsidy.[118] The local city council not only made the legislative decision to initiate an urban renewal project, but also selected the site, approved the plan for the area and the application for federal funds and ultimately paid the city's share of the bill. Almost invariably the city delegated the actual organization and execution responsibilities of each project to a local administrative agency.[119] The local public agency, or LPA as it became known in federal circulars, was a creature of state law, but was charged with meeting both state and federal urban renewal requirements. The LPA was frequently a housing agency that had been established by the state in the 1930's to pursue state slum clearance programs.[120] Accordingly, it was obligated to determine whether an area qualified as a "slum" under state law. If the area qualified, then the LPA was authorized as a matter of state law to employ eminent domain to acquire slum lands for clearance.[121] Since the state usually did not offer to pay the costs of urban renewal programs, the LPA's determination that an area was a slum under state law ordinarily had little practical significance other than to allow the LPA to use eminent domain on behalf of projects that also qualified under federal regulations.

The real function of the LPA then was to satisfy federal, rather than state, urban renewal requirements. Unlike the state requirements that were usually quite cursory, the federal standards were outlined in detail in two major federal statutes[122] and accompanied by three volumes of administrative regulations[123] that were modified or amplified by monthly circulars. In essence, the LPA was obligated to develop a basic analysis of the housing and other characteristics of each urban neighborhood and formulate a plan to prevent or eliminate blight in each area. On the basis of this self-styled "workable program"[124] for the city as a whole, the LPA next would

118. *See* note 148 *infra* and accompanying text.

119. *See generally* M. ANDERSON, THE FEDERAL BULLDOZER 16 (McGraw-Hill paperback ed. 1967).

120. *See, e.g.*, TENN. CODE ANN. § 13-801 *et seq.* (1973).

121. *Id.*

122. Housing Acts of 1949 & 1954.

123. The first administrative regulations were published by the Housing and Home Finance Agency in a 3 volume manual. HHFA's URBAN RENEWAL MANUAL has since been replaced by the HUD URBAN RENEWAL HANDBOOK [hereinafter cited as URH-RHA]. The language in the old manual is substantially the same as in the new handbook under HUD. Further cites will be to the handbook.

124. The workable program is composed of seven elements:

draft a detailed plan for an area selected by the city council for redevelopment. The urban renewal plan was to be a comprehensive blueprint of the various aspects of redevelopment that set forth the specific properties to be taken by the LPA and indicated the nature of the proposed new uses for the area.[125] After receiving approval of the plan from the city council and the federal funding agency,[126] the LPA would execute the project by acquiring the land,[127] relocating former residents and businesses,[128] clearing the site,[129] constructing any necessary site improvements,[130] and disposing of the cleared land to a private redeveloper by public auction or negotiation.[131]

Although it was a local agency, the LPA worked most closely with the federal organization entrusted with national responsibility for federal urban renewal as a whole. The federal agency's name changed according to the latest trend in organization charts, entering the 1950's as the Housing and Home Finance Agency, changing to the Urban Renewal Administration, and finally emerging in the late 1960's as part of the Department of Housing and Urban Development. The principle function of HUD, as it was later called, was to distribute federal funds to those urban renewal plans that appeared to it to be eligible for assistance. As a guide to communities wishing to apply for federal money, HUD issued an *Urban Renewal Manual*,[132] a three volume collection of particularized requirements,

1. Codes and Ordinances: establishing adequate standards of health and safety under which dwellings may be lawfully constructed and cooupied.
2. Comprehensive Community Plan: providing a framework for improvement, renewal, and blight prevention to foster sound community development in the future.
3. Neighborhood Analyses: developing a community-wide picture of blight—where it is, how intense it is, and what needs to be done about it.
4. Administrative Organization: establishing clear-cut authority and responsibility to coordinate the over-all program through effective administration of planning measures and other activities.
5. Financing: providing funds for staff and technical assistance needed, for public improments and renewal activities essential to the program.
6. Housing for Displaced Families: determining community-wide the relocation needs of families to be displaced; developing housing resources to meet these needs, and providing relocation service to displaced families.
7. Citizen Participation: assuring that the community as a whole, representative organizations, and neighborhood groups are informed and have full opportunity to take part in developing and carrying out the program. M. ANDERSON, *supra* note 119, at 17-18.

125. *See* URH-RHA 7207.1, ch. 4, § 1, *General Requirements*, at 1. *See also* M. ANDERSON, *supra* note 119, at 18.

126. *See generally* URH-RHA 7207.1, ch. 4, § 1 *Urban Renewal Plan* at 1.

127. *See* URH-RHM 7208.1, ch. 1, *Objectives and Policy*, at 1.

128. *See* URH-RHM 7212.1, ch. 1, *Objectives and Submission Requirements*, at 1.

129. *See* URH-RHA 7207.1, ch. 1, *Selection & Treatment of Project Areas*, at 5.

130. *See* URH-RHA 7209.1, ch. 1, *Project Improvements*, at 1.

131. *See* URH-RHA 7214.1, ch. 4, *Selection of Redevelopers*, at 1.

132. *See* note 123 *supra*.

to which each application for funds would have to conform. The *Manual* established the elements that had to be contained in the LPA's plan for each area,[133] the procedure whereby the plan was to be approved by the local community,[134] and the process by which the LPA was to submit both the plan and an accompanying application to HUD for funds.[135] In addition, the *Manual* described three other requirements of particular significance: the participation of the community in the local decision to initiate an urban renewal project,[136] compliance with the criteria that HUD would use to approve the site eventually selected[137] and the means of financing the project.[138]

A. *Public Participation*

Before an application could be submitted to HUD, it first had to be approved formally by the LPA and the local city government. In addition, HUD required that members of the public at large have an opportunity to voice their opinions on the plan at a public hearing.[139] The hearing could be sponsored by any local body and normally was held immediately before the final plan was presented to the city council. If nothing else, the hearing provided critics of an urban renewal program a chance to state their observations publicly prior to a conclusive decision by the council. Yet it was neither a judicial nor a legislative hearing, it had no binding effect on any public body and it had little substantive significance to HUD itself. Only summary minutes of the meeting were forwarded to HUD for the limited purpose of showing that "the hearing was held and an opportunity accorded to all persons and organizations to present their views."[140] The fact that a hearing was held was of consequence to HUD but the actual details of the meeting were not.

B. *Qualifying of an Area for Urban Renewal*

Of greater import to HUD than the outcome of the public meeting was the question whether the area proposed for renewal was fully qualified for federal assistance. The federal acts that provided for rehabilitation and clearance projects did not define the sorts of

133. *See* note 125 *supra*.
134. *See* note 126 *supra*.
135. *See* URH-RHA 7215.1, ch. 3, *Federal Grants*, at 1.
136. *See* URH-RHM 7206.1, ch. 3, *Public Hearing on the Project*, at 1.
137. *See* notes 141-46 *infra* and accompanying text.
138. *See* note 147 *infra*.
139. *See* note 136 *supra*.
140. *Id.*

areas eligible for urban renewal. Instead, they delegated to HUD the responsibility of defining the specific characteristics of slum and blight that would qualify an area for federal assistance. HUD complied by first establishing the general principle that a local area had to contain deficiences to such a degree that public action was considered *necessary* to eliminate and prevent the spread of deterioration and blight.[141] More explicitly, HUD created two sets of standards that had to be met depending upon whether an area was to be rehabilitated or cleared completely.

1. *Rehabilitation Areas*

In the case of a rehabilitation project, at least twenty percent of the buildings had to contain one or more "building deficiencies" and the area had to contain at least two "environmental deficiencies."[142] Building deficiencies encompassed a multitude of conditions, including deterioration of the structure caused by a defect not correctable by normal maintenance; an extensive series of minor defects in the building causing a deteriorating effect on surrounding land; or, more simply, defects that in general warranted the removal of the building as a whole. Environmental deficiencies were slightly more specific and included over-crowding of buildings on the land, excessive dwelling unit density, unsafe streets, and inadequate public facilities.[143] If an LPA could demonstrate that twenty percent of the buildings in an area had one such building deficiency and if the area had two such environmental deficiencies, the project area was eligible for federal rehabilitation funds. If, however, the LPA proposed to clear an area, it had to demonstrate that the area met both the rehabilitation standards and separate, stricter criteria for clearance.

2. *Clearance Areas*

If an area were to be cleared, the LPA had to demonstrate to HUD that one of two conditions existed: (1) either more than fifty percent of the buildings were "structurally substandard to a degree requiring clearance" or (2) alternatively, more than twenty percent of the buildings were qualified for clearance and additional clearance was required to remove external blighting influences from another thirty percent of the houses.[144] The first clearance formula

141. URH-RHA 7205.1, ch. 1, *General Eligibility Requirements*, at 1.
142. *Id.*
143. *Id.* at 2.
144. *See* URH-RHA 7207.1, ch. 1, *Selection and Treatmentof Project Areas*, at 3.

emphasized deterioration in the quality of the individual houses in a neighborhood. Over half the houses had to contain sufficient basic structural defects or deficiencies in essential facilities to warrant clearance. If slightly more than half the houses were substandard warranting clearance and slightly less than half were still in good condition, the entire neighborhood might be razed and redeveloped. The second clearance formula, on the other hand, placed more weight upon the deterioration of general living conditions in the neighborhood. Under it more than twenty percent of the houses had to warrant clearance for their own sake. More importantly, another thirty percent had to warrant clearance, not because the structures were defective in themselves, but because their removal would eliminate "blighting conditions" from the area as a whole. "Blighting conditions" were virtually the same as "environmental deficiencies"[145] and included over-crowding of buildings, excessive dwelling unit density and inadequate street layout. Of the two clearance formulas, the second was the easier to satisfy and was actually only slightly more difficult to meet than the basic standard for a rehabilitation project.[146] In view of the slight difference between the rehabilitation and the alternative clearance standards, the LPA would appear to have had a choice between rehabilitating or clearing an area. HUD, however, expressed a preference for rehabilitation and therefore required the LPA to explore all possible alternatives in order to retain the maximum number of sound buildings.[147]

In drawing up its qualification standards and in applying them to LPA applications, HUD exercised a well-insulated administrative discretion. Since its function was to disburse federal grants, HUD was not subject to the usual federal requirement that it submit its regulations to open public debate before final adoption. HUD's standards for rehabilitation and clearance areas were therefore not open to public discussion and ultimately were imposed in

145. *See* note 143 *supra* and accompanying text.

146. The rehabilitation standard at its strictest required (1) twenty percent of the buildings to have "defects warranting clearance" and (2) the area as a whole to have two environmental deficiencies. The second *clearance* formula required (1) that twenty percent of the buildings be "substandard warranting clearance" and (2) that "blighting influences" might be removed from the neighborhood as a whole if an additional thirty percent of the buildings were also cleaned. "Defects warranting clearance" were for all practical purposes the equivalent of a house that was "substandard warranting clearance." Similarly "environmental deficiencies" were very similar to "blighting influences" warranting clearance. The only significant difference between the two categories of requirements appeared to be the extent to which these blighting conditions affected the neighborhood as a whole. *See* note 142 *supra* and accompanying text; notes 149-158 *infra* and accompanying text.

147. *See* notes Part III 152 and 153 *infra*.

an unilateral fashion. Moreover, since HUD was an administrative agency, its determinations on the eligibility of particular projects under its own guidelines ordinarily were not subject to either legislative or judicial review. Thus as both a practical and a legal matter, HUD's decisions about which areas qualified for federal assistance were normally conclusive and beyond appeal.

C. *Financing an Urban Renewal Project*

HUD exercised less discretion in specifying the procedure by which an urban renewal project was financed. The federal government was statutorily required to pay up to two-thirds or three-fourths of the net cost of any project HUD declared eligible for assistance.[148] The net cost of a project was determined by first computing the gross cost of the project to the LPA, which usually included the purchase cost of the land and buildings within the urban renewal area, the cost of planning, overhead, interest, and relocation costs, and the cost of site improvements and supporting facilities.[149] If the project involved the sale of cleared land to private redevelopers, the proceeds from those sales were retained by the LPA and deducted from its gross costs. The resulting amount was the net cost of the project.[150] The federal government would pay up

148. Federal funds in an urban renewl project consist of four principal types: planning advances, temporary loans, long-term loans, and outright grants. A planning advance is a loan to cover expenditures during the survey and planning stage of a project that is being conducted on a two-thirds formula basis. *See* URH-RHA 7215.1, ch. 2, § 1, *Planning Advance*, at 1. This type of loan must be repaid with interest out of the first federal funds tbat become available to the LPA for undertaking the project. The actual execution of the project is financed by temporary loans consisting of either direct federal loans or federally secured loans. The most common of the two is the federally secured loan from a private lending institution to the LPA. *See* URH-RHA 7215.1, ch. 4, § 2, *Federally Secured, Private Short-Term Loans*, at 1. Generally, the market rate for this type of loan, which is guaranteed by the federal government, is lower than for the direct federal loan. For this reason, direct temporary loans from the federal government will he made only under certain circumstances when the private loans are not available to the LPA. *See* URH-RHA 7215.1, ch. 4, § 1, *Direct Federal Loans*, at 1. A definitive long-term loan is used in the few cases when land is leased, rather than sold, to a private redeveloper. The LPA finances the capital value of the leased land with the loan, and uses the proceeds from the rents to repay the federal government. *See* URH-RHA 7215.1, cb. 4, § 5, *Definitive Loan to Finance Imputed Capital Value of Leased Land*, at 1. Last, and most important, is the federal grant. *See* URH-RHA 7215.1, ch. 3, *Federal Grants*, at 1. These are payable in several installments, called "progress payments," over tbe life of the project. The LPA must have acquired at least 25 percent of the land to be acquired for the project before it can receive the first progress payment. The agreegate of progress payments cannot at any time exceed 75 percent of the total authorized capital grant. *See* URH-RHA 7215.1, ch. 3, § 2, *Capital Grant Progress Payments*, Relocation Grant Payments and Rehabilitation Grant Payments, at 1.

149. *See* URH-RHA 7215.1, cb. 1, § 1, *Calculating and Sharing Project Cost*, at 1.

150. *Id.*

to two-thirds of the net cost if the LPA included planning, administration, and local over-head costs in its calculation of gross costs. If, however, the LPA chose to pay for those particular expenses rather than to declare them as part of its gross cost, the federal government would pay up to three-fourths of the net cost of the entire project.[151]

Ordinarily the LPA elected to have the federal governme t pay two-thirds of the net cost, leaving the city to pay the remaining one-third. The city's portion could be paid either by cash disbursements or noncash grants-in-aid,[152] the latter consisting primarily of the expenditures that the city made on supporting facilities and site improvements within the project area.[153] Thus, if the city opted to build a major road through an urban renewal area or place a school nearby for its residents, the cost of the road or the school would be counted as a noncash contribution to the city's one-third share of the cost of the project as a whole. In many cases, it was to the city's advantage to pay for its one-third share through noncash grants-in-aid since the costs of public facilities that the city would have built anyway would then be credited to the city's share.[154] If, as often happened, the noncash expenditures of the city totaled more than one-third the net cost of the project, the federal government simply paid the remaining portion of the cost rather than its full two-thirds. The city could, however, receive credit for its extra expenditures by pooling them with its noncash contributions to another project. Accordingly, any noncash grant-in-aid that was over the city's normal one-third share could be recaptured later in another project.[155]

III. Section 112 and the Urban Renewal Program

Into this complex statutory milieu, the universities of the United States—and later its hospitals[156]—introduced Section 112 of the Housing Act of 1949, which introduced two changes into the basic structure of federal urban renewal. First, Section 112 waived the requirement for predominantly residential reuse of land in urban renewal areas, thus making it possible for an LPA to acquire

151. *Id.* at 3.

152. *Id.*

153. *See* URH-RHA 7216.1, ch. 2, § 1, *General Eligibility*, at 1.

154. *See* M. Anderson, *supra* note 119, at 30.

155. A simplified example of pooling of projects on a two-thirds capital grant basis is provided in URH-RHA 7215.1, ch. 1, § 1, *Calculating and Sharing Project Cost*, at 4-5.

156. In 1961 Section 112 was amended to allow public and private hospitals to participate on the same terms as educational institutions. 42 U.S.C. § 1463 (1970).

and sell land to a university for a non-housing purpose[157] and effectively placing eminent domain power behind the university in land acquisitions. Either the land owner would negotiate with the institution, or the LPA would take the land by eminent domain and then resell it to the institution. Secondly, where purchases were made directly by a university within or near an urban renewal area, the cost of the land, demolition expenses, and relocation expenses could be credited to the LPA as a noncash grant-in-aid toward its one-third share of the urban renewal project.[158] It was clearly possible, therefore, for a city to receive credit for expenditures it did not make and to use federal money generated by university purchases toward other urban renewal projects or, in some cases, for other HUD approved urban projects. Thus Section 112 not only enabled local communities to include universities in urban renewal, but also provided a strong financial incentive for doing so.

In order to participate in an urban renewal program, an educational institution could be either public or private, provided that it offered at least two years of course work towards a bachelor's degree.[159] Moreover, it had to be proximately situated to an urban renewal area for its acquisitions to receive federal credit. The project area either had to include part of the principal buildings of the institution, or, it had to be close enough, in most circumstances, so that more than 50 percent of the project area could be enclosed by a line no more than one-fourth of a mile distant from the campus boundaries.[160] If either test was satisfied, then expenditures for the acquisition of land within one mile of the project would qualify for grant-in-aid credit.[161]

Assuming the institution was academically qualified and properly located, the direct cost of any acquisitions made by it within the project area, the cost of any demolitions, and moving expenses for displaced residents would be eligible for grant-in-aid credit to the city.[162] In addition, if the university made purchases outside the project area but within one mile of its boundaries, the city could nonetheless receive credit for the expenditures if certain conditions were fulfilled. The land itself had to be deteriorating and the univer-

157. 42 U.S.C. § 1463(a) (1970).

158. *Id. See also* note 162 *infra*.

159. *See* URH-RHA 72161.1, ch. 2, § 3, *Grants-in-Aid Other than Supporting Facilities*, at 2-3.

160. *See id.* at 2; URH-RHA 7205.1, ch. 2, *Project Eligibility Categories*, at 5-6.

161. *See* URH-RHA 7216.1, ch. 2, § 3, *Expenditures for Land Acquisition*, at 7.

162. *See* URH-RHA 7216.1, ch. 2, § 3, *Expenditures of Educational Institutions or Hospitals Under Section 112*, at 2.

sity had to demonstrate that it would be used for academic purposes in such a way as to eliminate blight.[163] More importantly, the university had to show that the land fell within an area covered by a university development plan that had been approved by the local government after a public hearing.[164] In the event these conditions were met and the university plan received HUD approval, university acquisitions outside the urban renewal area also could be claimed for credit by the city. Indeed, there was only one situation in which university acquisitions would not generate credits for the city. If the LPA acquired property on behalf of the university in connection with a project for which it contracted to receive an urban renewal capital grant, the expenditures for the land were not eligible for grant-in-aid credit.[165] Thus, although the university had no reason to avoid condemnation proceedings conducted on its behalf by the LPA, the city had reason to prefer that university acquisitions proceed by private negotiations whenever possible.

PART THREE

PRIVATE UNIVERSITY EXPANSION THROUGH SECTION 112: A CASE STUDY

I. INTRODUCTION

Slightly more than a year after the United States Congress provided American universities with access to the power of eminent domain through Section 112 of the federal urban renewal program, Mayor Ben West of Nashville, Tennessee, invited half a dozen of his city's private colleges and universities to join him in planning an

163. *Id.*, Development Plans, at 4, provides that: The minimum criteria for determining blight or deterioration are that one or more of the following types of deficiencies must he present to the extent that living conditions in the area are being affected adversely: (1) Unsatisfactory standards of maintenance or repair. (2) Inadequate alterations. (3) Inadequate plumbing, heating, or electrical facilities. (4) Inadequate, obsolete, or unsafe building layouts, such as presence of fire hazards, shared bathroom facilities, or dwelling units or bedrooms without privacy of access. (5) Conversions to incompatible types of uses, such as rooming-houses among family dwellings or introduction of mixed uses. (6) Overcrowding or improper location of structures on the land. (7) Unsafe, congested, poorly designed, or othrwise deficient streets. (8) Inadequate public utilities or recreational and community facilities contributing to unsatisfactory living conditions or economic deterioration. (9) Incompatible land uses creating adverse influences on residential properties or living conditions in the area. (10) Overoccupancy of buildings. (11) General characteristics of obsolescence tending to reduce neighborhood stability, as evidenced by an unusual number of movements in and out of the area. (12) Other significant conditions which are clear evidence of neighhorhood obsolescence or decline.

164. *See id., Development Plans*, at 5.

165. *See id., Expenditures for Land Acquisition*, at 7.

urban renewal project that would embrace the expansion plans of all six schools.[166] Taken together the six institutions represented a variety of different religious, secular and racial communities.[167] Yet they all shared a common need to acquire urban land for campus expansion and they all appeared to be bordered by neighborhoods that would be suitable for urban renewal. Not surprisingly, each of the schools accepted the Mayor's invitation and their assent marked the commencement of a hotly contested urban renewal project of unusually long duration.

As it happened, only one of the six original sponsors of Nashville's Section 112 project ever implemented Mayor West's proposed plan. The sole survivor of a planning period that stretched from 1961 to 1967 was Vanderbilt University, the largest and most financially secure of Nashville's private educational institutions. Under the terms of its eventual agreement with the city of Nashville, Vanderbilt agreed to purchase and clear some one hundred and ten acres of nearby residential housing between 1968 and the end of the year 1975. If at the end of the eight year period the university had not been able to acquire the entire area by private purchase, Nashville's Housing Authority was to condemn the remaining houses and sell them to the university for clearance and redevelopment. The nine million dollars which it would cost the university to acquire the entire tract of land would serve as the city's share of the urban renewal project and in addition would generate ten million dollars in otherwise unobtainable federal funds for the city to spend on street and utility improvements.[168]

The land the university was to acquire lay in the heart of an exclusively white, predominantly middle-class neighborhood which bore little resemblance to the conventional image of a slum. The majority of the houses in the area had been built between the first and second world wars and although a number of them had begun to decline, many were still in adequate repair. A housing census conducted in 1960, the year Mayor West first proposed renewal for the area, established that nearly eighty per cent of the homes in the

166. Nashville Banner, Dec. 20, 1960, at 1, col. 3.

167. The six institutions invited to meet with Mayor West included Scarritt College for Christian Workers; George Peabody College for Teachers; Vanderbilt University; Meharry Medical College; Fisk University, and Tennessee State University. In addition, Belmont College, a private Baptist college, later considered joining either the University Center or the nearby Edgehill project.

168. Contracts signed between the Nashville Housing Authority and HUD dated April 16, 1968 and between Vanderbilt University and the Nashville Housing Authority dated May 6 and May 7, 1968.

area were in "standard" condition. Only twenty per cent were characterized as "substandard,"[169] in marked contrast to the two other residential areas of the city that received urban renewal treatment in which more than fifty per cent of the houses were classified substandard.[170] Moreover, the character of the neighborhood affected the attitude of its residents towards the urban renewal project that was to remove their homes. A handful of homeowners were convinced the neighborhood was fundamentally sound, resented the threatened use of eminent domain on behalf of a private university, and resisted the city's plan to raze their houses for university development. These active opponents of the university urban renewal plan certainly never constituted a majority of the residents in the area and they were seldom if ever unified in a single cohesive group.[171] In addition, they were understandably ignorant of the complexities of the urban renewal process and did not secure essential information about the particular project that affected them until after the project was formally approved by the Nashville Council in 1967 and the Department of Housing and Urban Development in 1968. Yet so deeply rooted was their opposition to the project that despite their practical ineffectiveness, the residents of the area actively opposed the project's implementation for six years after the project had been officially initiated. Their persistence, their inventiveness and their growing political skills eventually won for them an unusual success in the summer of 1973 when Nashville's Metropolitan Council voted to amend the urban renewal plan for the university area in such a way as to ensure their houses could not be taken by condemnation proceedings. The Council's action represented a vivid—and quite probably unlawful—repudiation of Nashville's original commitment to assisting university expansion through urban renewal. Although it was short-lived the accomplishment was none the less remarkable. Six years after all seemingly irreversible official commitments had been made to the plan for the

169. As quoted in *Inner City Blight: Analysis and Proposals*, 34 (1973), a study undertaken by the Metropolitn Planning Commission, an agency of Metropolitan Nashville.

170. The other two residential area projects were the East Nashville Urban Renewal Project in which 48.2% of the area's housing stock was classified substandard and the Edgehill Urban Renewal Project in which 55.9% of the houses were classified substandard in the 1960 housing census. *Id.* at 28, 31.

171. It is difficult to determine accurately how many of the area residents participated actively in the three citizen pressure groups that formed in the neighborhood. Membership in the groups apparently varied from ten to thirty-five residents of the area, depending upon the group and the period of time. Interview with area resident Dr. Marie H. Means, former president of the University Neighborhood Association, on Jan. 11, 1974. Interview with Mr. Joseph Johnston, Chairman of the Project Area Committee, on May 3, 1974.

university area, a relatively small group of neighborhood residents led by their Councilmen had persuaded the members of the Nashville Council to reconsider the merits of a major urban renewal project on which some nine million dollars had already been expended. Moreover, for a period of two months they succeeded in persuading the Council to abandon major elements of a plan which it had overwhelmingly endorsed six years earlier.

The narrative that follows traces the origin and evolution of the urban renewal project those residents sought to stop, the University Center Urban Renewal Project of Nashville, Tennessee. The study attempts to delineate the reasons why an urban renewal project that was honestly intended to benefit the community as a whole grew into a bitter and divisive struggle between an urban university that sought in no small part to make a positive contribution to its neighborhood's betterment and an adjoining residential area whose residents had for many years regarded the university with a certain measure of respect and perhaps affection. While it may be too late to resolve all the emotional charges and countercharges which gained the Nashville project momentary attention from such national publications as *Newsweek* and the *New York Times*, there may still perhaps be some intrinsic value in establishing a history of the events which first gave the controversy life. The events which took place in Nashville between 1960 and 1974 suggest the tensions which may be produced in a contemporary American community that resolves to use its power of eminent domain to clear a legally blighted neighborhood for redevelopment by a single highly visible, private institution. Although Nashville's experience with Section 112 is not necessarily characteristic of that of the hundreds of other American cities that also implemented similar urban renewal clearance programs, it does suggest the social costs a community might encounter when it determines to exercise eminent domain in a fashion that challenges the values as well as the comforts of those whose land is to be condemned. Although the power of eminent domain has been regularly used throughout American legal history to support the activities of favored private interest groups, Nashville's experience suggests that not all Americans willingly accept the legal reality that the state may ensure the enforced conveyance of land from one private owner to another. Moreover, while the decision to use eminent domain on behalf of private interest groups is essentially a political decision, Nashville's experience with urban renewal projects would seem to indicate that the residents of a neighborhood

destined to be subject to condemnation are initially ill-equipped to participate in the political process. Yet given the time and opportunity to develop political skills, the residents and homeowners in an urban renewal clearance area have the capacity to become an effective political force in their own right, are quite capable of protecting their own interests in the local political arena. As the experience of the residents and homeowners in Nashville's Section 112 clearance area suggests, however, the acquisition of the technical and political knowledge necessary to effectively represent the interests of those whose houses are to be cleared can be a time consuming process which reaches fruition only after the key decisions about the future of a neighborhood have already been made. Thus while as a legal matter those who were to suffer the loss of their property in Nashville undoubtedly received due process of law, as a practical matter those who were affected most directly by Nashville's decision to institute a Section 112 clearance project had the least eventual effectiveness.

II. The City of Nashville

Nashville, Tennessee, was an appropriate community for a Section 112 urban renewal project. Although the city was not large it contained an unusually high number of colleges and universities. By 1960 when its population had reached 170,000 persons, Nashville sustained no fewer than eleven different colleges or universities, nine of which were privately endowed and supported. The wisdom which was presumed to flow from such a high proportion of educational institutions combined with a rather grand reproduction of the Athenian Parthenon had long since earned for Nashville the sobriquet "Athens of the South." Not that the city's reputation for academic accomplishment was entirely regional. Peabody College for Teachers was nationally known for its contributions to public education. Meharry Medical College had educated over half the nation's black physicians and its next-door neighbor Fisk University was one of the oldest and most distinguished black universities in the country. To natives of Nashville, however, perhaps the best known of all the city's institutions was Vanderbilt University. Not only had Vanderbilt established a solid national reputation in such diverse fields as economics, literature and medicine, the University had made a continuing and visible impact on its own immediate community. Many of Vanderbilt's graduates had remained in Nashville to become influential members of the city's flourishing banking

and insurance establishments. Still others had achieved a full measure of local political success. The chief executive of the local county government was a Vanderbilt graduate[172] and the Mayor of Nashville was a graduate of both Vanderbilt and its law school.[173] Among a group of commercial and political leaders who were more often than not educated at Vanderbilt and who were in general accustomed to taking pride in the accomplishments of their city's educational institutions, any positive federal program which benefitted Nashville's colleges and universities in addition to the community, was almost certain to receive warm support.

In addition to its unusual number of educational institutions, Nashville was nationally known for its aggressive urban renewal program. In the early 1950's the city had launched one of the nation's first urban renewal programs when it acquired and cleared ninety-seven acres of badly deteriorated buildings that surrounded the Tennessee State Capitol. The Capitol Hill Redevelopment Project soon became a showpiece for the national urban renewal program. The Commissioner of Urban Renewal displayed a portrait of the project in his Washington office and delegations from other cities were encouraged to visit Nashville to learn how to implement a successful urban clearance program. Buoyed by the success of the Capitol Hill project, the city organized a second major undertaking in 1956. The East Nashville Project embraced over two thousand acres of blighted buildings and at the time of its official inception in 1959, it was the second largest urban renewal program in the United States. On the basis of Nashville's participation in one of the earliest urban renewal programs in the country as well as in one of the largest, one urban renewal official observed in 1961 that "Nashville is considered a first class example of an urban renewal city."[174] The same official confidently predicted that Nashville would eventually become the greatest center for urban renewal in the nation.[175]

III. Origins of the University Center Plan 1959-1961

With its high proportion of educational institutions and an unusual amount of experience in the urban renewal process, Nashville was an obvious site for a Section 112 urban renewal project.

172. County Judge Beverly Briley graduated from Vanderbilt in 1930.

173. Mayor Ben West graduated from the Vanderbilt School of Law in 1932 and received his A.B. in 1934.

174. T.W. Anderson, Conservation Officer for the Atlanta Region of the Urban Renewal Administration, Nashville Banner, July 17, 1961, at 15, col. 2.

175. *Id.*

Indeed Nashville's political and institutional leaders made initial plans to use Section 112 as the basis for a new urban renewal project within a few months after Section 112 was declared ready for federal funding. Although it is virtually impossible to determine what group first broached the subject, Mayor Ben West and the administration of Vanderbilt University were particularly aggressive in ensuring that Nashville utilized the newest opportunity for federal funds.

A. *The Mayor of Nashville*

Of the two, Mayor West was the most self-evident. Elected Mayor of Nashville in 1951, he was a New Deal Democrat who believed in strong federal action to prevent American cities from, in his phrase, "choking to death in urban decay."[176] The West Administration had overseen the implementation of the nationally famous Capitol Hill urban renewal project and it had been Ben West himself who helped initiate the mammoth East Nashville project. By 1959 Mayor West had become something of a national spokesman for urban renewal. When President Eisenhower vetoed a housing bill which contained urban renewal funds, Mayor West was called before the Senate Subcommittee on Housing to testify to the value of the urban renewal program. In his appearance before the Subcommittee Mayor West declared that urban renewal funds were vitally necessary to allow Nashville to save itself from slum and blight. After recounting the history of the two projects for which Nashville had become known, the Mayor then described in some detail the six additional areas in Nashville that he had earmarked for future renewal programs. At the time, none of the areas he mentioned included any of the residential neighborhoods that surrounded Nashville's colleges and universities.

When Section 112 was enacted into law later in the fall of 1959, however, it immediately made urban renewal for university areas an attractive program for cities like Nashville. Under Section 112 a university's private expenditures on land acquisitions for campus expansion could be used to fund the city's share of a clearance area for university development and a rehabilitation area as well. In addition to providing the city's share of the renewal project, the university expenditures could also generate federal funds for use on other projects or for the city to spend directly on improvements to the neighborhood's roads and utilities.[177] The incentive for a city

176. Nashville Banner, July 24, 1959, at 1, col. 1.

177. See text accompanying footnotes 148, 155 *supra*.

government to use Section 112 was powerful: by merely agreeing to include a university expansion plan in its program of urban renewal, a city could generate federal funds that would be unobtainable otherwise. When the mechanism for administering Section 112 programs was established in February of 1960,[178] Mayor West moved to take advantage of it. During the summer and fall of 1960 West requested the Nashville-Davidson County Planning Commission to study the areas in Nashville that would be appropriate for a college or university renewal program.[179] While the Commission was conducting its preliminary studies, the Mayor addressed himself to the theme of the urban university's responsibilities to its own community. In a key note address before a group of university officials gathered for a conference in Milwaukee in October, West stressed his belief that the problems of the city posed a challenge to the resources and integrity of the urban university. His remarks left little doubt that it was the role of a responsible university to take an active part in the concerns of the society around it and that participation in an urban renewal project was one means of satisfying this obligation.[180]

B. *Vanderbilt University*

Ben West's enthusiasm for urban renewal and his view of the urban university's role in the life of the city helped create a positive climate in which Nashville's educational institutions could consider participation in a Section 112 program. Yet at least one of Nashville's institutions had already taken quiet steps to insure that its plan for the future might be included in the federal renewal program. During 1958 and 1959 the leaders of Vanderbilt University had worked with other urban universities to help draft Section 112 and were, therefore, at least in part responsible for the legislation allowing universities to participate in urban renewal in the first place.[181] Moreover, the senior members of the University administration had provided the impetus for a Tennessee statute that secured the right for any senior college or university in Tennessee to exercise directly the power of eminent domain whenever necessary to further campus expansion into adjoining neighborhoods.[182]

178. Local Public Agency letter 193 issued on February 16, 1960 established the mechanics for implementing Section 112.

179. *See* Nashville Banner, September 25, 1960, at 1, col. 3. The Commission studied the area surrounding Vanderbilt University as well as the area adjoining Fisk University and Meharry Medical College.

180. *See* Nasbville Banner, Dec. 20, 1960, at 1, col. 3.

181. See text accompanying footnote 187 *infra*.

182. See text accompanying footnote 189 *infra*.

The actions of the Vanderbilt administration in 1958 and 1959 were part of a national pattern of response to the problems of campus growth which confronted Vanderbilt and most other private urban universities during the mid 1950's.[183] When founded, Vanderbilt had been located on the western edge of Nashville in a semi-rural setting, but with the passing of the years the university had become surrounded by residential housing and further constricted in its growth by two major traffic arteries intersecting to form a rough "U" around three sides of the campus. As enrollments began to increase at Vanderbilt during the early 1950's,[184] the university felt impelled to expand the campus and its facilities to keep pace. University officials faced a choice between moving the campus altogether in order to expand it or acquiring property on the open market on the only side of the university that was not landlocked by major roadways. In the end the university was deterred from moving the entire campus by the time, cost and inconvenience it would have required.[185] Instead, in 1956 Vanderbilt formally initiated a policy of acquiring land by private purchase in the residential area that formed the open top of the arterial "U" which surrounded the one hundred and fifty acre campus. In pursuit of its new policy, between 1956 and 1961, the university acquired one hundred and four tracts of land outside the campus proper at a total cost of some two million dollars.[186]

But campus expansion through piece-meal acquisitions was necessarily sporadic and depended on the availability of willing sellers in the adjoining neighborhood. Moreover, it was inherently subject to obstacles imposed by real estate speculators who would purchase key tracts for resale to he university at deliberately inflated prices.[187] As a consequence, Vanderbilt, along with other private universities in a similar position, began to explore statutory means of ensuring the success of their expansion program. In the

183. See text accompanying footnotes 27, 22, 23 *supra*.

184. The enrollment at Vanderbilt was 3,529 in 1950; 3,663 in 1955; 4,111 in 1960, 6,123 in 1967 and 7,485 in 1972.

185. Chancellor Harvie Branscomb, Chancellor of Vanderbilt University from 1946 to 1963, contemplated shifting tbe university's campus during the early 1950's but rejected the move, in part because it would have required him to dedicate most of his years as Chancellor to overseeing the move. Interview with Chancellor Emeritus Harvie Branscomb in Nashville, Tennessee, February 26, 1974.

186. *Id.*

187. Gerald Henderson, former Business Manager for Vanderbilt, has observed that speculators occasionally bought property in the Vanderbilt expansion area but that he was normally able to block their projects through timely purchases. Interview with Gerald Henderson, in Nashville, Tennessee, Jan. 31, 1974.

summer of 1957 a Vanderbilt representative attended a workshop on urban university expansion sponsored by the Association of American Universities. The workshop participants eventually agreed to sponsor a proposed amendment to the Housing Act of 1949, which amendment eventually became Section 112 of the Housing Act of 1949.[188]

In addition to assisting in the passage of Section 112, Vanderbilt took other steps closer to home to assure the success of its expansion program. Chancellor Harvie Branscomb of Vanderbilt initiated a draft bill for the consideration of the Tennessee legislature which would allow private colleges and universities in Tennessee to exercise the power of eminent domain directly, without recourse to any state or federal agency. Although Vanderbilt's attorney, Mr. Cecil Sims, expressed doubts about the constitutionality of the bill, Chancellor Branscomb encouraged its presentation to the legislature because, if it did nothing else, its presence alone would help deter speculators from exploiting the university even if it never had occasion to employ the measure. Chancellor Branscomb invited officials from Union College in Jackson, Tennessee, to present the bill to the Tennessee legislature, which they did in 1959.[189] The bill was enacted into law in the same year, in large part because by encouraging the expansion of private schools it helped reduce pressure on the legislature to create four new state colleges.[190]

C. *Early Planning*

By the spring of 1960 Mayor West and the administration of Vanderbilt University were moving in the same direction for differ-

188. During 1957 and 1958 Vanderbilt participated in the preliminary discussions and the comprehensive institutional survey which preceded the drafting of Section 112. Vanderbilt University was listed as one of the institutions sponsoring the bill but did not send a representative to the Senate hearings. With its active involvement in the meetings and studies which led to the drafting of Section 112, the Vanderbilt Administration was almost certainly aware of Section 112's enactment into law in September of 1959. Interview with Edwin Bryan in Nashville, Tennessee, March 1, 1974; see *Hearings* note 99 *supra* (Vanderbilt University as participant in the creation of Section 112).

189. Interview with Chancellor Emeritus Harvie Branscomb, in Nashville, Tennessee, February 26, 1974.

190. The original statute granted the University of Tennessee the power of eminent domain for use in campus expansion. The amendment proposed by Chancellor Branscomb purported to give the same power to all qualified colleges and universities in Tennessee on the same grounds. The complete statute, as amended, provided in relevant part: "The University of Tennessee shall have the power to condemn and appropriate such lands, property, property rights, privileges and easements of others as in the judgment of its board of trustees, or the executive committee thereof, may be necessary or proper for the purpose of providing buildings and other facilities . . . . The compensation for damages in taking of such lands,

ing reasons. Both the Mayor and the university were fully aware of Section 112 and were prepared to consider using it: the Mayor because Section 112 would help regenerate a deteriorating neighborhood in urban Nashville at little or no expense to the city; the university because Section 112 would back-stop the university's private acquisition plan and guarantee its ultimate success. The two groups spent the better part of 1960 conducting their own preliminary studies to determine the feasibility of a Section 112 plan. Mayor West requested that the Nashville-Davidson County Planning Commission investigate Nashville's potential for employing Section 112. At about the same time Chancellor Branscomb established at Vanderbilt an Executive Planning Committee composed of the Chancellor, the three Vice-Chancellors, the university's principal philanthropist, Mr. Harold S. Vanderbilt, and the director of the university's planning division, Mr. E.E. Bryan.[191] The Mayor's study group and the Vanderbilt group met separately but were united from the outset by an influential common member, Mr. Charles Hawkins, who served as a member of the Vanderbilt Planning Committee and who was then the Director of the Nashville-Davidson County Planning Commission. By the end of November work had progressed sufficiently for Vanderbilt's planning team to suggest that a meeting with other college officials might be useful in order to explore the possibility of a joint project.[192] Mayor West took the initiative and organized two exploratory meetings with university officials from six different colleges and universities. The first meeting was held on December 19 among officials from three contiguous schools on the soughwest side of Nashville: Vanderbilt University, Peabody College for Teachers and Scarritt College for Christian Workers. Mayor West presided over a group which included the executive leaders from all three schools, the four councilmen in whose districts the schools were located and repre-

property, property rights, privileges, and easements shall be paid by said university, and the same shall be condemned and determined in the mode and manner provided in chapter 14 of this title.

Existing senior colleges in Tennessee, located on established campuses, granting the bachelor's degree, and holding membership in the Southern Association of Colleges and Secondary Schools, shall have the power of eminent domain to the same extent, to be exercised in the same manner, as the University of Tennessee under this section except, the property sought to be condemned must be adjacent to the campus of said senior college." TENN. CODE ANN. § 23-1506 (1973).

191. The planning committee was officially instituted in May 1960. Nashville Banner, May 20, 1960, at 1, col. 4.

192. Memorandum by Charles Hawkins, dated November 29, 1960, on file at the Nashville Housing Authority.

sentatives from the Nashville Housing Authority and the city-county planning commission. At the end of what he termed a most satisfactory discussion, West announced the willingness of the three schools to coordinate their expansion plans with the city's urban renewal program.[193]

A few days later at a meeting of officials from Meharry Medical College, Fisk University and Tennessee State University, West received assurances from Fisk and Meharry that they too would be willing to plan a joint urban renewal project that would unite their separate expansion plans.[194] At West's suggestion, in February of 1961,[195] the heads of Vanderbilt, Peabody, Scarritt, Fisk and Meharry each wrote the Commissioners of the Nashville Housing Authority urging them to make an application for federal funds in order that formal planning on a Section 112 project might begin.

D. *Application for a Federal Planning Advance*

The agency to which the colleges addressed their request, the Nashville Housing Authority, was entrusted with operational control of Nashville's entire urban renewal program. Created under state law by an ordinance of the city of Nashville,[196] the NHA had been organized during the depression to supervise Nashville's public housing program but it had assumed responsibility for urban renewal as well when the program was initiated in 1949. Although only the Nashville City Council could formally initiate a housing or urban renewal project, once approved by the Council the project was supervised and implemented by the NHA.[197]

In theory the NHA's own activities were controlled by its five-man Board of Commissioners who were charged with ultimate responsibility for the authority's programs and were alone empowered to institute eminent domain proceedings on behalf of NHA projects.[198] In practice, however, the five commissioners were normally

193. Nashville Banner, Dec. 20, 1960, at 1, col. 3. The story which appeared in the Banner suggested that Mayor West initiated the project "when he pointed out to Chancellor Branscomb that wording in the federal urban renewal act includes 'university center' as areas tbat can be designated as urban renewal projects." In light of the university administration's active involvement in the development of Section 112 in 1958 it is unlikely that Chancellor Branscomb was surprised by the news brought to him by Mayor West.

194. See *id.*

195. Mayor West made his request in a letter dated February 2, 1961. Chancellor Branscomb responded by writing the NHA on February 4. Minutes, Board of Commissioners, Nashville Housing Authority, number 8265.

196. TENN. CODE ANN. §§ 13-901 to -918 (1973).

197. TENN. CODE ANN. §§ 13-801 to -833 (1973).

198. The Board of Commissioners could institute eminent domain proceedings by

local businessmen who served at their own expense on a part-time basis. The commissioners relied upon the NHA staff to attend to the numerous details incident to any joint project involving both local and federal government. In the case of an urban renewal project the NHA staff was responsible for drafting all the applications for federal funds and ensuring that they were duly circulated to the Board of Commissioners, the City Council, and the Urban Renewal Administration for political and administrative approval. In addition, it was normally the duty of the staff to supervise the development of formal renewal plans for each project area, to acquire any land that was to be cleared and to ensure that each tract was properly redeveloped or rehabilitated. With its previous experience in clearing, redeveloping and rehabilitating the Capitol Hill and the enormous East Nashville projects, the NHA staff was undoubtedly one of the most experienced in the nation.

It was also one of the busiest. In the spring of 1961, acting on the request of the leaders of Nashville's colleges and universities,[199] the NHA staff began to prepare an application for a federal loan to subsidize the cost of drawing up plans for a university center project.[200] Officially the application was to be made by the city of Nashville to the Urban Renewal Administration and it had to demonstrate on a preliminary basis that the proposed area was suitable for urban renewal assistance. In addition to drawing up such an application for the university area, the NHA staff was also requested by Mayor West to draft similar applications for planning funds for two other projects in Nashville, a clearance and redevelopment area in the central business district and a renewal project in Edgehill, a black residential area in South Nashville.[201] The NHA staff prepared the university center, the downtown loop and the Edgehill applications at the same time and presented them together for approval by the Board of Commissioners on August 7. The Board

adopting a resolution declaring that the acquisition of the property in question was "in the public interest and necessary for public use." TENN. CODE ANN. § 13-807 (1973).

199. See text accompanying note 195 *supra*.

200. At a joint meeting of the City-County Planning Commission and the NHA staff on February 11, 1961, the Planning Commission recommended that the NHA prepare applications for federal planning funds for the university center area, the Fisk-Meharry area and Edgehill. Minutes, Board of Commissioners, NHA, numher 8265-6.

201. The sudden burst of urban renewal activity was caused in part by a telegram from President Kennedy to Mayor West encouraging West to increase the pace of urban renewal projects. West replied by cabling Kennedy "Your words come as manna and your wish is my command." West later ohserved to the Nashville press, "This is a real switcheroo from the days when we had the Republican slowdown." Nashville Tennessean, Feb. 3, 1961, at 1, col. 8.

approved the applications and passed them on to the Nashville Council for final political approval. Taken together the three applications called for a potential total of 3,243 acres to receive urban renewal treatment at an approximate cost of one hundred and sixteen million dollars. Of this amount the proposed university center project represented less than a third of the total in size at a modest 959 acres and less than one quarter the estimated cost at approximately twenty-four million dollars.[202] Faced with three major undertakings simultaneously, the Nashville Council could not examine any of the three projects in detail. On August 15, 1961 the Council unanimously declared that all three areas were slum and blighted neighborhoods suitable for urban renewal and approved the applications for planning funds for all three.[203]

With regard to the university center area, however, there was some initial doubt at the time as to whether the 959 acre neighborhood was really an area qualified for urban renewal. The Council's finding that the neighborhood was a slum and blighted area represented the recital of a legal conclusion necessary for the area to be legally eligible for federal planning funds. It was not based upon detailed research but rather upon a brief visual survey conducted by the NHA staff and a later inspection tour by the four councilmen whose districts were affected by the proposed project.[204] Other observers, perhaps equally familiar with the neighborhood, expressed doubt about the accuracy of the Council's official findings. *The Nashville Tennessean*, a newspaper seldom inclined to oppose local use of federal programs, had expressed its misgivings when Mayor West first revealed the project was under consideration. In a lead editorial, the *Tennessean* observed:

> "A bothersome question keeps popping up: Are these areas surrounding Vanderbilt-Peabody-Scarritt . . . the ones in worse need of repair? Do Nashville's slums touch Vanderbilt on any side?
>
> . . . .
>
> We do not mean to discourage enlightened planning. It is true the housing around Vanderbilt and Peabody is growing old, and within a few years could become substandard.
>
> . . . .
>
> Perhaps, all circumstances considered, the two . . . centers belong in the city's next order of renewal business. But at the moment, we are not fully convinced."[205]

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202. Nashville Tennessean, Aug. 12, 1961, at 1, col. 1.

203. *See* Nashville Banner, Aug. 24, 1961, at 14, col. 1.

204. Interview with former Councilman Aubrey D. Gillem in Nashville, Tennessee, Feb. 22, 1974. Mr. Gillem co-sponsored the measure and toured that part of the project area that was in his district. Mr. Gillem observed that his walk through the neighborhood constituted the only research that he, or as far as he knew, other Councilmen undertook in 1961.

205. Nashville Tennessean, Dec. 22, 1960, at 14, col. 1.

More importantly the Urban Renewal Administration was not immediately convinced the area was qualified for urban renewal. Although the applications for planning funds for the downtown and Edgehill projects were processed in a regular manner, the application for the university center was delayed by the URA's request for additional documentation that the neighborhood was, on a preliminary basis, sufficiently substandard to warrant investing time and money in a planning study.[206] The URA made its request in October of 1961 and a month and a half later the NHA supplied the additional data.[207] On the basis of the 1960 Housing Census the NHA demonstrated that 21% of the houses in the area were substandard. Moreover, a recent NHA exterior survey indicated that 53% of the houses were deficient in some respect. Using these figures the NHA maintained that the university area met, on a preliminary level, the federal requirement for an urban renewal rehabilitation area. After three months of deliberation the URA concurred and issued Nashville a $200,000 planning loan with which to survey the area and to draw up plans for its renewal.[208]

IV. Formal Planning of the University Center Project 1962-1967

The planning loan from the Urban Renewal Administration was to be used for two major tasks. The first was a formal housing survey of the university center neighborhood to determine on a final basis whether the area constituted a slum or blighted area eligible for federal urban renewal. Assuming that the area was found to be qualified for urban renewal, the second task was to prepare a plan for its redevelopment, either by rehabilitation of the original structures if the neighborhood was merely blightd or by clearance and private redevelopment if the area met the stricter qualifications for a clearance area. Rather than conduct the eligibility survey and draft the redevelopment plan for the university area itself, the NHA contracted for the work to be done by a New York consulting firm, Clarke and Rapuano. Clarke and Rapuano were already familiar with Nashville urban renewal and the university center area: the firm had prepared the redevelopment plan for Nashville's Capitol Hill Project and in the late 1950's it had been hired by Vanderbilt University to draft a comprehensive plan for the university's cam-

206. Letter from Bruce Wedge of URA to Gerald Gimre of NHA, Oct. 17, 1961.

207. Letter from Gerald Gimre of NHA to Bruce Wedge of URA, Dec. 4, 1961.

208. The planning loan was approved on April 9, 1962. Nashville Banner, April 9, 1962, at 1, col. 5.

pus expansion program. Since Vanderbilt could expand in only one direction, the planning firm was necessarily familiar with the neighborhood in question. Thus Clarke and Rapuano was hired by the NHA in 1962 to determine if the neighborhood for which it had already begun to draw up redevelopment plans for Vanderbilt might qualify as an urban renewal clearance area. In effect the planner for Vanderbilt University was hired to help determine whether Vanderbilt and four other institutions might acquire land needed for their expansion programs through urban renewal rather than private purchase. Although later critics were quick to point out what seemed to them to be an apparent impropriety and the potential for a conflict of interest on the part of Clarke and Rapuano,[209] at the time the NHA staff itself was not concerned by the firm's overlapping responsibilities to the NHA and to Vanderbilt. Instead the staff was troubled by the initial unwillingness of the Urban Renewal Administration to approve the selection of Clarke and Rapuano as the project planner. The URA noted that the firm's proposed fee for the project was unusually high and it requested the NHA to send additional information demonstrating the wisdom of its choice.[210] Gerald Gimre, the Executive Director of the NHA did so at length. In a nine page single spaced letter with four enclosures,[211] Gimre justified the selection of Clarke and Rapuano on the basis of their unusual competence in urban renewal work and the unusual complexities losed by the university center area. Gimre observed that in addition to a local staff of four engineers and draftsman who would work virtually full time on the project, the principal partner in the firm would be expected to devote half his working time to the university area as would a New York support staff of nine additional designers, architects and engineers. Gimre concluded that Nashville "will not countenance a routine, ordinary, run-of-the-mill planning program"[212] and that Clarke and Rapuano was ideally suited to provide the community with a stimulating and inventive plan for the university area. At length the URA was swayed by the NHA's defense of its choice of planners and allowed the agency to hire Clarke and Rapuano for a total fee of not more than $134,000 dollars.[213]

209. The issue was subsequently raised in a lawsuit filed by two homeowners in the eventual clearance area. Two federal district judges found no impropriety in Clarke and Rapuano's role with the NHA and Vanderbilt.

210. Letter from Bruce Wedge of URA to Gerald Gimre of NHA, May 21, 1962.

211. Letter from Gerald Gimre of NHA to Bruce Wedge of URA, June 1, 1962.

212. *Id.*

213. Bruce Wedge approved the choice of Clarke and Rapuano although he noted that its fee was still in excess of those normally paid in the southeastern region. Letter from Bruce Wedge of URA to Gerald Gimre of NHA, June 13, 1962.

A. *Surveying the Area*

The most critical of all Clarke and Rapuano's tasks was to determine whether the university center neighborhood qualified as an area suitable for urban reneal under Tennessee and federal law. The task was critical because the constitutionality and the legality of the entire project depended upon whether the area met the legal definition of a slum. If the area was a legal slum, then eminent domain could be exercised to clear the area for private redevelopment and the slum clearance in its own right would satisfy the Fifth Amendment's requirement that eminent domain be exercised for a public purpose.[214] Thus any land acquired by condemnation could be conveyed to Nashville's colleges and universities for their own private reuse without violating the Fifth Amendment. If, however, the area was not a slum, any land taken for condemnation and private institutional use would not be taken for the public purpose of slum removal but for the arguably private purpose of campus expansion. If the area was not a slum or deteriorating area, any land acquired by eminent domain for Nashville's private educational institutions would be taken in a prima facie unconstitutional manner.

1. *State and Federal Standards*

Both the Tennessee and federal standards for an urban renewal area were extremely flexible but both served different functions. The Tennessee statute allowed the NHA to condemn and clear "blighted areas" which the agency found to contain buildings which were "detrimental to the safety, health, morals or welfare of the community."[215] If it determined that a neighborhood constituted such a detriment to the community, the Board of Commissioners of the NHA was authorized to exercise eminent domain to acquire and clear the offending lots.[216] Thus a finding by Clarke and Rapuano that the university center area was a blighted area under Tennessee law was essential if the NHA were later to use its power of eminent domain in the neighborhood.

The federal guidelines served a different purpose. Rather than

214. *See* text accompanying footnotes 86-94 *supra*.

215. "Blighted areas are areas (including slum areas) with dwellings or improvements which, hy reason of dilapidation, obsolescence, overcrowing, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use, or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community." TENN. CODE ANN. § 13-813 (1973).

216. TENN. CODE ANN. §§ 13-807.814 (1973).

trigger the condemnation power, the federal standards determined whether the proposed renewal area qualified for federal urban renewal funds.Unlike the state requirements the federal specifications were not statutory but were administrative regulations issued by the Housing and Home Finance Agency (HHFA), the parent agency of the Urban Renewal Administration. Since the regulations governed the release of federal funds, they were not subjected to open public debate before being finally adopted by the HHFA.[217] Instead the agency unilaterally determined the standards it would apply to the applications it received for loans and grants.[218] The standards themselves were then published in the *Urban Renewal Manual*, a three volume compendium of urban renewal procedures issued for the benefit of local agencies like the NHA. The *Urban Renewal Manual* requirements for a federal rehabilitation or clearance area were more detailed than those of Tennessee but no less flexible and no less open to subjective interpretation.

For an area like the university center in Nashville to qualify for federal funding, Clarke and Rapuno had to determine that the neighborhood satisfied two different sets of criteria. The first standard to be met was that governing urban renewal rehabilitation areas. In order for the university area to qualify for federal funds to rehabilitate the neighborhood's houses, Clarke and Rapuano had to determine that twenty percent of the buildings in the area contained at least one "building deficiency" and that the neighborhood as a whole contained at least two "environmental deficiencies."[219] As

217. The Federal Administrative Procedure Act does not require federal agencies to follow the rule making procedure if a matter relating to federal grants is involved. The exception to the usual requirement of a public hearing on proposed federal regulations originally stemmed from the belief that a federal grant was given as a matter of privilege to which the government could attach any limitations it saw fit, rather than as a matter of the rights of the recipient. 5 U.S.C. § 553(a)(2). For a classic statement of the "privilege doctrine" in a licensing context see Walker v. Clinton, 244 Iowa 1099, 59 N.W.2d 785 (1953). The doctrine has been undermined by recent cases. Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968) (admission of tenants to public housing).

218. The *Urban Renewal Manual* was first compiled and issued in the early 1950's by the Housing and Home Financing Agency. An examination of the *Federal Register* for the years from 1949 to 1974 reveals that the *Manual* qualification standards were not subject to the rule making process. An inquiry by Congressman Richard Fulton of the Fifth District of Tennessee directed to HUD determined that present HUD officials do not know by what precise means the Housing and Home Finance Agency drafted the original eligibility guidelines. Letter from John K. Johnson, Assistant for Legislative Affairs, HUD, to Congressman Richard Fulton, March 28, 1974.

219. "The legal eligibility of a project area must be determined in the light of State and local legal requirements as well as the Federal requirements contained herein.

"An urban renewal area must be a slum area or a blighted, deteriorated, or deteriorating area (or an open land area) which is approved by HHFA as appropriate for an urhan renewal project.

defined by the *Urban Renewal Manual*, "building deficiencies" included "inadequate" original construction of the building, "inadequate" internal utility systems, extensive minor defects in a building which caused it to have a deteriorating effect on the surrounding neighborhood or quite simply defects in a building that were so extensive as to warrant its clearance.[220] The two "environmental deficiencies" could include among other things an "excessive" number of dwelling units in the area's building, "incompatible" types of conversions such as roominghouses among family dwellings, unsafe or "congested" streets, "inadequate" public utilities or any other "significant" environmental deficiency.[221] If Clarke and Rapuano determined by its survey of the neighborhood that twenty percent of the buildings contained such building deficiencies and that the area as a whole contained at least two such environmental deficiencies, the neighborhood would qualify for federal funds with which it could be rehabilitated and restored.[222] Since the 1960 Hous-

"To qualify for Title I assistance, an urban renewal area, other than an open land area, must contain deficiencies to a degree and extent that public action is necessary to eliminate and prevent the development or spread of deterioration and blight. Specifically, at least 20 percent of the buildings in the area must contain *one or more building deficiencies*, and *the area itself* must contain at least two *environmental deficiencies*." (emphasis added). 1 Housing and Home Finance Agency, URBAN RENEWAL MANUAL, §§ 3-1, 1 (1965) [hereinafter referred to as MANUAL].

220. Building deficiencies included:

(1) Defects to a point warranting clearance.
(2) Deteriorating condition because of a defect not correctable by normal maintenance.
(3) Extensive minor defects which, taken collectively, are causing the building to have a deteriorating effect on the surrounding area.
(4) Inadequate original construction or alterations.
(5) Inadequate or unsafe plumbing, heating, or electrical facilities.
(6) Other equally significant building deficiencies.

1 MANUAL § 3-1, 1.

221. Environmental deficiencies included:

(1) Overcrowding or improper location of structures on the land.
(2) Excessive dwelling unit density.
(3) Conversions to incompatible types of uses, such as roominghouses among family dwellings.
(4) Obsolete building types, such as large residences or other buildings which through lack of use or maintenance have a blighting influence.
(5) Detrimental land uses or conditions, such as incompatible uses, structures in mixed use, or adverse infiuences from noise, smoke, or fumes.
(6) Unsafe, congested, poorly designed, or otherwise deficient streets.
(7) Inadequate public utilities or community facilities contributing to unsatisfactory living conditions or economir decline.
(8) Other equally significant environmental deficiencies.

1 MANUAL § 3-1, 1-2.

222. In addition the surveyor had to establish that the deficiencies be envenly distributed throughout the area.

Either building deficiencies or environmental deficiencies necessary to establish the

ing Census indicated that twenty-one percent of the houses in the area were substandard, the neighborhood seemed likely to qualify for rehabilitation if the requisite environmental deficiencies existed.[223]

If, however, any parts of the university neighborhood were to be cleared and subsequently redeveloped, Clarke and Rapuano had to find that those sections met a nominally stricter standard for clearance projects. Since the clearance of houses necessarily involved marked personal inconvenience to the displaced residents, the *Urban Renewal Manual* required as a preliminary matter that the necessity for the clearance be satisfactorily demonstrated in every case[224] and that alternatives to clearance be fully explored in an attempt to limit the number of demolitions.[225] If the area still appeared to require clearance, however, it had to conform to one of two alternative clearance formulas. The first clearance formula was a severe one and required Clarke and Rapuano to determine that 50% of the buildings in the proposed clearance zone were "structur-

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eligibility of a project area must be present to a reasonable degree in all parts of the area. If any sizable part of the project area fails to meet this test, it must be justified by one of the following:

(1) Inclusion of the part is necessary to achieve the urban renewal objectives for the total project area.

(2) Inclusion of the part is necessary to bring the project area to a sound boundary.

Any included area not meeting the distribution-of-deficiencies test cannot be more than a relatively minor portion of the project area.

1 MANUAL § 3-1, 2.

223. See note 169 *supra*.

224. "The *necessity* for *clearance and redevelopment* of a project area, or of any sizable part thereof, must be satisfactorily demonstrated in *all cases*. If conditions warranting clearance and redevelopment do not exist, the appropriate treatment will be rehabilitation and conservation, which may include spot clearance.

. . . .

The LPA must (1) demonstrate the *necessity* for treatment through clearance and redevelopment, (2) show that the *extent of clearance* proposed is *necessary*, and (3) *fully justify* the acquisition of indivudual parcels of *basically sound property* which involves high acquisition costs." (emphasis added) 1 MANUAL § 10-1, 1-3.

225. "In connection with either type of treatment—clearance and redevelopment or conservation—the LPA must demonstrate that:

(1) The extent of clearance proposed is necessary.

(2) In the decelopment of the Urban Renewal Plan, full consideration has been given to proposals which would result in retention of a greater number of buildings which are structurally sound or capable of rehabilitation. HHFA will not concur in the acquisition for demolition of property that is:

(1) Of such quality and potential use that its retention is compatible with the achievement of the Urban Renewal Plan objectives for the project area.

(2) Capable of being improved and successfully integrated into the project."

1 MANUAL § 10-1, 3.

ally substandard to a degree requiring clearance."[226] The phrase structurally substandard to a degree requiring clearance was a term of art which, reduced to its simplest form, meant any combination of defects that would justify the clearance of a building.[227] Since half the buildings in the immediate clearance area had to be in such condition, the first clearance formula was not an easy standard to achieve. The second clearance formula, however, was not as severe. It placed less emphasis on the condition of individual houses and more on the general condition of the neighborhood. Under its terms only twenty percent of the houses had to be substandard requiring clearance and, in addition, another thirty-one percent of the houses had to warrant clearance in order to remove general "blighting conditions"[228] from the neighborhood. "Blighting conditions" were very similar to the environmental deficiencies that were necessary for a rehabilitation area and included, among other factors, "excessive" dwelling unit density, "overcrowding" of buildings on the land, and "inadequate" street layouts.[229] Since one of the major objectives of the Nashville university project was to provide cleared land for campus expansion, it was necessary for Clarke and Rapuano to determine whether the areas immediately adjoining each campus would be eligible for clearance under either the first or second clearance formula. The 1960 Housing Census finding that the entire neighborhood contained only twenty-one percent sub-

226. "In a built-up project area or sizable part thereof which is proposed for clearance and redevelopment, one of the following conditions must exist:

(1) More than 50 percent of the buildings, not including accessory outbuildings, must be structurally substandard to a degree requiring clearance as determined by specific criteria consistent with the definition set forth below." 1 MANUAL § 10-1, 2.

227. "Buildings classified as 'structurally substandard to a degree requiring clearance' must contain defects in structural elements and/or a combination of deficiencies in essential utilities and facilities, light and ventilation, fire protection (including adequate egress), layout and condition of interior partitions, or similar factors, which defects and/or deficiencies are of sufficient total significance to justify clearance. Additional buildings warranting clearance in order to remove blighting influences shall be classified and reported separately."

228. "More than 20 percent of the buildings must be structurally substandard to a degree requiring clearance, and additional clearance, in an amount bringing the total to more than 50 percent of the buildings, must be warranted to effectively remove existing blighting influences such as:

(a) Inadequate street layout.
(b) Incompatible uses or land use relationships.
(c) Overcrowding of buildings on the land.
(d) Excessive dwelling unit density.
(e) Obsolete buildings not suitable for improvement or conversion.
(f) Other identified hazards to health and safety and to the general well-being of the community."

1 MANUAL § 10-1, 1-2.

229. *Id.*

standard housing made it unlikely that any area near a campus would be able to qualify under the first formula with its requirement that over fifty percent of the houses be so substandard as to require clearance. It was far more likely that any area that would be used for university expansion would have to qualify under the second formula with its relative emphasis on the general inadequacy of the neighborhood itself rather than the individual houses it contained.

2. *Application of the Federal Standards*

As those who were closest to the project were subsequently quite willing to admit, the Nashville university area was not a slum.[230] Moreover, there were many other neighborhoods in Nashville that were in far worse condition.[231] Nevertheless the professional engineers who worked for Clarke and Rapuano and the Nashville Housing Authority agreed that even if the area was not a slum or even a badly blighted area, it did qualify for federal urban renewal under the necessarily elastic terms laid down in the *Urban Renewal Manual*.[232] In defining rehabilitation and clearance areas the *Manual* made numerous references to "inadequate" or "excessive" or "incompatible" conditions but made no attempt at defining the terms in a practical way that a working engineer could use to assess the condition of a particular house or an actual neighborhood. Nor were the officials of the Urban Renewal Administration much more helpful. Although urban renewal was a national program ostensibly based on national standards for participation, in reality the working definition of the eligibility standards to be applied by such firms as Clarke and Rapuano was a local matter, to be decided by the surveying firm in consultation with local and federal urban renewal officials. In practice, the URA tolerated a reasonably wide variation in qualification procedures from one city to another. What constituted "excessive" density of dwelling units in one city might be entirely reasonable in another, depending upon variations in municipal codes and the professional opinion of the engineer surveying the area.

Before Clarke and Rapuano could survey the university area to determine whether any part of it was qualified for rehabilitation or clearance, the firm had to devise its own working version of the

230. Interview with Mr. Jack Herrington, Executive Director, Metropolitan Development and Housing Agency (the successor agency to the NHA) in Nashville, Tennessee, Sept. 13, 1973. "The area was not a slum area but it was a qualified area."

231. Interview with Alexander Koltowicb, Resident Engineer, Clarke and Rapuano, in Nashville, Tennessee, Nov. 6, 1973. "There are scores of areas in town worse than this area."

232. *Id.*

Urban Renewal Manual standards. It did so by using a combination of its own engineers' professional sense of what constituted adequacy in construction and the city of Nashville's current zoning ordinance.[233] The definition of "inadequate plumbing," a building deficiency which would help qualify the area for rehabilitation, was derived from the Clarke and Rapuano staff's professional opinion of modern plumbing standards. Thus although all the plumbing in the eventual clearance area was in workable condition,[234] some plumbing was deemed inadequate if the pipes were not in "modern condition" as judged by the surveyors.[235] On the other hand a major "blighting condition" that would serve to qualify the area for clearance under the second clearance formula was defined by reference to Nashville's most recent zoning ordinance. The standard for determining what constituted the "overcrowding of structures on the land" was taken directly from the ordinance.[236] A majority of houses in the area were built before the ordinance was adopted, and a number were either built on lots that were subsequently deemed to be insufficient in size or were centered upon their lots in such a fashion as to crowd too closely to an adjoining house. These nonconforming uses were entirely legal but under the Clarke and Rapuano standard for inspection they were considered blighting influences that could warrant the clearance of the area. In another instance the Clarke and Rapuano staff defined an *Urban Renewal Manual* term by using both the Nashville zoning ordinance and their own sense of professional building standards. "Excessive dwelling unit density" was not defined by the *Manual* but was considered both an environmental deficiency and a blighting influ-

233. *Id.* The *Project Area Report* placed on public record at the Metropolitan Clerk's office by the NHA on July 27, 1967, also describes in general terms the working standards employed by Clarke and Rapuano. In addition the testimony given by Mr. Koltowich, in the Adair-Gardner lawsuit on August 12, 1971, at pages 468-581 of the trial transcript adds more details about the survey process and its evaluation standards. The testimony given at that trial will hereinafter be referred to as *Trial Transcript*.

234. U.S. Dept. of Commerce, *Housing Census of Nashville, Tennessee* p. 12 (1960). The census revealed that nearly ninety per cent of the area's plumbing was "sound" and that all of the area houses contained flush toilets. In the East Nashville project on the other hand, privies were still in use in the project area at the time the program was begun.

235. *Trial Transcript* of Mr. Alexander Koltowich p. 562-67.

"Q: Would you consider any bathroom that had a tub and a commode and a lavatory, would you consider that an adequate bathroom if it worked?

Mr. Koltowich: Yes, if it worked, and the plumbing pipes that ran to it were in modern condition.

Q: You mean workable condition?

Mr. Koltowich: No, I mean modern condition."

236. The zoning ordinance was enacted in 1933 and was used as one of Clarke and Rapuano's standards in 1962. *Project Area Report*, Code R 212, 9 (1967).

ence warranting clearance. The Clarke and Rapuano staff chose to define the term in two ways. First, the zoning ordinance for the area permitted only one to two family dwellings. Thus a four family dwelling constructed before the passage of the ordinance was considered to be excessive dwelling unit density and a blighting influence warranting clearance even though it was a legal nonconforming use in the neighborhood.[237] Second, even if a single homeowner chose to convert his house in such a way as to provide adequate zoning space in his house for two families, the survey staff chose to regard the house as having excessive dwelling unit density because the house was originally built for one family not two.[238] Thus a family of six in one house was not considered excessive but if the same house was converted for use by two families with two persons each it would be considered to have excessive dwelling unit density and to be sufficiently blighting to warrant clearance.

The standards which Clarke and Rapuano ultimately devised to evaluate the Nashville university center were approved by both the NHA and later by the URA. The firm then began to apply them to each individual house in the 959 acre area that was proposed for the five institution project. From September 1962 through January 1963 a two man team inspected over three thousand five hundred buildings, compiling individual evaluation sheets for each. As the buildings were evaluated, the individual sheets were checked for accuracy by the head of Clarke and Rapuano's Nashville office. Together the three men rated each house as needing minor repair, needing major repair or as substandard and beyond repair. In addition, any house that was regarded by the surveyors as obsolete was so designated[239] and a darkened circle affixed to its place on the master map of the area. Upon completion of the exterior inspection

237. Q: And why did it warrant clearance?

Mr. Koltowich: "The zoning ordinances permit one to two family dwellings, ... Four dwellings is excessive.

Q: Did you count as a blighting influence warranting clearance, the buildings that were constructed before the zoning regulations that were in effect in 1967, that were a nonconforming use in the zoned area? Did you count them as a blighting influence warranting clearance in the clearance area?

Mr. Koltowich: Yes.

Q: Why is that a blighting influence warranting clearance?

Mr. Koltowich: Because this was a residential A zone, which was limited to one and two families, and this would come up with an excessive dwelling unit density on a property within the zoning area where you would have entirely one and two family units, one or two family units.

Trial Transcript, 509-10.

238. Testimony of Mr. Alexander Koltowich, *Trial Transcript* 522 (1971).

239. Interview with Mr. Alexander Koltowich.

in January 1963, the survey team joined a representative from the Nashville Division of Inspection and Permits for a random interior inspection to determine whether the interior conditions of each house were consistent with the survey results for the exterior. Interior inspections were conducted for houses that were regarded as standard, needing minor repair or needing major repair but those houses which had previously been classified as substandard were not thought to be worth further evaluation and were excluded from the interior survey.[240] In addition to the exterior and interior inspections, the Clarke and Rapuano team conducted a third study to determine the nature and extent of the environmental deficiencies in the area.[241] On the basis of their three different kinds of inspection, the team at last concluded that the area as a whole qualified for rehabilitation and that among others, the area nearest Vanderbilt was qualified for clearance under the second clearance formula. Some thirty percent of the houses near Vanderbilt were found to be structurally substandard warranting clearance and an additional twenty-four percent of the houses in the area were found to constitute blighting influences warranting clearance.[242] With the area properly qualified for urban renewal, Clarke and Rapuano released the inspection sheets, the maps of the area and the final tabulation of results to the staff of the NHA for their use in further planning and for ultimate submission to the Urban Renewal Administration for federal funding.

While the professional qualifications and the integrity of the Clarke and Rapuano staff were beyond reproach, the process whereby they determined that the university area was appropriate for urban renewal clearance was more troublesome for some area residents. The determination that the area was appropriate for clearance was the first and most critical step in a long line of decisions that would ultimately lead to a loss of the homes of the area landowners. As a practical matter some value existed in assuring those whose property might be taken that the procedure used to evaluate their neighborhood was unquestionably fair and free from doubt. Yet the firm hired to evaluate the area had, again as a practi-

240. Project Area Report, Code R 212, 8. The failure to include substandard houses in the interior survey subsequently proved to be a source of anger to the area residents who believed that their homes were thus prematurely foreclosed from a better ranking. Testimony of Celeste Albright, *Trial Transcript*, 666-71 (1971).

241. *Id.* at 2.

242. 30.6% of the houses in the clearance area were found to be structurally substandard warranting clearance. 23.7% were categorized as "blighting influences warranting clearance." *Id.* at 14.

cal matter, an apparent political interest in the outcome of its survey. Even if the legal elements of a conflict of interest were not present—as indeed a federal judge subsequently found—the selection of Clarke and Rapuano to survey the area was inevitably bound to spark an avoidable controversy about the firm's impartiality. Similarly, as a practical if not a legal matter, some value existed in ensuring that the process which derived the standards used to judge the neighborhood was in its own right a transparently fair procedure. Yet the standards applied to the area were never subjected to public scrutiny or debate. The original standards for a clearance area as delineated in the Urban Renewal Manual were promulgated unilaterally by a federal agency, without the benefit of the public hearing that normally accompanied federal rule making. Moreover, the standards themselves were so inherently ambiguous as to require broad local discretion in their interpretation and application, particularly in the case of the second clearance formula whereby only twenty percent of the houses were to be "structurally substandard requiring clearance" and the remaining thirty-one percent needed only represent such general blighting influences as "overcrowding of structures" or "excessive dwelling unit density." Yet the local interpretations of such broad concepts, which ultimately had a major influence in determining whether the area was to be cleared, were no more open to discussion than the formulation of the original standards.

Instead, perhaps even necessarily, the professional engineers of Clarke and Rapuano reached their own operative definitions of the *Manual* standards subject only to later consultation with other engineers from the NHA or the URA. While their determinations were made in complete good faith, they were not entirely free from doubt. The decision to use the Nashville zoning ordinance as a decisive indicator of blighted houses that warranted clearance might reasonably have been subject to further discussion. As an indirect statement about the undesirable building practices of the past, the Nashville zoning code no doubt had merit as a standard by which to judge the quality of housing in a neighborhood. Moreover it was an easy guide to use, subject to few ambiguities of interpretation. Yet the Nashville zoning code was probably never intended to serve as a final determinant of which neighborhoods in the city should be cleared and which preserved. Had it been so intended, the doctrine of non-conforming uses would not have been observed and those areas that did not comply with the code could have been put into

immediate conformity by an enforced rebuilding of the neighborhood after the code was first passed. Similarly, Clarke and Rapuano's decision that "excessive" dwelling unit capacity would be determined by the number of dwelling units the structure was originally built to contain rather than, for example, by reference to the number of persons per square or cubic foot the structure might properly hold could have been viewed as a convenient but perhaps unduly narrow standard. Yet just such decisions made by professional engineers who were removed from the persons whose houses might be affected helped determine whether a future deprivation of property was to take place. The nature of the *Urban Renewal Manual* standards and the scope for their discretionary local interpretation was perhaps best summarized by the able and conscientious NHA engineer responsible for the university area project who later observed "If you use the HUD [URA] regulations, you could define anything as a slum."[243]

B. *Delay 1963-1967*

Although Clarke and Rapuano determined that the entire 959 acre project area was qualified for federal urban renewal funds in the winter of 1963, the final plan for renewing and redeveloping the area was delayed for four and a half years thereafter. The delay was occasioned by the difficulties inherent in attempting to coordinate the policies and activities of a metropolitan government, a housing agency responsible for four urban renewal plans and five educational institutions. In the latter part of 1962 the city government of Nashville merged its governmental powers into those of Davidson county to form a new, unified, city-county government. In the ensuing election for Mayor of Metropolitan Nashville, the main proponent of Nashville's urban renewal program, Ben West, was defeated by his fellow Vanderbilt alumnus County Judge Beverly Briley. Like West, Mayor-elect Briley was an advocate of urban renewal and had at one time addressed a Senate subcommittee on the need for extending urban renewal to the counties as well as the cities of America.[244] Briley, however, was concerned that the new Metropolitan Nashville treasury would be unable to afford the four ambitious development programs that West had initiated. Although it was unlikely that the university area project would be an expense to the

243. Interview with Mr. John Acuff, Jr., Director of Development, Metropolitan Development and Housing Agency, in Nashville, Tennessee, Oct. 1973.

244. Nashville Tennessean, Jan. 28, 1959, at 7, col. 6.

city, the NHA nevertheless delayed planning for six months to allow the new Mayor time to assess the proposed program.[245]

In the meantime changes of attitude and changes of leaders at the participating institutions led to additional delays and alterations in the size of the area. Under pressure from their district councilman who opposed the use of urban renewal on philosophic grounds, the Presidents of Fisk University and Meharry Medical College withdrew from the proposed plan.[246] The withdrawal of Fisk and Meharry, coupled with a reduction in the availability of federal funds, triggered a reduction in the size of the area from 959 acres to 700 and then again to 527.[247] Nor was it entirely clear that the remaining three schools were ready to sustain even such a greatly reduced project. Although Vanderbilt University's financial position was more secure,[248] it experienced a change of administrators which clouded its original commitment to the project. On February 1, 1963 Chancellor Harvie Branscomb retired and was succeeded in office by Dr. Alexander Heard. Upon assuming office, Chancellor Heard initiated a study of the future needs of the university including the availability of funds with which to sustain an expansion program. Although the NHA organized a special meeting between the new Chancellor and the drafter of Section 112, Julian Levi, the NHA was still unable to get an official commitment to the project from the Vanderbilt administration pending the outcome of the Chancellor's study.[249] When Gerald Gimre of the NHA was equally unsuccessful in his efforts with the leaders of Peabody and Scarritt, the planning phase was informally postponed for still another six month period.[250] Planning was resumed once again in 1964 in the

245. Interview with Mr. John Acuff, note 243 *supra*.

246. *Id.*

247. The proposed project area was reduced from 959 acres to approximately 700 in 1963. The area was reduced to 527 acres in 1965 with the elimination of an area to the north of West End Avenue.

248. In 1956 Mr. Harold S. Vanderbilt had established a living trust that was to he conveyed to the university upon his death. The corpus ultimately grew to 23.7 million dollars. In the intervening years the university was allowed to secure loans with the corpus of the trust as security. Mr. Vanderbilt in turn absorbed the cost of the interest on the loans, thus allowing the university interest free loans during his lifetime as well as the corpus of the trust thereafter. Of the 23.7 million dollars, approximately 12 million dollars was ultimately committed to land acquisition. Interview with Dr. George Kaludis, Vice Chancellor, Vanderbilt University, in Nashville, Tenn., May 15, 1974.

249. On April 9, 1963, a conference was held at the chancellor's dining room on the Vanderbilt campus with Julian Levi and Neil Carothers, President of the University Circle Development Foundation of Cleveland who described their experience with Section 112 projects. Minutes, Board of Commissioners, NHA number 9907.

250. At a meeting of the NHA on August 5, 1963, Gerald Gimre, Executive Director of

course of which the NHA conducted a series of meetings with the merchants in the area to determine how their interests might be advanced through the project.[251] Nevertheless, 1964 lengthened into the fall of 1965 and Charles Hawkins, who had become the Director of Urban Renewal for the NHA, became increasingly impatient for the planning phase to conclude and the implementation of the project to begin. Under his urging a NHA site office in the project area was opened for area residents in the summer of 1965.[252] The site office was equipped with maps and printed explanations of the proposed project and a full-time staff to answer the questions of the residents of the neighborhood. As a supplement to the site office on November 15, Hawkins and Gimre responded to an invitation from a local Parents-Teachers Association and described the project to a PTA meeting held at Eakin School in the project area. Hawkins and Gimre described in necessarily general terms the still tentative plan for the 527 acre project. According to one member of the audience the NHA staff members did not describe the plans for a clearance area and the audience was requested by the presiding officer of the PTA to refrain from questioning the staff about individual parcels of land.[253] Whatever its limitations, the November 15 PTA meeting represented the first in a series of similar meetings for residents that Hawkins promised to hold in the future. In addition to his attempts to publicize the plan among the area residents, Hawkins proposed that the formal plan for the area and an application for federal funds should be forwarded to the Nashville Metropolitan Council for final political approval before they were submitted to the URA. Hawkins noted that the delay between 1961 and 1965 had created hardship for the staff of the NHA, which had difficulty keeping maps and proposals up to date, and serious inconvenience to the residents of the area who were uncertain about the status of their property. He proposed that the plan and application for funds be submitted to the Council for a two-month period of deliberation to begin in December of 1965 and to end February 1, 1966. In the course of the two

the NHA reported that the principal difficulty lay at Vanderbilt, where the change in administrations had not allowed the new Chancellor to determine the future needs of Vanderbilt nor the availability of funds. Minutes, Board of Commissioners, NHA, number 100937.

251. On July 10, 1964, the NHA held meetings with the business merchants in the Hillsboro Village section of the project area to discuss how alternative roadways in the area would affect their business. Minutes, Board of Commissioners, NHA, number 10759.

252. The site office was opened on July 6, 1965. The NHA circular which announced its opening emphasized that there was no completed plan for the area but that the NHA staff would be available to discuss and explain the general implications of the project for the area.

253. Testimony of Mrs. Charles Adair, *Trial Transcript*, 9-10; interview with Mrs. Charles Adair in Nashville, Tennessee, May 27, 1974.

months the Council would hear the bill on three separate readings and would conduct a separate public hearing on the merits of the proposal.[254] Hawkins's timetable seemed to allow a reasonable amount of time for deliberate reflection on the part of the Metropolitan Councilmen and a reasonable opportunity for members of the public at large to express their opinions. The timetable was blocked, however, by Councilman Glenn Ferguson, one of two councilmen whose districts were still affected by the now reduced university center plan.[255] Unlike his colleague, Councilman Richard Taylor, who supported the urban renewal plan,[256] Councilman Ferguson was less certain of the plan's value and inclined to explore its potential adverse effect on the neighborhood residents. Ferguson argued that the residents should have further opportunities to learn about the project before it was presented to the Council. He forcefully suggested that both he and the NHA should conduct further public meetings for the area residents and that in the meantime the presentation of the project to the Council should be postponed. Reluctantly Hawkins agreed to Ferguson's suggestion and his plan for submission to the Council was withdrawn.[257]

Although the presentation of the plan to the Council was delayed in order to give the NHA and Ferguson further time to meet with the area residents, only one such meeting was subsequently held in 1966 and it was held for residents of a neighborhood that was later deleted from the project area. In August of 1966, Hawkins secured memoranda of understanding from the heads of Vanderbilt, Peabody and Scarritt, firmly binding the three schools to an urban renewal project in the event the plan was approved by the Metropolitan Council and the Urban Renewal Administration. On the strength of these commitments, Hawkins sought to establish a new timetable for presentation of the plan to the Council. Under his new schedule the Council's consideration of the plan would be preceded by four public meetings to be held in the project area during the

254. Hawkins proposed the plan would be presented to the Council for first reading on December 21, 1965; a public hearing would be held three weeks later on January 11, 1966; a second reading a week later on January 18, and a third and final reading on February 1, 1966. Minutes, Board of Commissioners, NHA, number 11812-13.

255. Councilman Ferguson expressed his opposition to Hawkins time-table at a meeting held at the NHA on November 16, 1966. *Id.*

256. A graduate of Vanderbilt, Councilman Taylor was originally opposed to the project on the philosophic grounds that it was improper to exercise eminent domain on behalf of a private university. He later became convinced of the value of the plan for the area he represented and subsequently became the sponsor for the project in the Metropolitan Council. Interview with former Councilman Richard Taylor, in Nashville, Tennessee, Feb. 12, 1974.

257. *See* note 254 *supra*.

month of September. Thus during September the area residents would have a full opportunity to hear the plan described and to present their criticisms of it to the NHA. Both the NHA and the area residents would then have two months during October and November to air their differences and to amend the plan where that seemed desirable before it was finally presented to the Council at the end of November for three readings and a public hearing during a period of two and a half additional months.[258] If anything, Hawkins' second timetable was longer than his first, allowing as it did over five months of time for public consideration of the university center project. Ironically, however, Councilman Ferguson was once again responsible for its postponement. After the first of the four September neighborhood meetings had been conducted by Hawkins, Ferguson resigned from the Council to run for another office, the postition of Metropolitan Trustee. Until his position as Councilman could be filled in a special election, the members of his district would be unrepresented in the Council at a time when the Council would be giving consideration to a plan that could fundamentally change the neighborhood. In deference to Ferguson's request to delay consideration of the plan until his successor had been elected, on September 21, 1966 the NHA once again abandoned its plans for presenting the project to the Council and cancelled the three remaining meetings with the area residents.[259] Thus of the four meetings scheduled to be held in the project area in September 1966, only one was successfully implemented before the entire schedule for presenting the plan to the Council was cancelled.[260]

In the early winter of 1967, the Department of Housing and Urban Affairs (HUD), the successor to the Housing and Home Finance Agency and to the Urban Renewal Administration, began to cut back on its funding of urban renewal projects. HUD's new policy was a direct result of increased federal military spending in Southeast Asia and it resulted in a sharp drop in funds available for Nashville's university center project. HUD officials recommended

258. Hawkins's timetable called for 4 public meetings in the project area at the end of September and a two month pause for reflection during October and November before the plan was presented to Council on November 30, 1966. During the two and a half months from November 30, 1966 to February 15, 1967, the Council would consider the bill on three separate readings and a single major public hearing. Minutes, Board of Commissioners, NHA, August 16, 1966.

259. Minutes, Board of Commissioners, NHA, number 2449 for a meeting held Sept. 21, 1966. NHA Circular dated Sept. 21, 1967.

260. The residents from an area bounded by Grand Avenue, Broadway and Villa Place were invited to the meeting. The area was eliminated from the project in 1967. An NHA Circular dated September 1966 shows the area for which the meeting was held.

that the university area should be divided into two parts.[261] Area I would include Vanderbilt University's clearance area, a clearance area for St. Thomas Hospital which had expressed an interest in constructing a new facility near Vanderbilt's medical school[262] and a rehabilitation zone for the remaining houses. Since Vanderbilt had already purchased a substantial amount of land in its clearance area and since it appeared financially able to purchase the remaining lots, NHA officials suggested that the federal funds that were presently available should be used to sponsor an immediate project in Area I.[263] The renewal project in Area II which included Peabody College and Scarritt, would be deferred until further federal funds became available. In April 1967, the NHA divided the university center project into Area I and Area II. Area II, the Peabody and Scarritt project section, was destined to go unfunded and unfulfilled. And as luck would have it the sole meeting held for the area residents in September of 1966 had been for the benefit of those who lived in a part of Area II.[264]

With the division of the project into Area I and Area II, implementation of the university center plan gained impetus from an unexpected source. In the first week of July 1967, HUD issued an ultimatium to the Nashville Housing Authority. If Nashville did not submit a final application to HUD for a loan and grant for the university center by August 18th, HUD would refuse to fund the project altogether.[265] HUD's deadline was an understandable reac-

261. On February 2, 1967, John Edmunds, Assistant Regional Administrator for HUD's Atlanta office called Scott Fillebrown, Chairman of the Board of Commissioners of the NHA, and informed Fillebrown that the capital grant which HUD had reserved for the university area project had been reduced to $7.9 million. On February 6 a delegation from the NHA visited Edmunds and his staff in Atlanta whereupon the HUD staff members recommended that the project be divided into two parts. "It was the view of the conferees that the first stage . . . should embrace the Vanderbilt area . . . ." Minutes, Board of Commissioners, NHA, number 12710.

262. Section 112 was amended in 1961 to allow hospitals as well as educational institutions to participate in the urban renewal program. 42 U.S.C. § 1463 (1970). St. Thomas became interested in joining Nashville's Section 112 project several years after planning had first begun. St. Thomas along with Vanderbilt became one of the two institutional sponsors of the project that was approved by the Metropolitan Council in August 1967. St. Thomas withdrew from the project in late 1969. Whether because its acquisition area was limited to fifteen acres or because it was not as large an institution, St. Thomas did not attract the same bitterness from the area residents that Vanderbilt did. Since St. Thomas was not a participant in the events after 1969, its role in the present study has been foreshortened.

263. Letter from Charles Hawkins of NHA to John Edmunds of HUD, March 10, 1967.

264. *See* note 260 *supra*.

265. On May 19, 1967, HUD's Local Public Agency Letter 419 announced that where project planning had been in progress for more than 36 months and the final section of the local application for federal project funds had not been received by HUD, HUD would no longer continue to reserve funds for the project. In June or July of 1967 John Edmunds of

tion to the five years of delay which had characterized the planning of the university area plan. If after five years Nashville could not decide whether to initiate a formal urban renewal plan for the area, the money which HUD had earmarked for the project should be given to another, better organized, community. The NHA's response to HUD's ultimatum was swift in coming. On July 5th, the Board of Commissioners and the executive staff of the NHA met with Mayor Briley, Chancellor Heard, and Councilman James Hamilton, the recently elected successor to Councilman Ferguson.[266] The purpose of the meeting was to construct a schedule which would enable the project participants to gain Council approval of the plan for the area and of an application to HUD for federal funds before the August 18th deadline. The schedule which was ultimately agreed upon called for a public meeting for the entire neighborhood to be held at Eakin School on July 19th. The single meeting was to take the place of the series of meetings which Charles Hawkins had attempted to arrange during the past two years and included both a formal presentation of the plan by the NHA staff and an opportunity for the residents to ask questions or make statements. On August 3rd the plan would then be introduced to the Council. On August 7th the Council would combine the second reading of the bill with a public hearing on its merits and on August 15th the Council would presumably give the plan final approval upon its third reading.[267] Mayor Briley would then approve the plan on the 16th, the NHA would dispatch it on the 17th and on August 18th, 1967 HUD would at long last receive the final application for federal funding for Nashville's university center urban renewal project. Thus in response to a federal administrative deadline, Nashville was to compress into a period of four weeks a process of local debate and political approval which in the past had been thought to require two to five full months.[268] Moreover, the Metropolitan Council was called

HUD's Atlanta office advised Gerald Gimre of the NHA that he would recommend that funds be retained for Area I of the university center project if the final application from the city of4 Nashville were received by August 18, 1967. Minutes, Board of Commissioners, NHA, number 13135. On July 5, 1967, Edmunds cabled Gimre that the final application would have to arrive in Atlanta by August 18th or it would not be funded. Cable from John Edmunds of HUD to Gerald Gimre of NHA, July 5, 1967.

266. Other members of the meeting included two members of the Board of Commissioners, four NHA staff members, the Director of the Metropolitan Planning Commission and the Senior Vice Chancellor of Vanderbilt University. Minutes, Board of Commissioners, NHA, number 13135.

267. *Id.*

268. For the alternative schedules proposed by Charles Hawkins in the years before 1967 see notes 254 and 258 *supra*.

upon to act in the full knowledge that any further delay for any reason would irretrievably prejudice the possibility of federal funding for the project.

V. Local and Federal Approval of the Plan 1967-1968

A. *The Plan and Its Advocates*

The extrinsic nature of the urban renewal plan that was to be presented to the Metropolitan Council in August 1967 made its passage seem relatively certain. As the original drafters of Section 112 had intended, the financial advantages that would accrue to Nashville if the Council approved the plan were so extremely attractive as to discourage critical evaluation of the underlying merits of the proposal. As explained to the Council members and to the general public, the net cost of the entire project was to be some 21.8 million dollars. Ordinarily the city of Nashville would have to contribute one-third that sum or some 7 million dollars. In the case of a Section 112 project, however, the city could take credit for the expenditures made by the sponsoring institutions. Thus the City of Nashville could use as its share of the project costs the 11.8 million dollars that would be spent for land acquisition and clearance by Vanderbilt, and St. Thomas Hospital. Since the 11.8 million was more than the city's one-third portion of the cost, the city did not have to spend its own money toward the cost of the project. Moreover, by simply approving the project, the city could actually make money for itself. The federal government was obligated to pay Nashville the difference between the local expenditures on the project and the total cost of the project, up to two-thirds of the net cost of the project. Since the sponsoring institutions were to spend 11.8 million dollars on a project whose total cost was 21.8 million dollars, the federal government would pay Nashville the difference of 10 million dollars. Since the total cost of the project was to be borne by the sponsoring institutions, the city was free to spend the 10 million dollars of federal money for the installation of new separated storm and sanitary sewers, new roadways and the acquisition of land to expand the grade schools in the urban renewal area. In return for this virtual windfall of 10 million dollars, the city had only to spend 500,000 dollars on necessary improvements immediately outside the project area[269] and to assent to the NHA's use of eminent

269. *Background Statement: University Center Urban Renewal Area—One: Tenn. R-51* issued by the NHA in July 1967. Placed on public file with the Metropolitan Clerk's office on August 4. Nashville Tennessean, July 12, 1967, at 1, col. 1; Nashville Banner, Aug. 7, 1967, at 1, col. 5.

domain in the event a property owner refused to sell his land to a sponsoring institution. To a Council that was going to have to improve the sewers, roadways and schools in the area in any event, the opportunity to do so without cost to the voting taxpayer aided the plan's approval. Moreover, Mayor Briley had endorsed the project and his backing alone was said to be worth twenty-five to thirty votes in a forty-member Council.[270] Taking its cue from Mayor Briley, the Chamber of Commerce, representing Nashville's downtown commercial interests also threw its weight behind the plan.[271] In addition the two Nashville newspapers contributed their editorial support to the project as well. The morning *Nashville Tennessean*, which had once expressed its doubts about the wisdom of the project, reversed directions and acclaimed the plan as an economic bargain for the city.[272] The front page political columnist for the evening *Nashville Banner* also endorsed the plan in the same terms, dwelling at length upon what he called an "extra value bargain" that an economy-minded Council could "buy" for $500,000.[273] In sum by the time the much-reduced university area plan was finally presented to the Metropolitan Council, the economic benefits that its passage would produce had been extolled by the Mayor of Metropolitan Nashville, the Chamber of Commerce and Nashville's two daily newspapers.

B. *The Response By the Neighborhood*

The only opposition to the project that existed in the city of Nashville in August 1967 came from the residents of the project area that was to be cleared for university and hospital expansion. Six years of delay and changing plans had resulted in a 600 acre reduction in the size of the project area, from some 959 acres in 1961 to a modest 317 acres in Area I in 1967. Of the 317 acres included in the final university area plan, approximately 110 were to be acquired and cleared for redevelopment by Vanderbilt University, another 15 were to be used for the site of a new private hospital and the buildings in the remaining acrease were to receive rehabilitation

270. Interview with Councilman Richard Taylor, in Nashville, Tennessee, Feh. 12, 1974. Councilman Taylor sponsored the plan before the Council.

271. *Id.*

272. "Hopefully the plans will be given final approval . . . . with or witbout urban renewal, these developments are going to occur." Nashville Tennessean, Aug. 6, 1967, at 4B, col. 1.

273. Battle, *University Center Urban Renewal Is a Bargain*, Nashville Banner, Aug. 11, 1967, at 1, col. 3.

274. HUD Region III Report on Tenn. R-51, dated Oct. 23, 1967.

treatment.[274] The opposition to the university center plan was to stem primarily from the homeowners in the 125 acre area destined to be cleared and redeveloped by Vanderbilt University and St. Thomas Hospital.

1. *The Character of the Project Area*

Although the neighborhood had been certified by Clarke and Rapuano as eligible for clearance under the urban renewal regulations, the area did not bear all of the usual characteristics of an urban slum appropriate for razing and redevelopment. According to the 1960 federal housing census, the nearly five hundred buildings in the clearance zone ranged in value from approximately 8,000 to over 20,000 dollars.[275] The housing census had found that only 20 percent of the buildings in the area as a whole were "substandard."[276] Similarly a diaguostic study conducted in Area I for the NHA in 1964 and July of 1967 to determine the family and housing needs of the entire area found that "this project is somewhat unique in that the area is not typified by badly deteriorated structures, chronic low income nor minority group occupance."[277] Instead another NHA sponsored study found an area characterized by an aging but non-indigent population almost entirely free of welfare cases and participants in related categorical assistance programs.[278] And as the NHA staff determined in a study released in 1967, the median income of the approximately 360 non-student residents in the clearance area ranged between $350 and $400 per month,[279] an adequate sum at the time and more than enough to make the majority ineligi-

275. U.S. Dept. of Commerce, *Census of Housing in Nashville, Tennessee*, 12, Table 2, census block 22 (1960).

276. *See* note 169 *supra*.

277. *Project Area Report*, R-216, 1.

278. Memorandum from Darlene Nolle to Dick Hume, Dec. 5, 1966. "A general survey of a number of health and welfare services used by residents of the University Center Area reveals that the area is not one of primary concern from the standpoint of social pathology. Our findings indicate a non-indigent aging population for whom services are available if needed. The non-indigency is evidenced by the small Department of Public Welfare family services caseload—categorical assistance programs—old age assistance, aid to the blind, aid to the disabled, and aid to families with dependent children—and defined services caseloads; the Metro Welfare Commission's small financial and service caseload; only one OJT (On the Job Training) and no Headstart enrollers in the area; and the small number of people receiving free health services.

The inference that the population was an aging one was drawn from the small numbers of children receiving day care, group work and recreation, pupil personnel, child health, and medical services and from the low rates of delinquency and dependent neglected children."

279. *Project Area Report*, Estimated Housing Requirements and Resources for Displaced Families, D HUD-6122, 5 and accompanying narrative statement.

ble for public housing programs anywhere in the city.[280] Although no fuller statistical profiles of the clearance area existed, the neighborhood gave the appearance of being a white, essentially middle-class, area populated by teachers, a sprinkling of professional men, university and hospital employees, a number of blue collar workers and a substantial number of retired persons living on pensions which they supplemented by renting rooms to college students. In addition, for an urban renewal area, there were a number of persons with either single or multiple college degrees.[281] On the whole the residents of the clearance area were as likely to understand the urban renewal process and as likely to foresee its implications as any group that was apt to encounter urban renewal in Nashville.

2. *Understanding the Project*

During the course of the seven years from 1961 to 1967, however, the residents of the neighborhood actually learned very little about the proposed university center plan. Their lack of understanding was no doubt caused in part by their preoccupation with their own affairs and their inclination to ignore a project whose future seemed less and less certain with the passage of time. As the project was reduced in size from 900 to 700 to 500 and at last to 317 acres,[282] it seemed quite possible the entire plan would be abandoned completely, leaving the residents to live as they had before. Moreover, the daunting complexity of the urban renewal process—with its overlapping relationships between the sponsoring institutions, the local housing authority, the Metropolitan government and the Urban Renewal Administration—was not designed to encourage the residents to study the project itself with any care. Yet while their lack of knowledge about the university area project was no doubt caused by the residents' own inattention it was furthered in no small part by misleading or incomplete information distributed by both the local and federal urban renewal authorities.

Although there is no reason to doubt the integrity or good faith of the staff of the NHA, part of the information which they publicly

280. *Id.*

281. It is impossible to quantify the educational background of the clearance area residents hut it is apparent that the members of the citizen action groups that later grew up in the neighborhood included persons with a substantial formal education. The membership of the University Neighborhood Association consisted in part of Marie H. Means (B.A., M.A., Ph.D.), Celeste Albright (B.A., M.A., M.A.), Annie Stroud (B.A.), Mrs. David White (B.A., M.A.) and Mr. White (B.A., L.L.B.). Mr. Joseph Johnston, the Chairman of the Project Area Committee formed in 1970 was also a college graduate.

282. *See* note 247 *supra.*

distributed between 1961 and 1967 could not help but mislead the residents of the area that was to be affected by the university project. For much of that time the NHA staff labored under the very real difficulty of having to explain a project whose boundaries constantly shifted and whose future seemed clouded with doubt. Nevertheless, the public statements made by senior staff officers and the leaflets mailed to the residents' homes combined to create an impression of the project that was inaccurate and misleading to any residents who read their mail or newspapers. One recurring impression created by official NHA statements was that the university area project was essentially a rehabilitation project rather than a clearance program that would be enforced by the NHA's power of eminent domain and that would result in the razing of over 100 acres of homes. In the spring of 1962 Charles Hawkins, the Director of Urban Renewal for the NHA, was called upon to rebut a newspaper article which reported the university project was to involve the widespread clearance of residences. Hawkins did so but in terms that could only have been misleading to residents of the eventual clearance area. "This is truly an urban *RENEWAL* program" (emphasis in original), Hawkins observed, "and not a slum clearance project as such. We are trying to bring about renewal and rehabilitation as the neighborhood changes instead of waiting until it becomes depressed and then make the needed changes. . . . We anticipate there will be comparatively few structural demolitions."[283] As a Section 112 project, however, the original and primary purpose of the plan was to provide clearance space for campus expansion. Although the ratio of rehabilitation to clearance may have favored rehabilitation,[284] the clearance of residential housing was necessarily a substantial part of the Section 112 program. To dwell upon the rehabilitation aspects of the project and to de-emphasize the extent of the clearance area could only create a misleading impression about the nature of the program and its potential effect upon those who lived in the project area. Yet from 1962 to 1968 the NHA leaflets that were mailed to the area residents emphasized the importance of rehabilitation and made only veiled or indirect references to the "orderly expansion" of the educational institutions in the neighborhood.[285] Moreover, in 1965 when the NHA staff first

283. Nashville Tennessean, April 11, 1962, at 9, col. 4.

284. The final plan projected approximately 125 acres for clearance out of a total project area of 317 acres.

285. "The Urban Renewal Administration announced its approval on April 9, 1962, of a Survey and Planning Grant Application for a University Center Urban Renewal Project.

began to seek Council approval of their plans for the area, a well-known columnist for the *Nashville Banner* ran a series of front page articles on the project in an attempt to help the NHA explain the plan to the public. The first article in the series bluntly proclaimed that "This project is *NOT* a slum clearance program . . . . It is an effort . . . to help this section of the community to readjust to new trends and new land uses around the universities . . . ." (emphasis in original).[286] Although the words of the article were those of the columnist, the pattern of emphasis on the restorative nature of the project mirrored the NHA's own public portrayal of the plan's objectives.

At the same time the NHA issued statements emphasizing the importance of rehabilitation as a project goal, it also repeatedly assured the area residents that they would have a full opportunity to discuss the proposed plan in a series of public meetings before the plan was cast into its final form. Charles Hawkins firmly announced that:

> The people in this area have a right to know exactly what is contemplated. We intend to listen to the public and hear any suggestions they might have. If any problems are brought to our attention in these neighborhood meetings we will do our best to help the people solve them. This project is for their benefit and we want them to be involved in it from start to finish. At this point, however, we want to emphasize that nothing is final. We are ready to listen to the people who will be affected by this project and to accept their suggestions.[287]

Naturally, this news is of great interest to residents of this area. In order to avoid misunderstandings about the proposed Urban Renewal Project and the changes it may bring about, residents of the area are provided the following facts.

—The purpose of a University Center Urban Renewal Project is to *provide various improvements in a basically sound neighborhood* (new street and traffic facilities, sewers, sidewalks, parks, etc.); and to make possible the *orderly expansion of the colleges*, hospitals and universities that mean so much to the future of this area." (emphasis added). NHA Circular to Area Residents dated April 1962. When planning resumed again in 1964, a NHA brochure dated March 4, 1964, announced once again that the purpose of the project was to "provide various improvements in a basically sound neighborhood." When the site office was opened in 1965 the circular announcing its opening made no reference to a clearance area but instead observed that "You may wish to learn how a particular property might be affected." The only direct reference to clearance activities that appeared in the NHA materials distributed to residents occurred in an August 1965 leaflet that assured residents that the "decision as to areas to he acquired and cleared" would not be made until the end of the final planning studies. The NHA *Background Statement* placed on public record at the Metropolitan Clerk's office on August 4, 1967—three days before the formal public hearing on the project—made the first and apparently only official public acknowledgement before the project received approval that the NHA would be specifically authorized to use eminent domain on behalf of the sponsoring university and hospital. *Background Statement*, 4 (1967).

286. Nashville Banner, Dec. 6, 1965, at 1, col. 1.

287. Nashville Tennessean, April 11, 1962, at 9, col. 4.

NHA circulars made the same point and encouraged the residents of the area to attend such meetings in order to receive direct answers to their questions and concerns.[288] Moreover, the NHA conducted several such public meetings for the merchants in the commercial areas outside the clearance zone.[289] But with the exception of the PTA meeting presentation in the fall of 1965,[290] in the course of the planning period, no such meetings were held for the homeowners in the neighborhood that was ultimately selected for clearance. The meeting that was held in 1965 focused on the plan for an area that was 200 acres larger than the project ultimately presented to the Metropolitan Council two years later. Although the interruptions which occurred in 1965 and 1966 when the NHA staff did attempt to hold its promised series of meetings could not be attributed to the NHA, the impression that the residents were to play some part in the planning of the project was rendered illusory nevertheless.

The illusions that the project was primarily intended to "restore a basically sound neighborhood" or that the neighborhood's residents would have an opportunity to influence the plan before it was to receive final local consideration by the Council were not created intentionally by the NHA staff. Indeed the staff had gone to some trouble to attempt to provide accurate information to the residents by establishing a site office in the project area with current

288. "During the planning period, a great many meetings will be held with neighborhood groups and citizen organizations to discuss *every detail* of the *proposed Urban Renewal Project*. All residents of the area will be encouraged to participate in these discussions. Only after these meetings have been held and after the final Project Plan has been prepared, and approved by the Nashville City Council and the Urban Renewal Administration, can the actual project work begin." (emphasis added) NHA Circular dated April 1962. Again in May 1964 a leaflet stated "The Nashville Housing Authority is planning a series of meetings for the University Center residents. The purposes of the meetings will be to acquaint you with the status of the plans as they develop and to give you an opportunity to participate in discussions about them. At those times you can have your questions answered directly instead of depending on rumors." In September 1966 the NHA scheduled four meetings in the project area and announced "Preliminary plans for the University Center Urban Renewal Project have been completed. Although the plans are primarily the same as those which have been on display in the Project Site Office for a number of months, the Nashville Housing Authority wishes to conduct a series of neighborhood meetings during which the plan will be discussed. At these meetings, residents and property owners may express their ideas and feelings concerning the planning proposals, and mayask questions." Of the four meetings, however, only one was ever held and it was for residents outside the neighborhood eventually designated for renewal. *See* text accompanying notes 258-9 *supra*.

289. In July of 1964, the NHA conducted meetings with two different groups of businessmen from the Music City Area and Hillsboro Village to discuss three different alternative routes for a major boulevard that would affect their businesses. Minutes, Board of Commissioners, NHA, number 10790. Another meeting was held with the Hillsboro Village Merchants Association in November of 1965.

290. *See* text accompanying note 253 *supra*.

plans on hand and NHA staff members available to discuss individual questions. The site office was opened in the summer of 1965 when plans for the rehabilitation and clearance areas were still necessarily tentative.[291] The only apparent firm information on which the visitors to the office could rely was a large Clarke and Rapuano map with a legend indicating the status of each individual house in the neighborhood. The large dark circles which indicated obsolete homes and the legend indicating houses that were substandard and warranted clearance produced predictable responses from site office visitors. Residents whose homes had been rated obsolete or substandard were concerned by the evaluation report and began to inquire into the basis for the survey. According to some of the homeowners who made inquiries at the site office, however, the NHA staff on hand did not refer to the *Urban Renewal Manual* standards nor attempt to refer the residents to the *Manual* in responding to their questions. Instead the staff members replied more generally that the houses had been judged in accordance with federal regulations and that the neighborhood as a whole contained sufficient substandard houses to warrant a clearance area.[292]

At least one property owner whose house was rated substandard became actively dissatisfied with the information supplied her by the site office. In the fall of 1965 Mrs. Harvey Gee wrote directly to E. Bruce Wedge, the Regional Director of Urban Renewal in Atlanta, Georgia, requesting an explanation of the criteria employed to judge a house substandard. Wedge replied that current regulations required "a minimum of 51% of the buildings in a project area proposed for clearance and redevelopment must be structurally substandard to a degree requiring clearance as determined by specific criteria." Although he did not elaborate on what those specific criteria should be, Wedge added that a "standard" building had to be "structurally sound, and meet all of the city's code standards and any additional criteria adopted by the metropolitan government in

291. The site office was opened on July 6, 1965. In the leaflet announcing the opening of the office, the NHA explained that while there was no final plan for the area, the plan could be discussed in general terms. "During the time of these studies and the evaluation of the various alternate proposals, it is not possible to provide reliable information on the details of the plan. While the project plan is still in the formative stage at this time, its development has progressed to the point that it can be explained and discussed with interested persons for their consideration and comments." NHA Circular dated June 30, 1965.

292. Interview with Mr. and Mrs. Charles Adair, in Nashville, Tennessee, Jan. 30, 1974; interview with Mr. Elbridge Wright, in Nashville, Tennessee, Jan. 23, 1974; interview with Mr. Robert Gardner, in Nashville, Tennessee, Jan. 22, 1974; interview with Dr. Marie Means, in Nashville, Tennessee, Jan. 11, 1974; letter from Celeste Albright to R.M. Carmody, May 15, 1974.

establishing project rehabilitation standards." He ended by suggesting that the resident contact NHA officials and ask them to review the plan with her.[293]

To the homeowners who were concerned about the standards employed to evaluate their houses, Wedge's response to Mrs. Gee's inquiry was perhaps the single more influential piece of information they received about the eligibility criteria in the years before the plan was presented to the Metropolitan Council. Mrs. Gee shared the contents of the letter with friends who were also concerned about the project and together they ascertained by an inspection of the map at the site office that the project area lacked a sufifcient number of substandard houses to qualify for a clearance area. With that false assurance they believed themselves secure from a forced removal by urban renewal officials. Wedge had failed to mention, however, that the area could still qualify for clearance under the alternative clearance formula which required only twenty percent substandard houses and the removal of another thirty-one percent in order to remove blighting influences. Nor did he mention then or in his correspondence with other residents in the area that the standards by which the neighborhood had been evaluated were available in the *Urban Renewal Manual*.[294] Moreover, even when one resident, Miss Celeste Albright, wrote the Secretary of HUD requesting an explanation of the standards to be applied to an urban renewal area, she still received no indication of the existence of the *Manual* or its importance.[295] In fact only after the Metropolitan Council had considered the plan for the university area did the residents of the neighborhood obtain access to a copy of the *Manual* and have an opportunity to study its requirements.[296] Thus throughout the period when the future of the plan was being decided, those who were most inclined to critically evaluate the project were not told of the alternative standards against which it could have been measured.

293. Letter from Bruce Wedge to Mrs. Harvey Gee, Nov. 19, 1965.

294. *See* note 292 *supra*; letter from Bruce Wedge to Harvey Gee, Nov. 2, 1965; letter from Bruce Wedge to Mrs. Harvey Gee, Nov. 19, 1965; *see* letter from Dan Hummel, Assistant Secretary of HUD, to Elbridge Wright, Nov. 6, 1966; letter from Celeste Albright to Robert Wood, Secretary of HUD, April 25, 1967 (requesting explanation of standards).

295. Letter and information from Harrison Knapp, Director of Consumer Relations, HUD to Celeste Albright, May 18, 1967 (sending general urban renewal information but making no reference to the *Urban Renewal Manual*); Letter from Celeste Albright to R.M. Carmody, May 15, 1974.

296. Lee Galvani, a resident of the area, apparently purchased a copy of the *Urban Renewal Manual* in the fall of 1967, after the Metropolitan Council had approved the project. The other residents of the area did not become aware of the *Manual* until the spring of 1968. Letter from Celeste Albright to R.M. Carmody, May 15, 1974.

3. *Origin of the University Neighborhood Association (UNA)*

Whether well-founded or otherwise, by the fall of 1966, a handful of residents of the university neighborhood had become convinced that the NHA was not giving them full or accurate information.[297] The NHA had not fully explained to the residents the standards which had been used to evaluate their houses and it had failed to supply evaluation sheets for individual houses to the few homeowners who had asked for them.[298] Despite the statements of Charles Hawkins that the project was primarily one for the rehabilitation, rather than the clearance of houses, the site office had made clear to those who actually visited it during its slightly awkward hours from 7:30 in the morning to 4:00 in the afternoon that a number of houses were to be removed for Vanderbilt University expansion and that those who refused to sell their land voluntarily would have it taken by condemnation instead. Moreover, it had become increasingly clear that despite the assurances by Hawkins and others that the homeowners would participate in the planning process, no such participation was in sight in the foreseeable future. As a result of their growing frustration with the NHA and their fear that their homes might be taken in a clearance project, approximately twenty of the eighty resident homeowners formed the University Neighborhood Association (UNA) in December, 1966.[299] The stated purpose of the University Neighborhood Association was to help inform the other residents of the area of impending urban renewal activities and to offer a means of publicizing the residents' point of view.[300] The President of the UNA was Dr. Marie Means, a 76 year old psycho-therapist and authoress. The other members of the group included several school teachers, a retired lawyer, a pharmacist and a local camera store owner. They were brought together by their common opposition to the nature and purpose of the university area clearance project. In addition to their shared fear that they would lose comfortable or in some cases profitable houses in what was to them an attractive neighborhood, they were united by their common opposition to using eminent domain to compel them to sell

297. The belief that the NHA was being less than open with the residents began to emerge in 1965. Letter from Harvey Gee and Charles Adair to Bruce Wedge, Oct. 26, 1965.

298. *See* note 347 *infra* and accompanying text.

299. Interview with Dr. Marie Means, Jan. 11, 1974; interview with Celestre Albright, Jan. 7, 1974. Although the group was formed in late 1966 it did not have a meeting for business purposes until the spring of 1967. Letter from Celeste Albright to Undersecretary of HUD Robert C. Wood, April 25, 1967.

300. Letter from Celeste Albright to Robert C. Wood, April 25, 1967.

their houses to private groups of developers like Vanderbilt University or St. Thomas Hospital.[301] Rightly or wrongly they believed that the federal constitution forbade the threatened or actual use of eminent domain on behalf of private interest groups.[302] Acting as a united group, the UNA continued to acquire additional information from the Regional Urban Renewal office in Atlanta. Working through the Regional Office, the Association discovered that the NHA had failed to use proper interviews with residents in preparing relocation information.[303] Later it managed to secure a packet of general brochures about the national urban renewal program.[304] Somewhat surprisingly, however, their correspondence with the Regional Office never elicited any reference to the *Urban Renewal Manual* and they continued their efforts in ignorance of it.

United as they were in a common goal and a shared view of the constitutional restrictions which existed on the power of eminent domain, the members of the UNA began to disagree on tactical issues. In the spring of 1967 when Area I was separated from Area II for individual consideration by the Council, unified action became increasingly difficult as two factions surfaced within the organization. One stressed totally truthful and lawful opposition, while the other was more militant and felt that the project must be stopped at all costs. The militant faction advocated attacking the plan, the NHA, Vanderbilt, and political officials whenever possible, apparently without regard for the absolute truth of their statements. The conservative faction became preoccupied with drafting a constitution and debated the propriety of incorporating the group. Just as the difference in approach of the two groups was becoming apparent, the NHA announced that the final plan for the university center urban renewal project would be presented to the Metropolitan Council for final action.[305]

C. *Passage of the Plan*

The compressed schedule which the NHA had proposed to secure passage of the university center plan by theMetropolitan Coun-

301. The residents' expressions of disapproval sometimes took unusual forms. In the spring of 1965 one resident, Fannie Mae Dees, placed a coffin in her front yard as a symbol of the death of the neighborhood and of the institution of private property.

302. *See* note 292 *supra*. Others were more concerned that they would not receive full value for their property. Nashville Tennessean, July 20, 1967 at 29, col. 7.

303. Letter from Celeste Albright to Regional Director of Urban Renewal, Jan. 18, 1967.

304. Letter and information from Harrison Knapp, Director of Consumer Relations, HUD to Celeste Albright, May 18, 1967.

305. Interview with Dr. Marie Means, Jan. 11, 1974.

cil consisted of a public presentation of the plan to the area residents at Eakin School on July 19th, a public hearing conducted by the Council on August 7th and a final vote on the plan by the Council a week later on August 15th. The July 19th meeting at Eakin School was apparently intended to take the place of the series of meetings that Charles Hawkins had originally promised the area residents. At the July 19th Eakin School meeting, the evening was dominated by the NHA staff presentation of the details of the plan. For the first time the full details of the final plan were announced publicly to a full group meeting of the area residents. Vanderbilt and St. Thomas Hospital were to attempt to acquire all the houses in their clearance area by private purchase, but if their negotiations failed the Nashville Housing Authority would intervene and take the remaining property through eminent domain proceedings for subsequent reconveyance to the two sponsoring institutions. A largely hostile audience of 500 people had jammed the school hall for the NHA's explanation of the plan and received its description of the plan with apparent concern.[306] At the conclusion of the presentation, one UNA member criticized the lack of citizen participation which had characterized the planning of the project. Another observed the unlikelihood of obtaining a fair price for their land. Others denounced what appeared to them an unconstitutional use of eminent domain to assure the success of the project.[307] No member of the audience however was able to question the technical aspects of the project because none had been introduced to the *Urban Renewal Manual* or its underlying requirements. Once again, moreover, one of the Commissioners of the NHA reiterated that the area had to contain at least 51% substandard housing to qualify for clearance.[308] With the false belief that there was only one clearance formula for the area, the members of the audience went home after three hectic hours of questioning and critical statements.

The August 7th public hearing—a hearing required by the *Urban Renewal Manual*—represented the area residents' final opportunity to influence the decision making process. The meeting had been shifted from the Metropolitan Council Chamber, which would have been filled to overflowing by the crowd of three hundred and fifty that attended the hearing, to the Municipal Auditorium

306. Nashville Tennessean, July 20, 1967, at 29, col. 7; Nashville Banner, July 20, 1967 at 1, col. 1.

307. *Id.*

308. Testimony of Councilman James Hamilton, *Trial Transcript*, 143 (1961).

with a seating capacity of over five thousand.[309] Rather than create a sense of the urgency of the situation by its size, the crowd of three hundred and fifty was dwarfed by the large auditorium. The members of the audience who wished to state their views were given a fairly limited opportunity to do so. Each speaker who wished to address the meeting was limited to five minutes of speaking time. Five minutes represented a brief opportunity to develop a concerted or detailed series of criticisms of a plan that had taken seven years to draft. Nor did the members of the University Neighborhood Association have the organizational skills to orchestrate speakers with a similar point of view. Instead the evening was characterized by a series of disparate and disjointed observations from residents and commercial land owners. The speakers against the plan continued to emphasize that the area was not a slum and that eminent domain should not be used in such a coercive fashion to favor private interest groups at the expense of other private landowners.[310] By the end of the meeting approximately equal numbers of speakers had urged the Council to accept or reject the plan.

At the conclusion of the hearing the members of the Metropolitan Council considered amendments to the plan. Councilman James Hamilton, spearheaded an attack on the plan with two amendments that would have made it impossible for the NHA to exercise effectively its eminent domain powers and that would have made it prohibitively expensive for Vanderbilt and St. Thomas to acquire land by negotiated sales. Hamilton first proposed an amendment which would restrict the NHA's power of condemnation to parcels of property needed for streets and other expressly public uses. When that motion was tabled, Councilman Hamilton then moved to amend the plan to the effect that all residential property in the project area be rezoned "commercial," thus raising property values in the project area and thereby forcing higher land acquisition prices. The motion failed, for lack of a second. After Hamilton's motions failed, Councilman Tandy Wilson then proposed two amendments, both of which were unanimously adopted. The first required that project area properties acquired by condemnation must be used for "educational, hospital, or research uses only." The second amendment required that any further changes to the UCUR

309. The meeting was shifted to the auditorium at the request of Councilman James Hamilton, the leader of the opposition to the plan.

310. Nashville Banner, Aug. 8, 1967, at 1, col. 8. Memorandum from John Acuff, Assistant Director of Urban Renewal to Gerald Gimre, Executive Director of the NHA titled "Notes on University Center Public Hearing" Aug. 9, 1967.

plan must be submitted to the Council for approval. As it happened, the requirement of Council approval for the plan was to form part of the basis for an attack on the project six years later. The evening closed undramatically, however, with a 26 to 6 vote of approval by the Council on the plan's second reading.[311]

With only a week before the Council was to consider the university center plan for the last time, the UNA members working with Councilman Hamilton made final plans for what they still confidently believed would be their successful opposition to the plan. As a preliminary matter the UNA circulated a petition which expressed opposition to the plan in simple terms:

> WE, the residents in the proposed University Urban Renewal Area respectfully demand that our homes be protected from condemnation by the Urban Renewal Agency for the purpose of making said properties available to Vanderbilt, St. Thomas or any other private group or developers by compelling the sale of said properties against the will of the owners.
>
> We unanimously hold that it is a great and dangerous wrong for property to be taken by eminent domain from one private owner and arbitrarily sold to another private owner.
>
> We therefore petition the Metropolitan County Council to reject the proposed University Urban Renewal Plan and restore to us the free enjoyment of our homes.[312]

Working from street to street throughout the entire project area, the UNA members amassed a total of seven hundred and twenty-seven signatures from the one thousand or so residents of the rehabilitation and clearance areas.[313] In addition Councilman Hamilton began to collect data which would demonstrate on a preliminary basis the inaccuracy of the NHA's finding that the area was eligible for urban renewal. Members of the UNA had noted that the NHA maps for the project area contained references to buildings thathad been

311. *Id.*; interview with Councilman James Hamilton, in Nashville, Tennessee, Jan. 28, 1974; interview with Councilman Tandy Wilson, in Nashville, Tennessee, Feb. 1, 1974. Several Councilmen felt that the meeting was designed more to inform the public than to obtain public input for shaping the plan. Interview with Councilman James Hamilton, Jr., Jan. 16, 1974; interview with Councilman Richard D. Taylor, former Councilman for the 25th District, who sponsored the project, Jan. 28, 1974. Other Councilmen indicated that they thought the public hearing was designed to obtain meaningful public participation into the adoption of the plan, but that the process failed for lack of an adequately organized and aroused opposition to the plan as proposed by the NHA. Interview with Tandy Wilson III, Councilman for the 33rd District, Feb. 1, 1974; interview with James R. Tuck, Councilman for the 34th District, Jan. 22, 1974. Perhaps the most arresting observation was that of Mr. Farris Deep, Director of the Metropolitan Planning Commission, who said, "The people were heard but not listened to." Interview with Farris A. Deep, Director, Metropolitan Planning Commission, Feb. 1, 1974.

312. Copies of the petition are on file at the Metropolitan Clerk's office.

313. *Id.*

demolished. Hamilton hired a local certified public accountant to investigate the discrepancy between the NHA maps and the buildings that were still standing in the neighborhood. The accountant's report demonstrated, correctly, that the NHA maps contained over fifty buildings that had been torn down and could therefore no longer be used to satisfy the eligibility requirements for the area. The accountant further sought to demonstrate that twenty-one percent of the houses in the entire area were substandard[314] and that therefore, under the criteria for clearance areas described to Mrs. Gee by Bruce Wedge, the Regional Director of Urban Renewal, and reiterated at the July 19th meeting, the area could not qualify for a clearance program.

On August 15, 1967, the Metropolitan Council met to consider the project proposal on third and final reading. Councilman Hamilton presented the Council with the petition signed by 727 of the area residents coupled with a plea that their wishes be respected. In a long and vigorous speech, Hamilton then denounced the potential use of eminent domain on behalf of Vanderbilt and St. Thomas. The Councilman argued that the power of eminent domain was to be limited to the taking of land for an actual public use. He argued against an extension of the power that would allow its use whenever the public interest might be served by securing benefits to mere private corporations, whether they were private universities or private hospitals. Hamilton warned the other councilmen that the liberal use of eminent domain on behalf of such institutions as Vanderbilt and St. Thomas was an infringement of private property rights that were guarded by the Constitution and whose continued violation might lead to the end of the institution of private property in its own right.[315]

Hamilton concluded by observing that even if the university center project could be constitutionally justified, it still would not qualify as an urban renewal project under the criteria announced on July 19th by the NHA. The Councilman introduced the testimony of his accountant, demonstrating that the NHA maps for the area inaccurately represented over fifty houses that were no longer standing. He argued that with the inaccurately depicted houses deleted from the total houses in the neighborhood, only twenty-one percent of the buildings were substandard and the area was therefore far

314. The building count was conducted by Clyde Watson, a certified public accountant, and his conclusions placed on file at the Metropolitan Clerk's office.

315. Copies of Councilman Hamilton's speech were later printed at the expense of the University Neighborhood Association.

short of the fifty-one percent necessary for a clearance area. He concluded that the Council could not endorse the proposed project without violating the Constitution and without falsely asserting that the area was qualified for clearance.[316] Hamilton's charge that the area was not qualified for clearance at last brought forth an accurate public explanation of the clearance formula which had been used to establish the eligibility of the area. John Van Ness of the NHA staff described the alternative clearance formula under which clearance areas for Vanderbilt and St. Thomas had been qualified. Van Ness observed that according to the *Project Area Report* which the NHA had placed on file with the Metropolitan Clerk two weeks before,[317] the institutional clearance area contained 28.4 percent substandard buildings and 26.1 percent buildings where demolition could be justified to remove blighting influences. The total of 54.5 percent more than satisfied the second *Urban Renewal Manual* clearance standard of 20 percent substandard buildings and an additional 31 percent of houses whose removal would rid the area of a blighting effect. The *Project Area Report* was nearly 500 pages long and filled with a series of statistical compilations based upon Clarke and Rauano's surveys of the area as well as other studies conducted in the neighborhood. Had Hamilton and the area residents mastered its complexities in the two weeks the survey had been on file with the Clerk's office, they might at least have averted what was for them a painful as well as embarrassing error.[318] As it was, however, with the assurance from the NHA staff that the area was properly qualified for clearance as well as rehabilitation, the Council resolved by a vote of 30 to 4 to accept the plan.[319] In adopting the resolution, the Council thereby adopted the NHA survey findings that the project area was sufficiently blighted to be appropriate for urban renewal, approved the plan for submission to HUD, and, empowered the NHA to contractually commit the city of Nashville to the project. It also concluded seven years of confu-

316. Nashville Banner, Aug. 16, 1967, at 1, col. 1.

317. The Metropolitan Clerk's date on the Report is not legible and the *Report* could in fact have been filed at any time between July 27, 1967 and August 4, 1967, when the *NHA Background Statement* was filed.

318. The announcement of the alternative clearance formula was a distinct shock to the residents who had attempted to master the urban renewal process and who, until that moment, were confident the project area was not qualified for clearance. Interview with Mr. and Mrs. Charles Adair, in Nashville, Tennessee, Jan. 30, 1974; interview with Celeste Albright, in Nashville, Tennessee, Jan. 7, 1974.

319. Metropolitan Council Resolution No. 67-284, Aug. 15, 1967. Councilmen Hamilton, Blankenship, La Penna and Phelps voted against the plan.

sion about the ultimate future of Nashville's Section 112 Urban Renewal Plan.

In the years before the Council resolved conclusively to undertake the university center project, the neighborhood residents had had four opportunities to listen to public descriptions of the plan. No doubt any of the four might have satisfied the statutory prerequisite that a public hearing be held on the project and almost any one of them might alone have satisfied the constitutional requirements of due process. Indeed two different federal judges indicated as much in their later opinions on the legal adequacy of the hearings that were given the area residents.[320] As a practical matter, however, it was not clear that the meetings gave the residents a particularly useful opportunity to influence the ultimate nature of the plan. The PTA meeting in November of 1965 presented an early plan which was 200 acres larger than the plan presented to the Council in 1967. If the memory of one interested participant may be credited, the clearance area for the project was not discussed at the time nor was there a direct opportunity to ask questions about individual parcels of property. The second meeting held for the residents, the meeting which occurred in September of 1966, was held for the residents of an area that was later eliminated from the eventual project. The third and fourth meetings held on July 19th and August 7th of 1967 took place in the shadow of a federally imposed deadline for which there could be no extension to accommodate changes in the plan. And unlike the merchants in the area who had the opportunity to consider and reject alternatives in the plan before it was presented to the Council,[321] the residents themselves did not appear to have the opportunity to discuss alternative possibilities with the NHA staff before the final plan for the area was drawn up. Thus while the area residents and homeowners had a number of occasions to listen to descriptions of the plan and to voice their opinions of them, it is not quite so apparent that their views were of any practical effect.

VI. Approval by HUD

Nashville's application for federal funds arrived at HUD's regional headquarters in Atlanta on August 18, 1967, in time to meet HUD's deadline for funding. HUD had provisionally determined as early as 1966 that the university center area was eligible for federal

320. Adair v. Nashville Housing Authority No. 5686 (M.D. Tenn. Mar. 5, 1974). Gardner v. Nashville Housing Authority, No. 6201 (M.D. Tenn., Sept. 30, 1971).

321. *See* note 251 *supra*.

funds[322] but when Nashville's formal application arrived on August 18th it began the process of determining officially and formally the university neighborhood's eligibility. The surveys by Clarke and Rapuano and the supporting material amassed by the NHA in its *Project Area Report* were reviewed by the planning and engineering section of the Atlanta office to determine their accuracy and reliability. The HUD staff was aware of the controversy in Nashville about the project's eligibility and as a result took more time than usual to verify the validity of the area inspection results.[323] The members of the University Neighborhood Association forwarded a sheaf of information which the staff duly considered in turn: a copy of Councilman Hamilton's speech on August 15, photographs of the houses in the neighborhood, a description of how citizens had been allegedly excluded from the planning process, and copies of the house count conducted by the certified public accountant hired by Hamilton.[324] Although the UNA members allegedly were still not aware of the *Urban Renewal Manual* standards and so could not directly rebut the findings of Clarke and Rapuano, the HUD staff called a special meeting with the staff members from Clarke and Rapuano and the NHA to review the residents' contentions.[325] The group inspected some thirteen records in detail and found that four were unsatisfactory since they claimed buildings were blighting influences warranting clearance for "inappropriate, vague reasons."[326] Moreover, HUD requested the NHA to revise its list of four "blighting influences" with a view to condensing them into two different categories and reducing the number of houses eligible for clearance on these grounds.[327] In addition the HUD staff inspected the NHA's plans for relocating displaced residents. HUD concluded that the NHA relocation program had weaknesses that needed to be cured but that the relocation resources for the project were adequate because of the "above average financial characteristics of the families

322. Testimony of John Edmunds, Assistant Regional Administrator for HUD, Trial Transcript, 288 (1971). HUD determined on a preliminary basis in January 1966 that the area was eligible for rehabilitation and clearance and informed NHA officials that Vanderbilt might demolish the houses it owned in the area without affecting its eligibility if the university documented the condition of the houses before they were razed. Charles Hawkins notified the Treasurer of Vanderbilt that the university might proceed with its demolitions. Letter from Charles Hawkins of NHA to Ed Gardner of Vanderbilt, Jan. 28, 1966.

323. Testimony of John Edmunds, Assistant Regional Administrator for HUD, *Trial Transcript*, 284-86, 306-08 (1971).

324. *Id.* at 306-08.

325. Interoffice memorandum of Regional HUD office, dated Sept. 20, 1967.

326. *Id.*

327. Undated HUD Planning Review Memorandum.

to be displaced . . . and the extensive availability of private resources."[328] After dispatching one of its attorneys to inspect the Nashville university area in person, the head of the HUD regional office, John Edmunds, recommended on October 26, 1967 that the project be financed.[329] On February 2, 1968 HUD's Washington office provisionally approved the project[330] and on March 19th, it formally announced its full approval of the project. Nashville was to receive a federal loan of some eleven million dollars and a federal grant of a similar amount with which to execute the project.[331] Mayor Beverly Briley of Nashville hailed the good news by observing with satisfacton that "we're getting several million dollars of street, highway, water and sewer improvements almost without cost to local government."[332]

HUD's official approval of the university center project for federal funding was the signal for the NHA to seal the final terms of its relationship with HUD and the sponsoring institutions. On April 16, 1968, the NHA contracted with HUD to employ the federal loan and grant in a manner acceptable to the federal authorities. On May 6th and 7th the NHA then signed separate contracts with Vanderbilt and St. Thomas establishing the formal relationship that would exist between the housing authority and the institutional sponsors of the project. In return for Vanderbilt's agreement to spend up to nine million dollars on acquiring and clearing lots in the clearance area, the NHA obligated itself to exercise its power of eminent domain in the event Vanderbilt could not complete its acquisitions through private purchases by the end of the year 1975.[333] St. Thomas in turn signed a similar agreement, allowing itself to rely upon the housing authorities condemnation powers in the event its negotiated purchases failed. With the signing of its contracts with HUD in April 1968 and with Vanderbilt and St. Thomas in May, the NHA formally launched the implementation of the Nashville University Center Urban Renewal Plan.

328. Memorandum from Roger Veriland to John Edmunds of HUD, Sept. 19, 1967.

329. Interoffice Memorandum of HUD Regional office, Oct. 26, 1967.

330. Nashville Tennessean, Feb. 3, 1968, at 1, col. 3.

331. The grant was for $11,268,685; the loan for $11,939,310.

332. Nashville Banner, Feb. 2, 1968, at 1, col. 8.

333. In the spring of 1974 Vanderbilt's expenditures on land acquisition in the area actually totaled over twelve million dollars. Interview with Dr. George Kaludis, Vice Chancellor for Operations and Fiscal Planning, in Nashville, Tennessee, Jan. 29, 1974.

VII. Implementation of the Plan 1968-1972

A. *Vanderbilt Expansion*

Vanderbilt University's formal binding commitment to join the University Center Urban Renewal Project in the spring of 1968 in some ways merely represented a new version of an old policy. Since 1956 Vanderbilt had pursued an explicit policy of land acquisition in the residential area to its immediate south.[334] By the time the urban renewal project was first suggested in 1961,[335] the university, using part of a living trust fund that had been donated by Mr. Harold S. Vanderbilt had acquired 109 parcels of land adjacent to the campus at a total cost of over two million dollars. During the planning years from 1962 to 1967 the university had continued to negotiate sales of land in the area that later became the urban renewal clearance area. By 1967 Vanderbilt had already purchased approximately sixty percent of the clearance area through negotiated sales,[336] a fact which weighed heavily with many of the Metropolitan councilmen who considered the merits of the plan.

Under the terms of its 1968 contract with the Nashville Housing Authority then, Vanderbilt was to continue the land acquisition policy it had already pursued for some twelve years. The University was to continue buying land on the open market for eight more years at the end of which time it would either have acquired the entire area or it could rely upon the NHA to acquire the remaining tracts through condemnation. In fact, the relative simplicity of the plan and the guarantee of a finite area by a fixed date were initial inducements in persuading university officials to endorse the project.[337] In addition, however, the senior members of the university's administration were firmly convinced that the project would be a benefit to Nashville as a whole, both in terms of the millions of dollars of virtually free civic improvements the project would generate and in terms of the increased service to the community that a larger university could provide.[338]

Thus in 1968 Vanderbilt simply continued to buy land on what it continued to believe was the open market around it. Not surprisingly the university was able to rely upon a skilled and veteran team

334. *See* text accompanying note 185 *supra*.

335. *See* text accompanying note 248 *supra*.

336. Nashville Tennessean, Aug. 6, 1967, at 4B, col. 1.

337. Interview with Dr. William Force, former Vice Chancellor for Business Affairs, Vanderbilt University, in Nashville, Tennessee, Jan. 21, 1974.

338. Interview with Chancellor Alexander Heard, Vanderbilt University, in Nashville, Tennessee, Feb. 22, 1974; interview with Dr. George Kaludis, note 333 *supra*.

of land purchasers. Gerald Henderson, the Business Manager of the University, had been charged with directing the practical details of buying houses for the university as early as 1956 and he continued to do so until his retirement in 1969. Henderson continued to direct the university acquisition program under the urban renewal project much as he had done before. He operated independently, within a somewhat flexible budget, purchasing homes at his discretion when they became available on the market. Throughout the years he had compiled a rather detailed file on each home in the area—including the floor plan, the type of heating system, and any particular defects—which he used to calculate the offers he made to the owners of the clearance property.[339] By the time of his retirement at the end of 1969, Henderson had supervised the purchase of nearly seventy percent of the land in the area. Upon Henderson's retirement, authority for directing acquisitions subsequently became vested in Vice Chancellor George Kaludis who directed the acquisition program through Henderson's former assistant John Robinson. By the summer of 1973 the university had succeeded in purchasing approximately 322 of the 490 parcels it was obligated to purchase by 1975.[340]

B. *Clearance Area Reaction*

To Vanderbilt, the passage of the university area urban renewal plan merely meant a continuation of its old pattern of acquisitions, but to the residents and homeowners of the neighborhood who had opposed the project, it meant the beginning of five years of determined opposition to Vanderbilt's expansion plans. The means by which the clearance area had been qualified by the NHA had stunned the members of the University Neighborhood Association who had been told of only one clearance area criterion by federal and local urban renewal officials. As one former member of the UNA bitterly observed of the experience later, "It would have seemed incredible that we would have been misled, even lied to, by our government. Had anyone told me of the true state of affairs, I wouldn't have believed it."[341] Not only did the UNA members feel that they had been lied to by their government, but a number of them also felt that implementation of the urban renewal plan was deeply repugnant to their own personal philosophies of private prop-

339. Interview with Gerald G. Henderson, Business Manager for Vanderbilt University until 1969, in Nashville, Tennessee, Jan. 31, 1974.

340. Interview with Vice Chancellor George Kaludis, note 333 *supra*.

341. Letter from Celeste Albright to R.M. Carmody, May 15, 1974.

erty.[342] The passage of the urban renewal plan meant that no longer would Vanderbilt buy on an open market from willing sellers as it had done in the past but on a closed market from sellers who had no other choice but to deal with the university. Worse yet, any landowner who resisted would suffer what to him would be the indignity of having his house condemned for use by another private party. Thus, while Vanderbilt was implementing its portion of the urban renewal plan, the members of the clearance area who had originally sought to block the project sought new ways to defeat the program.

For a period of two years the residents' opposition was centered in two small pressure groups. The University Neighborhood Association continued to survive as the vehicle for the more militant members of the neighborhood. In the meantime the more moderate residents incorporated the Committee for the Protection of Private Property (CPPP), which concentrated on the use of existing administrative and legal avenues to forward their goals of forcing Vanderbilt to negotiate the purchase of their property in an arms-length transaction and denying the university the ultimate use of the NHA's power of eminent domain. Shortly after Council approval of the project, CPPP members expressed interest in a lawsuit and were advised by one member's lawyer that the cost might be prohibitive. He also indicated that they would not have standing to sue until they had exhausted their administrative remedies and the NHA actually had instituted condemnation proceedings against their property. Relying on this advice, the CPPP concentrated on compiling information on clearance project eligibility criteria and pursuing their administrative remedies.[343]

1. *Eligibility Criteria*

Having been sharply reminded of their ignorance of the urban renewal process by the means in which the clearance area had been qualified for federal funding, the area residents mounted an effort to learn the exact criteria that had been used by Clarke and Rapuano in conducting its survey. In addition, the residents sought access to the evaluation sheets Clarke and Rapuano had prepared for their houses and a list of all houses that had been found to be "substandard warranting clearance." Without exception, however,

342. *See* note 292 *supra*.

343. Interview with Dr. Marie Means, note 292 *supra*; interview with Mr. Elbridge Wright, note 292 *supra*; interview with Mr. Robert Gardner, note 292 *supra*; interview with Mr. and Mrs. Adair, note 292 *supra*.

the residents' requests for information were made after October 26, 1967, when John Edmunds had recommended to the Washington office of HUD that the project be funded. Nor was the response of HUD and the NHA sufficiently rapid to allow the residents to take advantage of the findings they were able to make. The cumulative effect was that of a group of citizens trying to master the workings of an administrative agency well after the process which had affected them was beyond effective appeal.

The residents began on November 22, 1967, with a request to HUD for a list of the 235 houses that had been found to be structurally substandard.[344] Although such a list might have been of value to both the housing authority as well as any group that sought to determine the accuracy of Clarke and Rapuano's survey, the NHA had not requested Clarke and Rapunao to draw up such a compilation, nor did it have one of its own. In consequence, letters to HUD and the NHA throughout 1968 produced no positive response from either.[345] In the end the CPPP was forced to prepare its own list of houses and submit it to the NHA for confirmation. The CPPP prepared its list in July of 1969, submitted it to the NHA in August and four months later in November received a verified list.[346] The entire process had taken two years to complete.

The CPPP met with little more luck with its request for copies of the evaluation sheets which Clarke and Rapuano had compiled for each house. The residents had first unsuccessfully requested the NHA to release the individual forms prior to the Metropolitan Council meeting in August 1967.[347] These requests were renewed

344. Letter from Dr. Marie Means to John Edmunds, HUD Atlanta, Nov. 22, 1967.

345. Letter from Dr. Marie Means to Charles Hawkins, NHA, Jan. 16, 1968; letter from Charles Hawkins to Dr. Marie Means, Jan. 25, 1968; letter from Elbridge Wright to Gerald Gimre, NHA, July 12, 1969; letter from Gerald Gimre to Elbridge Wright, July 17, 1969.

346. On July 17, 1969, two years after the Metropolitan Council had approved the project, the NHA offered to allow the members of the CPPP to copy a map of the project area and derive from it their own list of the substandard houses in the area. The CPPP members received the map on July 22, 1969, and by August 18th had completed their list of substandard houses which they submitted to the NHA for confirmation. The NHA kept the list from August 19th to November 21st at which time they returned a verified copy. Letter from Elbridge Wright of CPPP to Gerald Gimre of NHA, July 12, 1969; letter from Gerald Gimre of NHA to Elbridge Wright of CPPP, July 17, 1969; letter from Elbridge Wright of CPPP to Gerald Gimre of NHA, Aug. 18, 1969; letter from Gerald Gimre of NHA to Elbridge Wright of CPPP, Aug. 20, 1969; letter from Elbridge Wright of CPPP to Gerald Gimre of NHA, Sept. 29, 1969; letter from Charles Hawkins of NHA to Elbridge Wright of CPPP, Nov. 21, 1969.

347. Interviews with Mr. and Mrs. Adair, Jan. 30, 1974, Mr. Wright, Jan. 23, 1974, Mr. Gardner, Jan. 22, 1974, and Miss Albright, Jan. 7, 1974.

again in late 1967[348] and early 1968,[349] but it was not until after HUD had approved the plan that the NHA began to comply with the residents' demands. On April 9, 1968, the NHA sent summaries of the ratings for three properties to three owners in the area but it refused to send copies of the actual forms prepared by Clarke and Rapuano.[350] In June 1968 the President of the CPPP expressed dissatisfaction with the NHA's unwillingness to make the actual survey results available to all homeowners on a systematic basis.[351] At length on July 10, 1968, the NHA agreed to make summaries of the survey forms available to all individual property owners who applied for them in person at the housing authority's office.[352] During the following two weeks, approximately fifty owners requested and received summaries of the building conditions survey form as completed by the NHA's consultant.[353] One resident demonstrated, at least to his own satisfaction, how the summaries might have been used earlier when the plan was still under political and administrative consideration by hiring inspectors to investigate his "inadequate" wiring and plumbing.[354] The inspectors subsequently swore that the wiring and plumbing were in their opinions at least entirely adequate and in compliance with the building codes.[355] Yet while the summaries of Clarke and Rapunao's findings were made available on a systematic basis in July of 1968, the original survey sheets were not made available. According to one property owner, the original surveys were first given to her in 1971 and only then as a result of discovery proceedings in a lawsuit.[356]

The CPPP met with similar difficulties when it tried to deter-

348. Letter from Fannie Mae Dees to Charles W. Hawkins, Dec. 30, 1967 (repeating a phone request made several months before). Reply letter from Charles W. Hawkins to Fannie Mae Dees, Jan. 16, 1968 (general description of deficiencies listed, but no survey sheet).

349. Interview with Celeste Albright, Jan. 7, 1974.

350. Letter from Charles Hawkins of NHA to Celeste Albright, April 9, 1968 (the summaries related to the Albright, Adair and Dees properties).

351. Letter from Dr. Marie H. Means to Dr. H.B. Crouch, Vice-Chairman, NHA, June 24, 1968.

352. Letter from Gerald Gimre of NHA to Dr. Marie Means, July 10, 1968.

353. Inspection of requests submitted to NHA and offered in evidence in the Adair & Gardner lawsuits.

354. Interview with Mrs. Charles Adair, in Nashville, Tennessee, May 26, 1974. The actual survey sheets were made available through discovery proceedings.

355. Interview with Mr. Gardner, Jan. 22, 1974. NHA staff members have observed that the reason why the original Clarke and Rapuano survey sheets were not released sooner was to prevent the confusion and misunderstanding that would result if the area residents believed that the survey sheets were formal code inspection reports with which the homeowners would have to comply. Interview with John Acuff, former Assistant Director of Urban Renewal, NHA, May 1, 1974.

356. Interview with Mrs. Charles Adair, note 354 *supra*.

mine the definition of the term, "substandard." Although one member of the militant UNA obtained access to an *Urban Renewal Manual* during the Fall of 1967, the members of the CPPP did not learn of its existence until sometime in 1968.[357] When the CPPP wrote the NHA in April 1968 and requested their criteria for the substandard ratings, the NHA's reply stated only that the information was contained in the copy of the *Project Area Report* which they had loaned to the CPPP.[358] The *Project Report*, however, offered only a generalized definition of "substandard" and did not refer to the *Manual* at all.[359] Later, in 1969, the CPPP requested from HUD central offices in Washington, the working definition of a substandard building and the instruction sheets containing the criteria for a substandard rating.[360] HUD replied that the legal definition varied and was contained in locally adopted codes and ordinances. Its reply did list some general HUD characteristics for a substandard rating which were quoted directly from the *Manual*, but again the letter made no reference to the source.[361] Finally a letter in June, 1969 to HUD's Regional Office asking for information on how to count substandard buildings to determine project eligibility was answered fully in August with a complete reference to the *Manual* and its standards.[362] Although it was no doubt understandable for urban renewal personnel to assume familiarity with the *Manual* and its standards, again two years filled with correspondence had passed before the residents of the neighborhood received their first official reference to the source of standards by which their homes had been judged.

2. *Administrative and Legal Remedies*

The members of the CPPP experienced similar difficulty in determining whether they had exhausted their administrative remedies and so could proceed to file suit against the project. The President of the CPPP first inquired directly of the Secretary of HUD in November 1968 whether there were any further avenues of adminis-

357. Interviews with Mr. and Mrs. Charles Adair, Jan. 30, 1974 and Celeste Albright, Jan. 7, 1974; *see* note 296 *supra*.

358. Letter from Charles W. Hawkins of NHA to Elbridge Wright, Apr. 9, 1968.

359. "Substandard" was defined as "deteriorated beyond the costs of reclamation." Project Area Report, Code R212, 6 (1967).

360. Letter from Elbridge Wright to Secretary of HUD George Romney, May 24, 1969.

361. Letter from Ralph L. Herod, Acting Deputy Assistant Secretary for Renewal Assistance to Elbridge M. Wright, July 1, 1969.

362. Letter from Elbridge M. Wright to John T. Edmunds, June 18, 1969; interview with Elbridge Wright, Jan. 23, 1974.

trative appeal.[363] A similar inquiry was made of the regional office in Atlanta in December.[364] Somewhat surprisingly neither inquiry received a direct answer but instead referred the members of the CPPP to the NHA.[365] Yet another request was made to HUD in Washington in August 1969 for information on administrative remedies.[366] At length in September 1969 HUD notified the CPPP that it had exhausted its administrative remedies and had no further administrative recourse.[367]

With the knowledge that they had exhausted their administrative remedies the CPPP members began to contemplate legal action as the next step in their efforts to prevent the use of eminent domain to support Vanderbilt's expansion. They were uncertain about their legal standing because the NHA had not moved to condemn any of their property. Moreover, rightly or otherwise, they were concerned about the possibility of retaining a Nashville lawyer because of what they regarded to be high legal fees and the influence of Vanderbilt within the Nashville bar.[368] As a result, some CPPP members contacted the American Landowners Society to exchange information about urban renewal projects in Nashville and throughout the United States.[369] During these exchanges, the members learned of Mr. J. Granville Clark, an attorney in nearby Russellville, Kentucky, and they invited Mr. Clark to address the CPPP in November, 1969.[370] At the meeting, Clark voiced his concern about the area residents' lack of legal standing since the NHA had not thratened

363. Letter from Marie Means of CPPP to Secretary of HUD Robert Weaver, Nov. 3, 1968.

364. Letter from Marie Means of CPPP to John Edmunds, HUD Atlanta, Dec. 28, 1968.

365. Secretary Weaver's office informed the residents the project had been approved for funding in March 1968 and that they should address any further inquiries to John Edmunds of the Atlanta office. John Edmunds in turn added that the project had entered the execution phase on March 20, 1968. To the direct inquiry whether there were any other administrative remedies the residents should pursue, Edmunds replied that the residents should address their comments to Gerald Gimre of the NHA if they "object to any specific project activity." Letter from Mr. McCabe of HUD Washington to Marie Means, Nov. 22, 1968; letter from John Edmunds of HUD Atlanta to Marie Means, Jan. 7, 1969.

366. Letter from Elbridge Wright of CPPP to Secretary of HUD George Romney, Aug. 3, 1969.

367. Letter from Robert C. Scalia, HUD Washington, to Elbridge Wright, Sept. 26, 1969. This may have been the response to Mr. Wright's letter of Aug. 3, 1969. Note 367 *supra*. HUD's letter stated that HUD considered the approval of the plan fair and proper.

368. One lawyer allegedly told the Adairs that it would take a legal fee of $50,000 to fight the plan. Interview with Mr. and Mrs. Charles Adair, Jan. 30, 1974. Approximately 50% of the estimated 1000 lawyers in Nashville are Vanderbilt graduates. Interview with Anne Brandt, Placement Director, Vanderbilt Law School, May 15, 1974.

369. Interviews with Mr. and Mrs. Charles Adair, Jan. 30, 1974 and Dr. Marie Means, Jan. 11, 1974.

370. Interview with Dr. Marie Means, Jan. 11, 1974.

the use of eminent domain, but he later agreed to represent Mr. and Mrs. Charles Adair in an action to preserve their rental property in the urban renewal area.[371] An action for an injunction and damages was filed on March 26, 1970 after the Adairs had received an NHA letter threatening condemnation of their property for a right of way as of April 1.[372] Nearly a year later, on January 20, 1971, Mr. and Mrs. Robert Gardner also filed suit.[373]

C. *Formation of the PAC—The Political Strategy*

In the fall of 1970 the residents' resistance to the university area took a sharply political tack with the formation of the Project Area Committee (PAC). The Project Area Committee was a HUD institution created in 1968 for all new urban renewal rehabilitation projects. PAC members were elected by residents of the urban renewal area and their official function was to serve as a communications link between the residents of the area and the staff of the local public agency charged with urban renewal responsibilities, in Nashville's own case the NHA. HUD did not require Project Area Committees for projects initiated before 1968 but the members of the CPPP learned of the new institution, endorsed it and requested that the NHA authorized a PAC for the University Center Project.[374] After some initial hesitation the NHA agreed[375] and in September 1970 the area residents met at Eakin School to elect a Project Area Committee. The following month the new members of the committee selected a chairman, Mr. Joseph H. Johnston. Johnston was a resident of the Vanderbilt clearance area and a part owner of a house that his family had built in the area some thirty-four years before.[376] Johnston provided the PAC leadership at a time when the

371. Interview with Mr. and Mrs. Charles Adair, Jan. 30, 1974.

372. *Id.* The letter provided the Adairs with sufficient legal standing to file suit.

373. Interview with Mr. Gardner, Jan. 22, 1974. Mr. Gardner stated that he joined the suit because he was told that any dissatisfaction with the eventual NHA appraisals for eminent domain would have to be settled in court anyway. In addition, Mr. Elbridge Wright brought yet a third action against the university and the housing authority.

374. HUD LPA LETTER No. 458, *Increased Citizen Participation in Urban Renewal Projects*, at 1 (June 24, 1968).

375. The hesitation was ended by the arrival of Mr. Jack Herrington as the new Executive Director of the NHA. Formerly Assistant Regional Administrator for HUD in St. Louis, Herrington welcomed citizen participation in urban renewal projects and considered a Project Area Committee for the University Project a useful development. The approval of the University area PAC was one of his first acts upon assuming office in September 1970.

376. Johnston occupied an unusual role with the university, serving as an employee of its medical facilities, then as an employee of one of its research institutes and finally becoming a student in its law school.

CPPP and the UNA had begun to lose whatever immediate effectiveness they might once have had before.

Unlike the CPPP and the UNA, which had concentrated on gathering information about the administrative and political process that had affected their lives, the PAC under Johnston emphasized overt political action. From the outset the PAC worked closely with Councilman James Hamilton, the continuing opponent of Vanderbilt's clearance program, in an effort to induce the Metropolitan Council to unilaterally amend the urban renewal plan it had originally approved for the area in August 1967. In pursuing its political tasks, the PAC members had at least two advantages that the earlier citizens' interest groups did not have. In the first place the PAC had been organized by the NHA in accordance with HUD regulations and so had an aura of official legitimacy that the CPPP or the UNA never possessed.[377] In the second place, the PAC came into existence just as it became clear to the area residents that the project plan could be amended in a fundamental fashion.

This last bit of knowledge was important. The area members had often been told that the urban renewal plan for the university area was fixed, final and beyond change. They had been led to believe that once Metropolitan Nashville and HUD had approved the plan and the NHA had entered into bilateral contracts with HUD and the sponsoring institutions, the plan could no longer be changed.[378] As a consequence there had been little apparent reason for the members of the CPPP or UNA to contemplate political action since their activities apparently would not result in alternations within the university center plan. The legal and practical truth of the matter was somewhat different. Legally, the plan could be subject to amendment by an agreement among HUD, the NHA and the sponsoring institutions to amend the contracts that existed between them. In addition, the approval of the Metropolitan Council was considered necessary because the Council, although not a party to the contracts, had authorized their creation and was bound by them.[379] The negotiating process whereby the plan might be amended was cumbersome and time consuming but as a matter of

377. In addition the NHA gave the PAC office space, a budget and a coordinator, Mr. David Morton, to serve as liaison hetween the NHA and the PAC.

378. They were not alone in their belief in the essentially immutable nature of the project. Chancellor Heard of Vanderbilt later recalled that he received a similar response when he inquired whether the university might initiate changes in the project to more adequately reflect the interests of the residents. Interview with Chancellor Alexander Heard, Feb. 22, 1974.

379. Interview with Mr. Joseph Lackey, Jr.' counsel for NHA, Jan. 24, 1974.

legal fact, it did exist. Moreover, in the spring of 1970, immediately before the PAC was formed, the area residents observed a practical example of how the plan might be amended in a very basic manner. St. Thomas Hospital announced its intention to abandon altogether its role as a sponsoring institution of the urban renewal plan.[380] St. Thomas would no longer participate in the project but instead would acquire a site for its new hospital by private negotiation in an area some miles away from the urban renewal neighborhood. The decision by St. Thomas to terminate its contract with the NHA, its obligations to the Metropolitan government and its commitment to HUD constituted an amendment of the urban renewal plan of the first order. Yet to the enlightenment of the area residents who believed that amending the plan was virtually impossible, the Metropolitan Council, the NHA and HUD all consented to the withdrawal.[381]

The decision by St. Thomas to abandon its role in the urban renewal plan left Vanderbilt University as the sole institutional sponsor of Nashville's Section 112 project. More importantly, perhaps it provided the PAC with a means to attack the official plan for Vanderbilt's clearance area. For the next three years, using all the local and national publicity that it could generate, the PAC sought to induce the Metropolitan Council to amend the urban renewal plan for the area in such a fashion as to protect what it conceived to be the private property rights of the area residents. During the first year of its existence in 1971, the PAC worked closely with Councilman Hamilton and actively supported his efforts to undercut the plan for the urban renewal area. By the end of the year the alliance between the Councilman and the PAC had scored what they regarded as three distinct gains. The gains came in the form of three amendments to the plan which deleted particular tracts of land from the project area and forestalled the implementation of a street-closing which was required by the terms of the original plan. The first deletion was that of a local garage outside the Vanderbilt clearance area which was to be acquired by the NHA and demolished to make room for a parking lot for the benefit of local merchants. In January of 1971 Councilman Hamilton proposed that the Metropolitan Council should amend the plan in order to leave the

380. St. Thomas actually announced its decision on December 31, 1969. The Metropolitan Council did not formally amend the project plan until March and April of 1970 at which point the area residents began to realize that the plan could be altered in a significant fashion.

381. Interview with Joseph Johnston, Chairman, Project Area Committee, Feb. 22, 1974.

garage in place. With the active lobbying of the members of the PAC to support him, Hamilton arranged for the other Council members to hear a moving plea by the owner of the garage in support of its deletion from the plans for the area. The garage owner, Mike Lookofski, a Russian emigrè who had owned the building since 1926, went directly before the Council and in broken but effective English pleaded for the right to continue his ownership uninterrupted by urban renewal plans. Lookofski argued that the garage served the surrounding community just as a hospital did and that it had as much right to remain in place.[382] It was an effective, emotional appeal, which the new Executive Director of the NHA, Jack Herrington, determined not to resist in an effort to maintain amicable relations with the members of the PAC.[383] With the acquiescence of the NHA, the Council voted to delete the building from the project acquisition area and the NHA forwarded the amendment to HUD for its approval.

Emboldened by the successful Lookofski deletion, Councilman Hamilton later proposed that a house and lot owned by J. Paul Gregory should also be deleted from the plans for the area. The Gregory property was not a part of the Vanderbilt clearance zone but instead was part of a parcel that the NHA had contracted to sell to Senior Citizens Incorporated for a private apartment house for the elderly. Like the Lookofski property, however, the Gregory house was to be levelled for an asphalt parking area. In the face of vigorous opposition from the NHA, whose attorney had advised them that they were legally obligated to convey the property, the Council once again responded to Hamilton and the PAC's skillful presentation of the case and voted to delete the parcel from the plan.[384] This time, however, the NHA refused to acquiesce in the Council's action and refrained from sending it to HUD. Instead the NHA later successfully brought a lawsuit for a declaratory judgment

382. "Having a garage for the community is just like having a second hospital for the community. If you get sick, you go to the hospital in the community hut if your car gets sick, you need to take it to the community garage." Mike Lookofski, as quoted in the Nashville Tennessean, Jan. 10, 1971, at 1, col. 1.

383. "While in my view I think the project would be better without it [the garage], I feel there are higger issues than this facing us." *Id.*

384. The PAC wrote letters to memhers of the Council, actively seeking their support for the Gregory amendment. At the 3rd and final reading on the bill, one representative from the PAC and one from the Senior Citizens addressed the Council for five minutes. Councilman Hamilton then followed with an hour long peroration on the project as a whole, urging acceptance of the amendment as a means of making a had plan marginally better. Interview with Councilman James Hamilton, Jan. 16, 1974; interview with Joseph Johnston, Chairman, PAC, Feb. 22, 1974; resolution No. 71-1402 of the Metropolitan Council, May 18, 1971.

on the issue of whether the Council could lawfully act in such a unilateral fashion.[385]

In addition to their successful support of Councilman Hamilton's amendments to the plan, the PAC members raised their own successful challenge to the plan in a way that directly affected the interests of Vanderbilt University for the first time. The Vanderbilt clearance area was divided into two sections by a remaining portion of the old Natchez Trace Road which survived as a frequently traveled route from Vanderbilt to the suburbs adjoining and beyond the campus area. According to the original map of the project area, Natchez Trace was to be permanently closed to traffic to allow Vanderbilt to unite its two clearance areas. Although there had been no active move as yet to close the street, the vice chairman of the PAC, Mr. Harold Steele, was determined to make an issue of the closing. A printer and layout artist, Steele prepared a flyer which the PAC distributed to businesses, motorists, and residents that might be affected if the road were closed. Approximately 400 individuals attended a subsequent public meeting which the PAC organized. The plan was attacked by speakers representing local businesses, churches, and the PAC, and Councilmen Hamilton and Sharp informed the audience that they would propose an amendment to delete the planned closing of Natchez Trace at the next meeting of the Metropolitan Council. Having created a newsworthy event, PAC then persuaded Nashville's educational television station to cover the ensuing Council meeting in January, 1972. For the first time in its history, a Metropolitan Council meeting was subjected to continuous live television coverage and the Council members responded publicly as the PAC had hoped they would do. Not only did the Council vote to delete the planned Natchez Trace closing from the plan and thereby perhaps inconvenience Vanderbilt in the development of its clearance area,[386] it also refused to reconsider its deletion of the Gregory property as well, despite pressure from the NHA to do so.[387]

The PAC's use of television to publicize the Council's actions represented a new technique in the residents' efforts to block the

385. Nashville Housing Authority v. Romney, ___ F. Supp. ___ (1973).

386. Senior officials at Vanderbilt were uncertain about the merits of the plan which called for the road to be closed and declined to attend the meeting. Interview with Vice Chancellor George Kaludis, note 333 *supra*.

387. Interview with Joseph Johnston, Chairman of the PAC, Feb. 22, 1974; interview with David Morton, PAC Coordinator, Jan. 10, 1974; Nashville Tennessean, Dec. 15, 1971, at 1, col. 1. The decisive Council action was taken on March 7, 1972. Resolution No. 72-95 of the Metropolitan Council, March 7, 1972.

urban renewal plan. Throughout the course of 1971 the PAC members were sensitive to the importance of publicity to their efforts and consciously sought to exploit it. In the spring of 1971 while on a trip to the East Coast, the Chairman of the PAC, Joseph Johnston, contacted the Washington Bureau of the *New York Times* to tell it about what he called the Vanderbilt clearance program and to mention the lawsuit that had been recently filed by Mr. and Mrs. Adair and by Mr. and Mrs. Gardner. The *Times* responded by sending a reporter to cover the Nashville urban renewal court case in August 1971. Just before the suit began, Johnston called the *Newsweek* regional office in Atlanta to tell them of the impending trial. Although *Newsweek* was initially reluctant to cover the story because of its apparent lack of national interest, the fact that the *New York Times* would also report the case swayed *Newsweek* to report it as well.[388] The ensuing article published by *Newsweek* in October of 1971 was highly critical of Vanderbilt's role in the project, accusing the university of turning a middle class neighborhood into a slum through its land acquisition techniques.[389] Despite a firm denial of the article's allegations by Chancellor Heard of Vanderbilt and support of his position by a federal district judge,[390] *Newsweek* defended its story and its conclusions. Locally the *Newsweek* article was regarded by the PAC members as a public relations setback to the university and Johnston used reproductions of the story to secure local news coverage of what he had helped make an item of national interest.

In the course of 1971 the working alliance between Councilman Hamilton and the members of the PAC suffered only one setback. In the summer of 1971 Hamilton had proposed an unusual amendment to the Charter of Metropolitan Nashville. Hamilton's charter amendment would require a referendum on any proposed urban renewal project in the city. The referendum would be held in each councilmanic district affected by the plan and the plan could not be instituted in any district that failed to accord it approval by a majority of those voting. In effect Hamilton's proposal would ensure

388. Interview with Joseph Johnston, Chairman of the PAC, May 24, 1974.

389. NEWSWEEK, Oct. 11, 1971, at 105. Mr. Robert Gardner was pictured in front of his home with the caition, "Not Exactly a Slum." The article criticized what it called "windshield surveys" to qualify the neighborhood for clearance and a purchasing program that it said provided for little after-purchase maintenance and added to the deterioration of the area. *Id.*

390. Chancellor Heard observed that a federal district judge had recently found the criticisms of the university's role in the project to be without merit. NEWSWEEK, Nov. 1, 1971, at 4.

that the future of each urban renewal plan in Nashville would depend upon the people most directly affected by the plan. In addition, the proposed amendment sought to inhibit urban renewal projects by requiring that any urban renewal proposal that failed such a referendum could not be reconsidered for two additional years and that no more than two such referenda could be held every five years in each district.[391] Not surprisingly the PAC vigorously supported the Hamilton proposal and actively lobbied for it among Council members.[392] What was surprising, however, was the Council's response to the measure. Increasingly sensitive to the opposition to urban renewal which had grown up in both the Edgehill and University Center projects and no doubt weary of constant debates on urban renewal plans, the Council endorsed the proposal on June 15, 1971 by a one-sided vote of 32 to 4.[393]

The issue was by no means finally decided by the Council vote, however. Charter amendments were subject to public ratification and the NHA launched a vigorous campaign to ensure that the bill would be defeated at the election to be held August 26.[394] The NHA staff was understandably concerned that the measure would jeopardize their ability to secure future urban renewal funds since the fate of any plan could never be entirely certain if it were ultimately subject to residential approval.[395] Working closely with members of the Chamber of Commerce and other professional groups of builders and realtors, the NHA organized and directed an intensive media campaign of newspaper and radio advertisements against the proposal.[396] The PAC could not begin to match resources with professional commercial groups and the plan was defeated by a comfortable margin of 6,000 votes.[397] Nevertheless, although the members of

391. Nashville Banner, July 15, 1971, at 6, col. 2.

392. Interview with Joseph Johnston, Chairman of PAC, Jan. 9, 1974.

393. *See* note 391 *supra*. As one Councilman who voted against the proposal observed, "The image of urban renewal is bad in this community. Apparently the Housing Authority has not done its homework quite as well as a lot of us would like to see it done. Urban renewal has become a sore subject in Nashville in the past few months." Nashville Banner, July 15, 1971, at 1, col. 1.

394. Joseph Lackey, Jr., counsel for the NHA, argued that the amendment should be submitted to the Charter Revision Commission, a move that would have effectively killed the proposal since there would be insufficient time between July 15 and August 26 for the Commission to give the amendment the amount of consideration technically required by law. Nashville Tennessean, July 16, 1971, at 12, col. 1.

395. John Edmunds of HUD, however, was not prepared to say the proposal would affect federal funding of future projects. Nashville Banner, July 15, 1971, at 1, col. 1.

396. Interview with John Acuff, then Assistant Director of Urban Renewal NHA, May 1, 1974. "We did everything we could to defeat it."

397. Nashville Tennessean, Aug. 27, 1971, at 1, col. 3.

the PAC had been defeated in a city-wide contest, the Council's willingness to endorse the amendment was to them a comforting sign for the future.

VIII. The Last Hurrah 1972-1973

The PAC reached the peak of its political influence in the summer of 1973 when for a brief moment it directly and successfully challenged Vanderbilt University's plans for the clearance area into which it was to expand. The PAC did so by employing the same tactics it had exercised throughout 1971 and part of 1972. Once again Councilman Hamilton introduced a measure before the Metropolitan Council to delete parcels of land from the urban renewal area and once again the PAC supported him with active lobbying and an organized group of speakers to address the Council. As it had done in the past, the Council initially voted to support the area residents' position. On this occasion, however, Vanderbilt University and the Nashville Housing Authority joined together to mobilize their own political resources and in a considerable display of strength not only induced the Council to reverse its position but broke the PAC as an effective force in Council affairs.

The contest between the PAC members and the university was precipitated by the presentation to the Council of the university's own plan for developing the 110 acre clearance area. In order to secure credits for the NHA from HUD for the property it had purchased immediately outside the urban renewal area, Vanderbilt had to secure Council and HUD approval of its plan for redeveloping the entire area.[398] Although the university had to get Council approval for any amendments it might wish to make to its plan for developing the clearance area, in this case university officials proposed its plan in order to secure additional benefits for the community at large as well. In fact the university had not been altogether certain as to how it would incorporate the urban renewal clearance area into its plans for the future. In the fall of 1971 the Chancellor had requested that the Council delay implementation of utility improvements in the area until the university's newly created Office of Campus Planning could revise the then outdated plan that had been approved by the Council in 1967.[399] Throughout 1972 therefore the Vanderbilt plan-

398. 42 U.S.C. § 1463 (1970).

399. Although the university had begun to systematically acquire land for expansion purposes in 1956, it did not develop its own internal system for determining how to use the land until much later. During the late 1950's and through the mid-1960's the university had relied upon outside planners like Clarke and Rapuano to draft plans for the use of the

ning staff had worked closely with the NHA and the Metropolitan Planning Commission in developing a plan that would be sufficiently definite to allow a projection of its utility needs for the future as well as sufficiently flexible to allow the University to change its construction plans in the face of changing circumstances.[400] The resulting Vanderbilt plan for the expansion area was completed by the end of 1972, to be introduced before the Council in the summer of 1973.

The university's administration went to some lengths to ensure a favorable public reaction to the new plan. In March of 1973, university officials requested the PAC to arrange a meeting at which the plan could be explained to the area residents. The resulting meeting drew three to four hundred participants and was so successful it provoked the comment that similarly informative presentations in the past might have avoided much of the bitterness that had been directed towards the university.[401] In addition to meeting with the area residents, the Office of Campus Planning invited all the Councilmen to the campus to view the plan and to hear its details explained by the planning staff. During the course of March and April approximately one quarter of the Councilmen accepted the invitation.[402] While the Councilmen were introduced to the plan university officials explored satisfactory means of formally introducing the plan before the Council in the most favorable manner possible. Vanderbilt was at an initial practical disadvantage because the entire university area had been redistricted to fall within Councilman Hamilton's councilmanic district. Under the local cus-

expansion area and had presented a Clarke and Rapuano plan to the Council in 1967 for its proposed use of the area. After the Clarke and Rapuano plan had been criticized by both university officials and other planners during the late 1960's, the university administration moved to establish its own Office of Campus Planning in 1971 under John Waterman, a professional planner and architect. Waterman's first task was to use the year's grace period provided by the Council to develop a basic plan for the expansion area that would allow the city to implant major utilities in the area and at the same time give the university an opportunity to develop the area in accordance with later needs. The resulting plan was presented to the Council in 1973.

400. Interview with John Waterman, Director of the Office of Campus Planning for Vanderbilt University, in Nashville, Tennessee, Jan. 15, 1974. From the outset the staff members of the planning office sought to work with local government agencies in an explicit attempt to anticipate and prevent any problems that might be caused to the community by the university and its expansion.

401. Most of the residents were impressed with the plan and felt that Vanderbilt might have avoided much of the dissension and animosity directed towards the school if it had used the same approach several years earlier to explain its plans to the community. Interview with Joseph Johnston, Chairman of PAC, note 387 *supra*.

402. *Id.*; interview with Dr. George Kaludis, Vice Chancellor for Operations and Fiscal Planning, Vanderbilt University, Jan. 29, 1974.

tom of "councilmanic courtesy," Hamilton alone normally sponsored the bills that directly affected the residents in his district and other councilmen refrained from introducing any such bills that he opposed. Since Hamilton had fought Vanderbilt's urban renewal expansion since 1967, it was unlikely that the university could induce him to introduce its plan for the area. Moreover, other councilmen were reluctant to invade Hamilton's district by proposing bills for his district that he opposed because Hamilton might well return the favor in the future. In consequence William Rutherford, Councilman at large, introduced the Vanderbilt development plan on June 5, 1973 as an amendment to the original urban renewal plan approved by the Council in August 1967.[403] The bill passed on first reading and a public hearing on the revised plan was scheduled for July 3rd.[404]

While Vanderbilt was preparing for its oral presentation of the development plan for July 3rd, Councilman Hamilton and the PAC began to organize its last major political attack on the university center program. Once again the PAC persuaded the local educational television station to borrow the visual equipment necessary for a live broadcast of the Council's hearings.[405] Once again the PAC members organized a series of speeches to be delivered by the area residents in defense of their homes. And once again Hamilton was prepared to introduce a bill which would further restrict the urban renewal plan for the area. As the second reading on the Vanderbilt development plan began, Councilman Hamilton proposed to amend the Vanderbilt plan by deleting from its acquisition program all the tracts of land which Vanderbilt had not yet purchased. At the time some sixty-eight lots in the Vanderbilt clearance area were still owned by private individuals, some of whom were either members of PAC, the CPPP, the UNA or a combination of the three. The Hamilton amendment would have removed these sixty-eight parcels from the plan altogether, making it impossible for the NHA to acquire them for Vanderbilt by condemnation. Immediately after Hamilton proposed his amendment, PAC's group of speakers began

403. *Id.* Councilman Rutherford served as Chairman of the Council's Planning Committee and as such normally introduced bills that would have been blocked by the practice of councilmanic courtesy.

404. Official Minutes of the June 5, 1973, Meeting of the Metropolitan County Council of Nashville-Davidson County, at 15.

405. The PAC Chairman Joseph Johnston helped to arrange for the local educational television station to borrow portable equipment from one of the commercial stations. Johnston believed that if each Council hearing were publicly televised, the impact of the PAC presentation on the Council would be notably heightened. Interview with Joseph Johnston, Chairman of PAC, Feb. 22, 1974.

a concerted plea for the right to continue to dwell peacefully in their own homes. The area residents emphasized their advancing age and the personal difficulties a forced move would cause to them and others who were not well enough to attend the hearing. The PAC speakers again dwelt on the unconstitutionality and the immorality of using eminent domain to force them to convey their homes to Vanderbilt. With Bibles and copies of the Constitution in hand, the residents received a 19 to 14 vote from the Council in favor of the Hamilton amendment.[406]

The Council's decision to omit the remaining sixty-eight parcels represented a variety of motives. Only fourteen of the members of the Council who had approved the original plan in 1967 continued to serve in 1973 and by that time the public attitude toward urban renewal had begun to change. While the university center had received the most direct attention from the Council, the urban renewal projects in Edgehill and East Nashville had created local controversy and dissension as well. Urban renewal was no longer widely regarded as a uniformly positive program and as one Councilman observed earlier "Urban renewal has become a sore subject in Nashville in the last few months."[407] Moreover the members of the PAC had helped emphasize to the Councilmen the hardships imposed upon elderly individuals who were required to leave their homes.[408] More cynically perhaps, several days before the Council vote on the Hamilton amendment a federal district judge had ruled that the Council's earlier action in eliminating the Gregory property was without effect.[409] Thus it was possible to vote for the appealing Hamilton amendment with the knowledge that the Council's action would eventually be struck down by the courts.

Whatever the motives behind the bill, the Hamilton amendment represented a direct challenge to Vanderbilt's plans for developing the urban renewal clearance area. Immediately after the July 3rd vote, Chancellor Heard directed his planning staff to consider whether the university's plans for the area could be modified to accommodate the continued presence of sixty-eight parcels of pri-

406. Official Minutes of the July 3, 1973, Meeting of the Metropolitan County Council of Nashville-Davidson County, at 3.

407. Nashville Banner, July 15, 1971, at 1, col. 1, quoting Councilman Tandy Wilson.

408. Councilman James Tuck credited the PAC with having largely caused the Council's change of attitude toward urban renewal in residential areas. Interview with Councilman James Tuck, in Nashville, Tennessee, Jan. 22, 1974.

409. *See* note 385 *supra*.

vately owned land among the university's buildings.[410] The planning staff reported, as Hamilton and the PAC had known all along, that the sixty-eight lots were sprinkled unevenly throughout the 110 acre area in such a way as to make coherent development of the area around them virtually impossible.[411] On the strength of its planners' determination that the deletion of the sixty-eight lots would seriously impede the university's plans for expansion, representatives of the university made a vigorous effort to have the Hamilton amendment rescinded. Vice Chancellor George Kaludis and Mr. Wilson Sims, a former member of the Tennessee House of Representatives and a senior partner in the distinguished law firm representing the university, began to canvass individual Council members in an effort to persuade them to vote against the Hamilton amendment on its second reading on September 4th. Kaludis and Sims were joined in their efforts by the former Lieutenant Governor of Tennessee, Frank Gorrell, who was one of Sims' law partners and who continued to exercise an active influence in Tennessee political affairs.[412] The three Vanderbilt representatives worked closely with two members of the Nashville Housing Authority,[413] the new Executive Director Jack Herrington and the NHA's counsel Joseph Lackney, Jr.[414] Together the representatives from Vanderbilt and the NHA divided the members of the Council among themselves for individual solicitation. In the course of their individual canvassing the five men emphasized that Vanderbilt had already spent over ten million dollars on the urban renewal project in direct reliance upon the Council's approval of the plan in 1967. For better or for worse it was too late for the Council to retreat from its original commitment, particularly since a federal court had recently ruled that the Council's earlier unilateral attempt to delete the Gregory property from the project area was without legal effect in the absence of concurring approval from the NHA and HUD.

The efforts of the university and of the housing authority took early effect. Two weeks after the Council had voted to adopt the

410. Interview with Chancellor Alexander Heard, Feb. 4, 1973. Nashville Tennessean, July 4, 1973, at 1, col. 1.

411. Interview with Chancellor Alexander Heard, Feb. 4, 1973. The reason the lots were scattered throughout the area was because the university had not attempted to follow the acquisition schedule originally established in 1968 in individual cases where householders wished to stay longer in the neighborhood. Interview with Vice Chancellor George Kaludis, note 333 *supra*.

412. Interview with Joseph Lackey, Jr., counsel for the NHA, Jan. 24, 1974.

413. By this time the NHA had changed its name to Metropolitan Development and Housing Agency.

414. *See* note 402 *supra*.

Hamilton amendment deleting the sixty-eight remaining parcels from the clearance area, Councilman Elmer Disspayne, at the request of university and housing authority representatives, moved to rescind the July 3rd vote.[415] Disspayne had been one of the nineteen councilmen who voted in favor of Hamilton's proposal and Hamilton was angered by the reversal of attitude. Hamilton attacked Disspayne verbally, openly implying that Disspayne had been "gotten to" by Vanderbilt's representatives.[416] Disspayne's motion failed to get the required two-thirds vote needed to rescind previous Council action, but the vote of 17-13 in favor of his motion indicated that several councilmen who had voted for the deletion amendment on July 3rd had begun to have second thoughts by July 17th. The tide was beginning to turn against the PAC proposal and although the influence of Vanderbilt's and the NHA's canvassing was apparent, one observer indicated that Hamilton's outburst against Disspayne was a turning point which helped cause the changed votes on July 17th and set the stage for later developments in the September and November meetings which followed.[417]

The public hearing to consider the revised Vanderbilt campus expansion plan, as amended by the Hamilton deletion proposal, was held on September 4th. This time it was the university and the NHA staff who were prepared to make a concerted presentation to the Council. Vice Chancellor Kaludis demonstrated in some detail why the retention of the sixty-eight parcels would render it impossible for the university to adequately develop the expansion area. The university's counsel, Mr. Wilson Sims, urged the Council to consider the ethical and legal propriety of failing to support the university after the university had proceeded in good faith to implement a project the Council had approved six years before. Representatives of the NHA presented a detailed description of the liberal federal relocation allowances that would be available to the owners of the sixty-eight parcels in the event they were to move. In addition the university offered its own counter amendment, an amendment that would make some concession to the interests of the area residents without substantially interfering with the university's own expansion plans. Under the terms of the Vanderbilt amendment the sixty-eight parcels would be acquired by the NHA for conveyance to Vanderbilt by the end of 1975 in return for which the resident own-

415. Telephone interview with Councilman Elmer Disspayne, in Nashville, Tennessee, Feb. 22, 1974.

416. *Id.*; *see* note 412 *supra*.

417. *See* note 412 *supra*.

ers would be allowed to remain in their houses rent free until the end of 1976 or 1977, depending upon theirlocation.[418] In comparison to the detailed and polished expositions offered by the Vanderbilt and NHA representatives, the PAC's familiar pleadings seemed insubstantial and unpersuasive. By a vote of 23 to 12 the Council voted to adopt the Vanderbilt amendment in place of that offered by Hamilton.[419]

The Council vote to accept Vanderbilt's amendment signalled the end of the PAC's immediate political influence. The Vanderbilt amendment was subsequently passed by the Council on second reading, November 6th, by a vote of 24 to 10, despite an attempt by the PAC to introduce a new measure that would allow the owner residents to remain in their houses for the remainder of their lives.[420] At last on November 20th, 1973, Vanderbilt's original development plan as amended by its own subsequent proposal was passed on third and final reading by a vote of 26 to 10.[421]

The Metropolitan Council's endorsement of the Vanderbilt plan concluded a three year period in which the residents of the project clearance area had sought to use political action to reopen the debate on the underlying merits of the original university center urban renewal plan. Taking their lead from the decision by St. Thomas Hospital to abandon its commitment to the plan, Councilman Hamilton and the members of the Project Area Committee had exploited individual cases of hardship to induce the Metropolitan Council to delete more and more parcels of land from the project area. Yet when the PAC's amendments touched an area of fundamental concern to the Nashville Housing Authority or to Vanderbilt University, the PAC was defeated on both occasions by superior organization and resources. Although the PAC succeeded in inducing the Council to pass an amendment to the Metropolitan Charter requiring local referenda on each new urban renewal project in Nashville, the NHA defeated the proposal through vigorous and concerted campaigning among the city's commercial groups. Similarly when the PAC initially won Council approval for the deletion

418. Nashville Banner, Sept. 5, 1973, at 1, col. 1. The university's counter proposal was offered by Councilman James Tuck, one of the most respected figures on the Metropolitan Council and one of the few members who had been on the Council in 1967, when he was a supporter of the original plan.

419. *Id.*

420. The life estate proposal failed a voice vote. Telephone interview with Councilman Charles Sieberling, the original proponent on behalf of the PAC measure, in Nashville, Tennessee, Feb. 21, 1974.

421. Official Minutes of the November 20, 1973, Meeting of the Metropolitan Council, at 6.

of the sixty-eight remaining parcels in the Vanderbilt clearance area, the political organization and technical skills which both Vanderbilt and the Nashville Housing Authority commanded aided in the decisive defeat of the measure.

In the end the PAC was able to influence the Metropolitan Council in marginal ways that did not affect the interests of the major institutional and administrative participants in Nashville's urban renewal process. Yet even if the area residents were unable to reverse the Council's 1967 commitment to the university center plan, their active opposition to Vanderbilt's expansion through an urban renewal clearance program had a significant effect on the attitudes of Nashville's Councilmen towards urban renewal. As Councilman James Tuck observed in a sentiment that was widely shared by others, Nashville's experience with the university center project had virtually ensured that the Metropolitan Council would not support future urban renewal programs in residential neighborhoods, particularly if the project required a clearance area.[422]

IX. The Residents' Day in Court

With their final political defeat by Vanderbilt and the NHA before the Metropolitan Council, the area residents sought access to the courts to assert what they felt to be their rights.

In March, 1970, Charles and June Adair had instituted suit in federal court against the Nashville Housing Authority and Vanderbilt University, challenging the qualification of the University Center Urban Renewal Project area under the federal eligibility requirements. As owners of property located in the project area, the Adairs had chosen not to await condemnation proceedings to litigate the issues they had raised[423] but rather requested injunctive relief[424] and damages[425] in the context of a private lawsuit. R. L. Gardner and

422. Interview with Councilman James R. Tuck, Jan. 22, 1974.

423. Since the suit was not brought as a class action, the final disposition of the issues would not be conclusive on any other area residents who might wish to contest the necessity of the taking, or the amount of compensation to be paid them, in any condemnation proceedings which might arise later.

424. Plaintiffs sought to enjoin the NHA from initiating eminent domain proceedings to acquire plaintiffs' property and to enjoin any further funding or implementation of the University Center Urban Renewal Project; they also asked for a declaration of their rights under the Federal Declaratory Judgments Act.

425. In seeking damages for the diminution in value of their property, plaintiffs advanced two theories: first, that the mere designation of the area as an urban renewal area effectively created a one-buyer market to Vanderbilt's advantage, and that consequently Vanderbilt was able to obtain property in the area for less than what would have to be paid on the open market. Secondly, plaintiffs alleged that the university, having purchased partic-

Ruth Gardner, who owned and lived in a house in the project area, filed a similar suit in January 1971.

Federal courts ordinarily have been reluctant to interfere in urban renewal projects challenged by area residents,[426] and only occasionally has preliminary injunctive relief been granted on the basis of racially discriminatory relocation plans.[427] Seldom, if ever has the federal judiciary invalidated a plan already in progress, with funds already expended and land acquired and cleared. To halt a major urban renewal project already well underway thus wasting the large sums of money invested up to that point would be distasteful to most courts.[428] Furthermore, the law clearly limits the scope of review a court may exercise over an administrative agency's determination of the eligibility of a proposed urban renewal project. In reviewing a legislative or an administrative finding that an area is blighted or deteriorated, a court cannot reweigh the evidence but must confine itself to determining whether the finding was supported by substantial evidence.[429] Thus, while a court may examine the factual evidence which was before the legislative or administrative body when it determined the eligibility of the area in question,[430] it will not invalidate that determination in the absence of a showing of a clear and palpable abuse of authority,[431] or arbitrary and capricious action on the part of the decision-making body.[432]

Given these traditional judicial predispositions towards urban renewal actions, the disposition of the university center area

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ular pieces of property in the area, allowed the property to deteriorate in order to further devalue the surrounding neighborhood. Defendants, on the other hand, contended that property values in the area had, if anything, increased rather than decreased since the institution of the urban renewal program, and denied any actions on Vanderbilt's part to cause the neighborhood to deteriorate.

426. *See generally* McGee, *Urban Renewal in the Crucible of Judicial Review*, 56 VA. L. REV. 826 (1970).

427. *E.g.*, Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); *see* VA. L. REV. 826, 858-71 (1970).

428. 56 VA. L. REV. 826, 854-57 (1970).

429. *See, e.g.*, Berggren v. Moore, 61 Cal. 2d 347, 392 P.2d 522 (1964); In Re Bunker Hill Urban Renewal Project IB, 37 Cal. Rptr. 74, 389 P.2d 538 (1964); Sanguinetti v. City Council, 231 Cal. App. 2d 813, 42 Cal. Rptr. 268 (1965).

430. *See, e.g.*, Bristol Redevelopment & Housing Authority v. Denton, 198 Va. 171, 93 S.E.2d 288 (1956).

431. Harper v. Trenton Housing Authority, 38 Tenn. App. 396, 410, 274 S.W.2d 635, 641 (1954).

432. Starr v. Nashville Housing Authority, 145 F. Supp. 498, 503 (M.D. Tenn. 1956). It has been held that all presumptions are in favor of the determination made by the city or housing authority and that the burden of proof to be met by the one alleging the invalidity of the determination is not merely a preponderance of the evidence, but a more stringent standard of "clear and convincing proof." Runnels v. Staunton Redevelopment & Housing Authority, 207 Va. 407, 411, 149 S.E.2d 882, 884 (1966).

residents' lawsuit was not unexpected. The Adair and Gardner cases were consolidated and tried at the federal district court level in August 1971. Finally, in March 1974 after the case had been dismissed[433] and appealed for the failure to join HUD as an indispensable party,[434] after remand[435] and recusation of the original trial judge, a judgment was rendered for the defendants on all the issues and the suit was dismissed.[436]

The Adairs and the Gardners had presented three major contentions,[437] all of which the district court rejected. Their primary contention was that Section 112 of the Housing Act had been unconstitutionally applied to the project in question; secondly, they argued that the property owners in the university area were denied a fair and meaningful hearing as guaranteed by the due process clause of the fourteenth amendment; and finally, that the actions of the NHA, the Metro Council, and HUD in declaring the area to be a slum and blighted area suitable for urban renewal were arbi-

433. Gardner v. Nashville Housing Authority, No. 6021 (M.D. Tenn., Sept. 30, 1971).

434. Despite the fact that Judge Morton's dismissal of the case for lack of subject matter jurisdiction could readily be said to render the remainder of his opinion the dicta of its distinguished author, the defendants in their briefs on remand argued that the Sixth Circuit's failure to disturb the trial court's factual findings and legal conclusions was conclusive with respect to defendants Vanderbilt and the Nashville Housing Authority. Therefore the opinion limited the issues to be tried on remand to the sole question of the arbitrary or capricious nature of the project area eligibility determination made by HUD.

435. Gardner v. Nashville Housing Authority, 468 F.2d 480 (6th Cir. 1972). The court ruled that the case was clearly one of federal question jurisdiction: "Whatever proceedings were undertaken by the Nashville Housing Authority depended for their vitality and financing on federal statutes 42 U.S.C.A. § 1441, *et seq.* [Housing Act of 1949]." *Id.* at 481.

436. Gardner v. Nashville Housing Authority, No. 6021 (M.D. Tenn., Mar. 4, 1974).

437. In addition to these three major issues, the Adairs and Gardners argued that their neighborhood had been qualified as a clearance area as the result of a conspiracy between Vanderbilt and the NHA. Moreover, they maintained that the project was approved by the NHA as the result of a conflict of interest between the NHA commissioners and the Vanderbilt Board of Trust. Many residents of the area strongly believed that a conspiracy existed between Vanderbilt and the Housing Authority whereby the university allowed its property in the area to deteriorate in order to cause the neighborhood to qualify as a slum. Councilman James Hamilton testified that he attended a meeting in July 1967 with various NHA and Vanderbilt officials at which Chancellor Heard stated that in order to assure compliance with the required federal percentages of substandard structures in the area, Vanderbilt was deliberately permitting property it had acquired in the area to stand in deteriorating condition. The NHA, however, offered testimony from another participant in the same meeting which indicated Heard had not made such a statement.

The district court found no evidence supporting the conspiracy charge and noted that Vanderbilt had consistently followed a pattern of demolishing substandard housing it had acquired. The court further stated that Vanderbilt's plan of expansion had begun in 1956 and would have continued regardless of the availability of Section 112; hence there was no need for a conspiracy with NHA officials to qualify the area for urban renewal status.

Closely related to the conspiracy issue was an allegation by the property owners of the existence of several decisive conflicts of interest. The plaintiffs claimed that the dual employ-

trary, capricious, and in bad faith. This section will analyze the issues from the standpoint of the parties' relative contentions as well as the ultimate resolution by the court. Such an analysis may prove useful in indicating the potential results, in other cities, in future actions concerning urban renewal projects.

A. *The Constitutionality of Section 112*

Behind the Adairs' and the Gardners' decision to institute their lawsuit lay a philosophical opposition to the use of eminent domain by a government agency on behalf of a private institution. The constitutional validity of the use of urban renewal condemnation by private interest groups was, however, already well established. In attempting to convert their philosophy into a legal theory, therefore, the property owners sought to attack the constitutionality of Section 112 as it had been used in the University Center Urban Renewal Project. In making such an attack the plaintiffs had to circumvent two major cases, *Berman v. Parker*[438] and *Ellis v. City of Grand Rapids*.[439] In the landmark case of *Berman v. Parker* the Supreme Court had held that land taken in a slum clearance project to be redeveloped for private as opposed to public use was not in itself an unconstitutional taking. The court found that the clearance of slum conditions from the land was a legitimate public purpose justifying the use of eminent domain to obtain the land for clearance. Under its view, the subsequent redevelopment of the land was constitutionally irrelevant since the public use requirement of the fifth amendment had already been satisfied and because it was for the

ment of Clarke and Rapuano by the NHA and Vanderbilt created the possibility for the engineering firm to assure itself of additional work by finding that the area qualified for urban renewal. Furthermore, they sought to prove that two NHA commissioners, Gayle Gupton and Scott Fillebrown, had violated a state statute prohibiting housing commissioners from having or acquiring a direct or indirect interest in a proposed project. The plaintiffs argued that Gupton and Fillebrown, whose employers were bank officials and members of the Vanderbilt Board of Trust, were susceptible to infiuence in their capacities as NHA commissioners hecause of their positions in their respective banks. At trial, however, all of the individuals involved denied that there had ever been any discussion of the project between the employers and employees, much less any attempts to influence Gupton and Fillebrown in their NHA duties.

The district court held that there was no evidence to support the charge either as to Clarke and Rapuano or as to the NHA commissioners. It found no evidence that the engineering firm exhibited a bias in favor of the plans of Vanderbilt nor that the firm deliberately carried out its inspection surveys with the purpose of achieving the requisite qualifying percentages. As for Gupton and Fillebrown, the court stated: "There is not the slightest bit of evidence that . . . these individuals were, in their public capacities, at any time motivated by any purpose other than serving the interests of the community."

438. 348 U.S. 26 (1954).

439. 257 F. Supp. 564 (E.D. Mich. 1966).

legislature, and not the courts, to determine when to exercise the police and condemnation powers on behalf of the public. The specific issue of the constitutionality of Section 112 had been litigated in *Ellis v. City of Grand Rapids*. In *Ellis* a Michigan district court upheld the right of a private hospital to participate as a principal redeveloper in a Section 112 urban renewal program. The court relied heavily on *Berman's* characterization of the legislature's designation of the public interest as "well-nigh conclusive"[440] and stated that once an urban renewal project's primary public purpose of beautification and redevelopment had justified the use of eminent domain, the question of whether the condemned land was to be redeveloped by public or private bodies was largely irrelevant.[441]

Faced with such strong precedents, the Adairs and the Gardners attempted to distinguish *Berman* and *Ellis* from their own case on factual grounds. While noting that in *Berman* the percentage of substandard buildings in the project area exceeded 80 percent, the property owners observed that only 24 percent of the buildings in the university clearance area were substandard under the Clarke and Rapuano survey. They further argued that in both *Berman* and *Ellis* the private institution or developer was merely an incidental beneficiary of the redevelopment project at issue.[442] Vanderbilt, however, had participated in the origination of Section 112 and had originated an urban renewal clearance program the primary purpose of which was to benefit the university. The area residents contended that Section 112 did not authorize the selection of an urban renewal project for the *principal* benefit of a hospital or university to the damage of private property owners, and thus the statute had been unconstitutionally applied in the Nashville project. In response, Vanderbilt and the Nashville Housing Authority argued that Vanderbilt had embarked on a land acquisition program in 1956 that it would have pursued regardless of the enactment of Section 112. Vanderbilt had not initiated the University Center Urban Renewal Project but rather had been invited by the Mayor of Nashville to participate in the project along with Peabody College and Scarritt College. The defendants further argued, that the project from its inception was designed to benefit not only Vanderbilt but the entire

440. *Id.* at 571, *citing* Berman v. Parker, 348 U.S. 26, 32 (1954).

441. *Id.*

442. In *Ellis*, for example, the redevelopment plan consisted primarily of the establishment of a major medical center south of the city's central business district, and in addition to the land to be taken by St. Mary's Hospital, space was also to be provided for a public plaza, professional buildings, off-street parking, and commercial use. *Id.* at 572.

Nashville community by reducing traffic problems in the area and providing improvements to roadways, utilities, and sewers in the area at minimal cost to the city of Nashville.

Given *Berman*, its progeny in other courts,[443] and *Ellis*, the decision of the district court was rendered in favor of the defendants. The court observed that Vanderbilt's participation in the project's implementation and benefits did not render the project invalid.[444] In reaching its decision the court relied upon *Berman* and *Ellis*,[445] and held that "Section 112 . . . meets the constitutional challenge."[446] In response to the Adairs' contention that Vanderbilt had misused Section 112 for its own advantage, the court concluded by holding that "[i]t appears . . . that [this project] is of the particular sort for which this statute was enacted."[447]

B. *Whether Property Owners in the Area Were Denied the Right to a Fair and Meaningful Hearing as Guaranteed by the Due Process Clause of the Fourteenth Amendment*

The fourteenth amendment to the United States Constitution provides that no state may deprive any person of property, "without due process of law."[448] Due process has consistently been interpreted by the federal courts as requiring both notice and the opportunity for a fair and meaningful hearing before such a deprivation occurs.[449] One of the most significant issues raised by the plaintiffs related to the kind of hearing required by state[450] and federal[451] statutes as a prerequisite to the approval of an urban renewal plan.

At trial the Adairs testified that they were repeatedly denied access to the exterior survey summary sheets on all of the buildings rated as structurally substandard or blighting influences in the pro-

443. *See, e.g.*, Rabinoff v. District Court, 145 Colo. 225, 233-34, 360 P.2d 114, 118 (1961); Alanel Corp. v. Indianapolis Redevelopment Comm'n, 239 Ind. 35, 47-48, 154 N.E.2d 515, 522 (1958); Cannata v. City of New York, 14 App. Div. 2d 813, 221 N.Y.S.2d 457, 458 (1961).

444. Gardner v. Nashville Housing Authority, No. 6021 (M.D. Tenn., Mar. 4, 1974), at 13.

445. *Id.* at 14.

446. *Id.* at 13.

447. *Id.*

448. U.S. CONST. amend. XIV.

449. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 235 (1897).

450. "[The local] governing body shall not approve a [redevelopment] plan until after a public hearing has been held by said governing body . . . to determine the necessity for the adoption of said plan . . . ." TENN. CODE ANN. § 13-815 (1973).

451. "No land for any project to be assisted under this subchapter 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) (1970).

ject area[452] until after final HUD approval of the project in April 1968. Moreover, the *Project Area Report*,[453] with its compilation of qualification statistics, was not placed on public file until about a week before the August 7th public hearing. Additionally, the plaintiffs alleged that the area residents were not informed of the existence of the *Urban Renewal Manual* guidelines before the public hearing.[454] Without knowledge either of the federal standards used to judge the area or the specific deficiencies alleged to exist in their properties, and further limited to a five-minute speaking period per individual at the public meeting, the property owners argued that the hearing which they were accorded on August 7th was a hearing in form alone. Since the residents allegedly were denied a meaningful opportunity to rebut the contentions of the NHA that the area qualified for urban renewal, they contended that they were deprived of their property without due process of law.[455]

In response, the defendants emphasized that in addition to the statutorily required public hearing on August 7th, at which the Adairs, the Gardners, and other area residents spoke against the project, two other public meetings were held at Eakin School. The first took place in November 1965 at a meeting of the Eakin School PTA and served as a general informational meeting on the proposed project. The second occurred in July 1967, at which NHA officials were present to explain the project and answer questions, and at which both Mrs. Adair and Mr. Gardner were present. The defendants observed that once the five hundred page *Project Area Report* had been placed on file at the Metropolitan Clerk's office on July 27th, the area residents had access to all its information to use in

452. June Adair testified that although she and her husband were furnished in 1968 with forms specifying the particular deficiencies which had been the basis of the individual ratings placed on each of their own three pieces of property, it was not until 1971 that they were able to obtain similar forms on the rest of the properties in the area. *Record*, vol. 1, at 7-8, Gardner v. Nashville Housing Authority, No. 6021 (M.D. Tenn., Sept. 30, 1971) [hereinafter cited simply as "*Record*"].

453. *The Project Area Report* was compiled from the Clarke and Rapuano survey results; the maps of the area in the *Report* indicated by different shadings the ratings (e.g., minor repair, major repair, standard, substandard and obsolete) assigned to the structures represented, but did not anywhere list the specific building deficiencies that formed the basis for each rating.

454. The Adairs were given a copy of the *Urban Renewal Manual* when they visited HUD's Atlanta regional office in 1969.

455. "In determining what is due process of law, regard must be had to substance, not form." Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 235 (1897) (in a condemnation proceeding, the fact that statutory requirements of notice and a court proceeding were complied with did not in itself rebut the railroad's contention that it was deprived of its property without due process of law).

preparation for the public meeting on August 7th. The defendants treated the issue of plaintiffs' access to the individual evaluation sheets as irrelevant,[456] arguing that the conditions of individual pieces of property within the area had no bearing on the issue of whether the area as a whole qualified for urban renewal. Moreover, the defendants established that Councilman Hamilton knew of various alleged discrepancies in the eligibility documentation furnished to the Council,[457] and that Hamilton had raised the issue of the discrepancies before the Council prior to their passage of the ordinance on the final reading.

The property owners challenge to the adequacy of their opportunity to be heard raised a perplexing problem in constitutional law.[458] In effect the plaintiffs maintained that without adequate prior access to the working standards used to evaluate the urban renewal area as a whole and without prior access to the actual survey results for each building in the area, they would be unable to obtain a meaningful opportunity to be heard before the Metropolitan Council because they could not rebut the administrative findings that formed the technical basis for the project. In their own case the Adairs and the Gardners, among other members of the University Neighborhood Association, had made early attempts in late 1966 and early 1967 to understand the standards used to determine the condition of their houses. Yet it was not until some months after the August 7, 1967 hearing that the residents gained access to the *Urban Renewal Manual* and its standards.[459] Similarly their earlier efforts to gain access to the actual evaluation sheets that Clarke and Rapuano had filled out for every house in the neighborhood were not successful until almost four years after the August 7th meeting. Nor

456. Defendant Nashville Housing Authority cited Apostle v. City of Seattle, 70 Wash. 2d 59, 442 P.2d 289 (1966) as on point, but on close examination the case appears to be distinguishable from the instant situation. In *Apostle*, plaintiffs argued that each property owner should have been informed of the defects assigned to his property, in order to prepare adequately for the hearing before the city planning commission, but the court, relying on *Berman v. Parker*, held that denial of such information did not violate due process requirements since the council was concerned with an area concept and not whether any particular piece of property was standard or substandard. However, the Adairs were seeking access to survey sheets not simply on their own individual pieces of property, but on all the other property in the area as well, in order to investigate independently the issue of the eligibility of the area as a whole. Since the eligibility of the entire area was the issue voted on by the Metro Council and ultimately passed on by HUD, the *Apostle* case seems to furnish support for plaintiffs rather than defendants in the instant situation.

457. *Record*, vol. 1, at 69-70.

458. Note, *The Federal Courts and Urban Renewal*, 69 COLUM. L. REV. 472, 486 (1969).

459. DEP'T OF HOUSING AND URBAN DEVELOPMENT, URBAN RENEWAL HANDBOOK 7206.1, ch. 3, at 1.

could the *Project Area Report*, which was placed on file for public use on July 27, 1967, take the place of either the *Manual* or the individual evaluation sheets. Assuming that laymen were aware of the *Final Report* (and could assimilate its content in ten days) the *Final Report* nevertheless contained only a generalized verbal description of the results that Clarke and Rapuano had obtained in the area coupled with a series of conclusory statistical summaries. The *Report* did not, however, contain a clear summary of the actual standards which Clarke and Rapuano had applied nor any indication of its particularized results for individual structures. Thus, at the August 7th public hearing the Adairs and the Gardners had a five-minute opportunity to express their concern that the project area was not qualified but, alleged the plaintiffs, they had no opportunity to challenge the project area eligibility directly. Similarly, even if the meetings held on November 5, 1965 and July 19, 1967 had been sufficient in other respects, the plaintiffs alleged that they still did not have access to the underlying technical information that would have given them a full opportunity to question the project's eligibility.

The court, however, did not question the substance of either the August 7th public hearing or the two meetings that had preceded it. Instead the Court found that "the plaintiffs were not denied access to the project area plans, surveys, records and ratings on the structures involved."[460] The court further observed that the Adairs and Gardners had attended three different public meetings on the urban renewal plan but did not examine the substance or timing of the events. The court concluded that the three hearings in general and the August 7th meeting in particular, complied with the state and federal statutory requirements and were, therefore, by implication constitutionally adequate.

C. *Whether the Determinations Made by the Housing Authority, Metro Council, and HUD that the Area Constituted a Slum and Blighted Area Were Arbitrary, Capricious, and in Bad Faith so as to Require the Court to Overturn the Findings*

The crux of the area residents' suit consisted of an attack on the three decision-making bodies in their findings that the area constituted a slum or blight. Under *Berman v. Parker*[461] and subsequent urban renewal cases, taking property through eminent do-

460. Gardner v. Nashville Housing Authority, No. 6021 (M.D. Tenn., Mar. 4, 1974) at 10.

461. 340 U.S. 26 (1954).

main for urban renewal purposes is valid only if there is a clearly supportable finding of slum and blighted conditions in the area. The Adairs and Gardners most concerted efforts were therefore directed at producing evidence to show that the NHA findings, the ordinance passed by the Metropolitan Council, and the funding eligibility decision made by HUD, were all without factual basis and were thus arbitrary and capricious in nature.

1. *Actions of the Nashville Housing Authority*

The NHA received the brunt of the area residents' attack, in three specific charges made against Housing Authority officials. First, the Adairs and Gardners contended that NHA officials had failed to fulfill three statutory prerequisites in making the decision concerning area eligibility; secondly, they alleged that the NHA had failed to use any kind of objective criteria in the classification of structures in the area as "substandard;" and finally, the property owners attempted to show that the Project Area Report compiled by the NHA was riddled with statistical discrepancies affecting the percentages of "substandard" structures necessary to qualify the area for federal funding.

(a) *Statutory Prerequisites*

The first step in determining whether a particular area qualified for an urban renewal project required a finding that conditions in the area justified labelling it as a "slum" or "blighted area." The Adairs and Gardners argued that Section 112 required a finding of both slum *and* blighted conditions in the proposed urban renewal area,[462] and that, according to the deposition testimony of two NHA commissioners and the Director of the NHA's Urban Renewal Division, the area was not in their opinion a "slum." The plaintiffs argued therefore that the wording of both the Metropolitan ordinance and the NHA resolution approving the area for renewal evidenced a deliberate attempt to circumvent this statutory prerequisite through a falsification of the facts.

Secondly, the plaintiffs alleged that the NHA failed to meet the standards under Tennessee state urban renewal law that the area contained conditions detrimental to the safety, health, morals or

462. "In any case where an educational institution or a hospital is located in or near an urban renewal project area and the governing body of the locality determines that, in addition to the elimination of *slums and blight* from such area . . . ." 42 U.S.C. § 1463(a) (1970) (emphasis added).

welfare of the community.[463] The property owners introduced testimony by sociologists[464] to support their view that the urban renewal area was a richly heterogeneous neighborhood with a distinctively positive influence on the Nashville community as a whole.

Returning to federal law for their third and final statutory challenge to the NHA's findings, the Adairs and Gardners argued that the Housing Act did not authorize clearance of a proposed urban renewal area unless it had been determined that rehabilitation of the area was unfeasible.[465] At trial the plaintiffs introduced evidence showing that in many instances the cost of bringing allegedly "substandard" houses into full compliance with Metropolitan building codes was entirely reasonable.[466] They also sought to demonstrate that Clarke and Rapuano did not determine the values or repair costs of any structures in the area.[467] Had the NHA investigated rehabilitation costs, the plaintiffs argued, they would have discovered that the area was capable of being rehabilitated, and therefore the designation of the area as a clearance area was contrary to federal law.

The NHA countered by denying it had violated any statutory duties. It pointed out that the Housing Act prerequisites cited by the Adairs were obligations imposed only on the Secretary of HUD and not on the local public agency involved in an urban renewal project. Stressing Tennessee law as the source of power for the determinations made by the Housing Authority and Metro Council, the NHA noted that the pertinent statute's[468] requirements were considerably less clearly defined than requirements for federal assistance under the Housing Act. Since the Adairs and Gardners had not based their attack on the eligibility of the project under state law,[469]

463. TENN. CODE ANN. § 13-813 defines "blighted areas" as "areas . . . which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, . . . or any combination of these or other factors, are *detrimental to the safety, health, morals, or welfare of the community*" (emphasis added).

464. *Record*, vol. 2, at 233-45 (testimony of Dr. Carroll Bourg); *id.* at 200-01 (testimony of Dr. Marie H. Means).

465. "Notwithstanding any other provision of this subchapter, (A) no contract shall be entered into for any loan or capital grant . . . for any project which provides for demolition and removal of buildings and improvements unless the Secretary determines that the objectives of the urban renewal plan could not be achieved through rehabilitation of the project area . . . ." 42 U.S.C. § 1460(c) (1970).

466. *Record*, vol. 2, at 155-57.

467. *Id.*, vol. 5, at 526.

468. TENN. CODE ANN. § 13-813 (1973).

469. The Housing Authority thus appears to consider the challenge to the "health, welfare and morals" finding as not constituting a sufficiently direct attack on the eligibility of the area under state law.

the Housing Authority argued, the project presumably encompassed a legally constituted urban renewal area and any further attack would have to be directed at HUD's determination that it met federal financial assistance standards.

(b) *The Use of Objective Criteria in Classifying Structures as "Substandard"*

Under HUD regulations, no area could be subjected to clearance unless a percentage of its buildings were found to be "structurally substandard warranting clearance."[470] The *Urban Renewal Manual* defined "structurally substandard" in a general manner and at trial the property owners sought to prove that the Clarke and Rapuano engineers and officials involved in inspecting the proposed project area had failed to use any objective criteria in classifying structures in the area as "substandard." As prima facie evidence of their point, residents noted that houses in the area that complied with Metropolitan building codes were nevertheless classified as substandard. In the plaintiff's opinion it was not at all clear that a house that failed to conform to the building codes was therefore by definition "substandard" for HUD funding purposes. Depositions taken from an NHA commissioner and a HUD official produced conflicting opinions on whether a house which failed to meet Metropolitan Code standards was therefore "substandard" for HUD urban renewal purposes.[471] In further support of their view that there were no objective qualification standards, the Adairs also introduced a deposition statement by Charles Hawkins, NHA Director of Urban Renewal, admitting that there were no absolute standards to follow but that individual judgment played a key role in the evaluation process.[472] Further testimony elicited throughout the course of the trial from various NHA commissioners sought to demonstrate their own lack of personal knowledge to any of the factors used to classify structures as "substandard," and their unquestioning reliance on the results of the Clarke and Rapuano survey when voting on the NHA resolution to approve the plan. The cumulative effect of this alleged lack of objective standards and the NHA commissioner's own ignorance of the standards used by Clarke and Rapuano indicated to the plaintiffs that the entire qualification process was unlawfully arbitrary.

The Housing Authority relied both upon the conclusions of its

470. *See* note 227 *supra*.
471. Deposition of John Edmunds at 65.
472. Brief for Plaintiffs on Remand at 9.

own engineers and on the propriety their reliance upon a distinguished engineering firm that was experienced in making urban renewal surveys to satisfy HUD guidelines. The NHA's refusal to deal directly with the "objective criteria" issue possibly indicated their belief that no firm objective criteria in fact existed and that a careful exercise of discretionary judgment was their primary obligation.

(c) *Discrepancies in the Project Area Report*

The *Project Area Report* was prepared by the Housing Authority on the basis of the Clarke and Rapuano survey and was filed on public record on July 27, 1967. At trial the Adairs and Gardners alleged the existence of misleading and incorrect information in the *Report*. The four major discrepancies they alluded to included:

(1) Maps in the *Report* showed that over fifty houses in the project area rated as substandard were represented as standing in August 1967 when in fact they had been previously demolished.

(2) The margin of error in the random sample interior survey was twenty-eight percent rather than one to four percent as indicated in the *Report*.[473]

(3) Certain structures rated substandard because of building deficiencies had been cured by repair since the 1962 original survey.

473. Celeste Albright, an area resident and a witness for the Adairs and the Gardners, testified to the following facts, based purely on an independent compilation of statistics from the interior and exterior summary sheets: on the basis of the exterior survey, houses in the entire project area (not just the clearance area) were rated, in increasing order of deficiency, standard, minor repair, major repair, or substandard. Then a random sample inspection was made by Metro Code inspectors and Clarke and Rapuano engineers of the interiors of 10% of the structures, excluding those which had been rated substandard.

Of the 133 houses entered in the whole project area, in approximately 39% the interior and exterior survey ratings were the same, while in 53% the interior rating was better than the exterior rating and in 7.5% the exterior rating was better than the interior (giving a total of 60.5% of the structures whose interiors did not bear out their exterior ratings). In the clearance area, of the 78 buildings entered, in approximately 36% the interior and exterior ratings agreed, while in slightly over 56% the interior rating was better and in about 8% the exterior rating was better (thus in about 64% of the buildings in the clearance area the interior survey did not bear out the results of the exterior survey).

Miss Albright stated that the ratings shown on the maps were almost always the worse of the two ratings. For example, a house with an exterior rating of minor repair and an interior rating of major repair would be shown on the area map as major repair, whereas a structure with an exterior rating of major repair and an interior rating of standard or minor repair would also be shown on the map as major repair. Thus an interior rating worse than the exterior rating would serve to downgrade the final rating the structure would receive, but a hetter interior rating could never serve to upgrade the structure's final rating for purposes of final percentage tabulations of structure ratings in the area. *Record*, vol. 6, at 664-79.

(4) The *Report* was misleading in indicating that it summarized area eligibility conditions as of August 1967.

Numerous property owners in the area testified that the building defects listed on their individual summary sheets were incorrect; in addition, the plaintiffs introduced evidence attempting to show that in a few instances ratings of substandard had been assigned to lots where no structure at all existed.[474]

In response to the testimony and statistical evidence put on by the plaintiffs, the Housing Authority asserted that the area did qualify under the federal urban renewal criteria outlined in the HUD regulations. Although the NHA admitted that the maps of the area that were presented to the Council did indeed include over fifty houses that had already been demolished, it observed that removal of those houses from the eligibility tables did not affect the qualification of the area under federal regulations. Moreover, the NHA pointed out that the Metropolitan Council had been made aware of the demolitions by Councilman Hamilton immediately before the plan was approved by the Council on third reading in 1967.[475] The NHA, however, did not challenge the mathematical discrepancies alleged to exist in the interior survey, but did deny any attempt to mislead the Council as to the dates of the surveys, which were clearly indicated on the maps in the *Report*. In response to the plaintiffs' evidence that many defects listed on individual evaluation sheets had either been cured before 1967 or never existed in the first place, the NHA contended that while the buildings themselves might have been adequate, many of them had to be cleared to remove "blighting influences" such as inadequate street layout, incompatible uses or land relationships, overcrowding of buildings on land, or excessive dwelling unit density. Such blighting influences could not be eliminated by rehabilitation, and the property in question could not be removed from the category of houses to be cleared simply by proving that certain defects had been cured or were inaccurately determined. The Housing Authority further stressed the irrelevance of considering the conditions of individual pieces of property, under the "area concept" traditionally applied in urban renewal cases.[476] The NHA argued that the evidence as a whole showed that the area fully qualified under the HUD standards, and the plaintiffs' attempt to disqualify the area through their own definitions of slum and blight should not be allowed to succeed.

474. *Record*, vol. 2, at 231, 233.
475. *Record*, vol. 5, at 489.
476. *See* Apostle v. City of Seattle, 70 Wash. 2d 59, 61, 422 P.2d 289, 291 (1966).

In the face of the different yet interrelated theories advanced by the Adairs and Gardners to challenge the nature of the determinations made by the NHA, several things appeared clear by the end of the trial. The property owners had sought to demonstrate that the standards used to survey their neighborhood lacked specificity and were not readily explicable to nonengineers who had not participated in the actual survey itself. Moreover, the plaintiffs had demonstrated, in part, the NHA Commissioners' own lack of knowledge of the standards on which they had relied to approve the project. The court, however, dismissed all the plaintiffs' contentions with the observation that while the testimony of the area residents was "competely sincere," it was "for the most part by persons without engineering qualifications."[477] The court further stated that it found the area to be a slum and blighted area within the scope of the Tennessee statutory definition. It also found that the NHA's determination that the area was eligible for urban renewal under state law was "in accordance with the applicable legal requirements and the clear preponderance of the evidence"[478] and was therefore not arbitrary, capricious or in bad faith.

2. *Passage of the August 15, 1967 Ordinance by the Metropolitan Council*

Although the Metropolitan Council was not made a defendant to the lawsuit, the Adairs and Gardners challenged the validity of its ordinance that declared the area a slum and blighted area and approved the University Center Urban Renewal Project. The plaintiffs argued that the evidence produced at trial clearly showed that the federal urban renewal criteria were so arbitrarily applied as to invalidate any finding that the area was qualified, and that, in the absence of any rational basis for the legislative action taken by the Council in passing the ordinance, the court should declare the ordinance null and void. Vanderbilt, the Housing Authority, and HUD in turn contended that the weight of evidence at trial supported the determination of eligibility, even under the more stringent federal guidelines. Moreover, the defendants alleged that the Council was informed of many of the alleged discrepancies in the *Final Project Report* prior to voting on the ordinance, and thus made an informed legislative judgment about the project which should not, in the absence of clear and convincing proof to the contrary, be overturned by the court.

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477. Gardner v. Nashville Housing Authority, No. 6021 (M.D. Tenn., Mar. 4, 1974) at 7.

478. *Id.* at 8.

Although in the course of the trial some doubt was raised as to precisely how well informed the Metropolitan Council was when its members voted 32 to 4 to pass the ordinance authorizing the urban renewal project, in the opinion of the court, this question was not serious enough to affect the validity of the ordinance. Since the court had already determined that the area constituted a slum and blighted area within the definition of state law, the action of the Metro Council in approving the area for an urban renewal project was entirely lawful and would not be overturned.

3. *Determination of Funding Eligibility by HUD*

The Adairs and Gardners sought to prove that HUD officials had approved the university center project for federal funding in an arbitrary and capricious fashion constituting an abuse of their discretion. The plaintiffs alleged that HUD officials had either misled or ignored the residents of the area. The 1965 letter to Mrs. Harvey Gee from the Regional Director for Urban Renewal was introduced as evidence that HUD had informed the area residents of only one of two possible clearance area formulas and that the misunderstanding that resulted in consequence was prejudicial to the plaintiffs.[479] The limited report on the August 7, 1967 public hearing that HUD received from the NHA was introduced as evidence of HUD's indifference to the opinions of the area residents.[480] The plaintiffs further alleged that HUD officials had iguored evidence of a conflict of interest in Clarke and Rapuano's dual role as a planner for Vanderbilt and as a project area surveyor for the NHA in Vanderbilt's expansion area. Moreover, the area residents charged HUD with failing to adequately consider the exhibits and documentation they had submitted which directly conflicted with that submitted by the NHA.

In response to these charges, HUD produced extensive testi-

479. In a letter to Mrs. Harvey Gee dated November 19, 1965, E. Bruce Wedge (Regional Director of Urban Renewal in HUD's Atlanta office at that time) stated: "Current URA Regulations require that a minimum of 51% of the buildings in a project area proposed for clearance and redevelopment must be structurally suhstandard to a degree requiring clearance as determined by specific criteria." (Plaintiffs' Exhibit 27) Plaintiffs also introduced into evidence a letter dated July 7, 1969 from HUD Secretary George Romney to one of the area residents stating the area qualified because 50.3% of the buildings were substandard (see Deposition of John Edmunds, pp. 47-48). Both letters made no mention of the alternative way of qualifying an area for clearance—by having over 20% of the buildings found substandard warranting clearance coupled with enough blighting influences warranting clearance to bring the total number of buildings warranting clearance in the area to over 50%.

480. "[C]itizens were heard in favor and in opposition to . . . the bill." Deposition of John Edmunds, at 42.

mony to demonstrate the particular care it had exercised in evaluating the university center project precisely because of its controversial nature and because of HUD's communications with some of the area residents.

HUD officials testified that they were aware that Clarke and Rapuano had been employed by Vanderbilt as well as by the NHA, but they believed the relationship did not constitute a conflict of interest that would invalidate the accuracy of the engineering firm's findings. The Assistant Regional Director of HUD's Atlanta Office testified that he personally visited Nashville twice and walked through the project area, to determine conditions for himself.[481] In addition, he testified that both NHA and HUD officials had continued to make personal inspections of the area from time to time in order to be certain of continued project eligibility. During the period of time between the Metro Council's approval of the plan in August 1967 and HUD's final determination of eligibility in April 1968, HUD once again reviewed all the materials NHA had submitted on the project, sent a HUD attorney to Nashville to survey the area personally once more, and studied letters, tapes, and photographs sent them by area residents challenging the NHA findings, including a transcript of the speech made by James Hamilton before the Metro Council challenging the eligibility of the project, alleging a conspiracy between Vanderbilt and the Housing Authority and a conflict of interest on the part of certain NHA commissioners. After restudying all the documentation submitted, after considering the results of HUD officials' own visits to Nashville, and after giving careful consideration to the area residents' charges, HUD had made an independent determination that the area qualified for assistance.[482] HUD officials thus contended that the degree of care taken in reaching their determination, combined with the reliability of the data submitted by the NHA, negated any possible inference of arbitrary or capricious action by the federal agency.

The apparent care that the Atlanta HUD officials had taken in making their decision was a decisive factor in the court's decision. In ruling that HUD's determination that the area was eligible for urban renewal was neither arbitrary nor capricious, the trial judge was impressed by HUD's independent determination that the area qualified, on the basis of personal investigations of the area. Moreover, the court complimented HUD on the "courteous and competent" manner in which its officials replied to inquiries from

481. *Record*, vol. 3, at 284.
482. *Id.* at 308-09.

property owners in the area. As for the presence of the requisite guideline percentages of "substandard" structures in the area, the court stated that the clear proponderance of the evidence indicated these percentages did exist and that the area therefore qualified under federal as well as state law. In so holding, the court disposed of the area residents' final attempt to prove that the three decision-making bodies involved in the university area project had failed to act in a careful and objective manner.[483]

X. Conclusion

By the spring of 1974 the few remaining residents of the Vanderbilt university clearance area had absorbed two successive major reverses in their efforts to halt implementation of Nashville's Section 112 project. In the fall of 1973 the members of the Project Area Committee had lost their political struggle to have their homes deleted from Vanderbilt's acquisition program in the clearance area. In the early spring of 1974 the Adairs and the Gardners had lost their lawsuit against the university, and although its outcome was not binding upon other residents who might seek judicial relief in the future, the implications of the result were clear enough. Yet despite their reverses and despite the fact there were now no more than twenty property owners still within the clearance area, the members of the PAC continued to carry on their struggle. Some individuals began to lay plans for their own suits against the university. The PAC as a whole on the other hand requested the NHA to prepare a federal environmental impact statement for the entire urban renewal project area, a request that may have originated in the PAC's concern for the university neighborhood's environment but which also could not help but add perceptibly to the NHA staff's immediate workload. In short, despite the reverses that stretched back over the previous eight years, a significant portion of the original opponents of the Vanderbilt clearance program continued their plans to make acquisition of their homes as expensive as possible in time, trouble and perhaps even money.

The intractability of the handful of remaining residents had its origins in many sources. As a matter of personal convenience it was no doubt easier for the older members of the group to wait until 1975 before having to make a move to new quarters. More importantly, perhaps, many of the remaining residents continued to feel a genu-

483. Gardner v. Nashville Housing Authority, No. 6021 (M.D. Tenn., Mar. 4, 1974) at 7.

ine sense of concern that their homes could be forcibly taken from them to serve the expansion plans of a private institution. Despite judicial proceedings which sanctioned the use of eminent domain on behalf of private institutions a number of the residents continued to feel that condemnation of their land for such a purpose was immoral if not in fact unconstitutional. Most importantly of all, however, many of the remaining residents continued to feel a personal sense of bitterness that they had had such little opportunity to influence a project that directly affected their homes and their lives.

If nothing else, the experience of the residents of the university center urban renewal clearance area had suggested that in at least one city, those who were affected most seemed to have counted least in the community's decision to use eminent domain. Despite the PTA meeting in November 1965, the public meeting of July 19th and the public hearing on August 7th, 1967, the residents of the clearance area had been unintentionally but nevertheless effectively excluded from Nashville's political decision making process by their own ignorance of the federal urban renewal program, the unresponsiveness of urban renewal officials to their inquiries and their own initial lack of political skills. In contrast to the staff of the NHA with its monopoly of technical skills and the administration of Vanderbilt University with its capacity to determine the future of the plan, the area residents had neither the knowledge nor the power to command events. Although as a whole they seemed to be persons with more than average education, the residents who attempted to learn about the standards and procedures which governed the urban renewal process were unable to acquire the information they needed until after the final political and administrative decisions to implement the plan had been made. While the sponsoring institutions could affect the final decision to implement the plan, during the seven years from August 1961 to August 1967 the area residents could only wait for the decisions of others to affect their future. When at last in Augnst 1967 the residents were given their legal opportunity to speak to the merits of the clearance plan for their neighborhood, they were allotted five minutes each to attempt to reverse a plan that had gained virtually irreversible momentum from seven years of planning, an imminent federal deadline and an almost irresistable financial incentive to Nashville's government that Vanderbilt itself originally helped provide. As the events of succeeding years were to demonstrate, the area residents could be-

come an influential political force in their own right given the proper organization and the time necessary to acquire political skills. Yet by the time the residents had become politically adept the public decision about their property had long since been made and they could only embark on a series of bitter, time consuming skirmishes that resulted in few important victories and a number of ultimately pointless meetings of the Metropolitan Council.

Despite the fact that the area residents had no meaningful practical opportunity to affect the public decision about their neighborhood, the process by which they were to be deprived of their property was entirely constitutional. The very legality of the process by which they were to lose their land provided its own reflection on the judicial protection afforded to private property. The original federal guidelines which had first established the characteristics of an urban renewal clearance area were never the subject of public debate or dispute, although they were the ultimate determinate of whether a deprivation of property would occur under the federal urban renewal program. Likewise, the local application of the federal standards was never open to public discussion, although they exercised a similar practical function and in part, at least seemed open to some legitimate questioning. In addition, while some of the persons most directly affected by the clearance program had attempted to learn in advance the nature of the criteria that had been used to judge their homes, they were effectively but not deliberately prevented from learning the relevant technical standards until after the decision had been taken to clear their houses. When, at last, the residents sought judicial review of the political and administrative decisions that had ensured the deprivation of their property, precisely because those decisions were political and administrative in nature, the reviewing court was bound by precedent to apply the narrowest scope of judicial review. In effect the deprivation of the area residents' property was based on a series of *ex parte* regulations, applied in an *ex parte* manner and effectively insulated from judicial review by the political and administrative decisions to which they gave rise.

Although the administration of Vanderbilt University was subjected to local criticism for the means by which it fulfilled its part in the University Center Urban Renewal Project, in the end, the university's policies had little to do with the enmity it encountered from the residents of its clearance area. At various times university officials were advised that the project would have gained greater

acceptance had the university developed its own direct communications with the area residents rather than relying on that of the housing authority.[484] Alternatively some residents observed that the university would have encountered less resistance had it been capable of demonstrating a coherent plan for redeveloping the clearance area.[485] Yet it seems apparent that neither of these nor any other palliatives would have worked a change in the attitude of the residents who opposed the university's urban renewal expansion plans. Once the university resolved to proceed with the University Center Urban Renewal Plan it almost inevitably imposed upon itself and its community the social cost of the struggle of a group of people whose attachment to the institution of private property mirrored the rhetoric but not the reality of American property law. The cost of that struggle was almost certainly raised by the bitterness those people continued to feel from their initial exclusion from the political decisions that affected their lives and homes. And despite the years of past and present American legal tradition that justify the practices, it is a cost which every community might practically consider in resolving to use its own power of eminent domain on behalf of private interest groups. In Nashville, Tennessee, at Vanderbilt University, with over a year to run before the remaining thirty homes must be acquired or condemned, that cost has not yet been fully paid.

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484. *The University Next Door*, published by the Vanderbilt Inter-Faith Association circa 1969.

485. *See* note 188 *supra*.

Note on Sources

The present case study was based in part upon interviews with representatives of the Metropolitan Development and Housing Agency (formerly the Nashville Housing Authority), Vanderbilt University, residents of the clearance area and several of the Nashville Councilmen who participated in the political decisions of 1961, 1967 and 1973. The authors were given access to the files of the old Nashville Housing Authority, the Project Area Committee, the trial transcripts of the Adair-Gardner suit and the trial exhibits. Acting upon the advice of its attorney, the administration of Vanderbilt University did not allow the authors access to university files but the individual members of the administration were generous in sharing

their own personal recollections of the events.

From the outset the authors offered to circulate the manuscript of the present study for critical comments and suggestions before publication. In every case there bas been a conscious effort to incorporate tbe numerous useful comments wbich were received during the period from May 23rd to May 28.

The authors wisb to express their appreciation to the numerous persons who were generous with their time and knowledge. The resulting study and its conclusions are the exclusive work of the autbors. Any errors tbat may appear in the text are also exclusively theirs.