CITIZEN PARTICIPATION IN THE MODEL CITIES PROGRAM

Toward a Theory of Collective Bargaining for the Poor

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LOCAL GOVERNMENT AGENCIES have failed to perceive and respond affirmatively to the dilemma of the urban poor; an element of the population which is increasingly non-white.[1] This failure is exemplified in many ways: by the arbitrary denial of welfare benefits and the subjection of recipients to odious invasions of personal rights;[2] by the construction of dreary public housing projects in which tenants must submit to degrading management practices;[3] by the administration of ghetto schools which perform a custodial rather than an educational function;[4] and by the failure to provide adequate police protection and other necessary municipal services.[5] The rising and increasingly militant demands of the poor in general, and various minority groups in particular, for a greater voice in the administration of the government programs which affect them is the inevitable result of the accumulated failures of municipal government. One observer accurately describes the new consciousness of slum residents in Model Cities areas he has studied:

> . . . the old ways of community decision-making are dead — programs and services designed by experts and accepted by the power structure can no longer be offered unilaterally to the poor, nor decisions by the 'establishment' imposed upon them. Planning must henceforth be carried on, in the words of the model cities guidelines, *with* as well as for the residents of low-income areas. And so must program execution.[6]

Whether these efforts for increased community influence will lead to orderly reform of urban bureaucracies or will be frustrated and diverted into non-productive or violent ends depends in large measure upon vigorous advocacy to assure that emerging legal entitlements to

1. It has been estimated that between 1960 and 1985 the nonwhite population of central cities will nearly double — increasing from 10.4 to 20.1 million. At the same time the white population of central cities is expected to decrease by approximately 5%. National Commission on Urban Problems, *The Challenge of America's Metropolitan Population Outlook — 1960-1985* (Washington, 1968), p. 25.
2. Cloward & Piven, *Poverty, Injustice and the Welfare State*, The Nation, vol. 202, pp. 230-5, 264-8, March 7, 1966; Reich, *Midnight Welfare Searches and the Social Security Act*, 72 Yale Law Journal 1347 1962-63..
3. Rosen, *Tenants Rights in Public Housing*, in HOUSING FOR THE POOR: Rights and Remedies, Project on Social Welfare Law, New York University Law School, Supplement No. 1 (New York, 1967).
4. *Rogers, 110 Livingston Street: Politics and Bureaucracy in the New York City School System* (New York, 1968).
5. *Report of the U.S. National Advisory Commission on Civil Disorders*, (Washington, 1968), pp. 161-162; Chevigny, *Police Powers Police Abuses in New York City* (New York, 1969); Cray *The Big Blue Lines Police Power v. Human Rights* (New York, 1967).
6. Sundquist, *Making Federalism Work* (Washington, 1970), p. 117.

participate are used to good advantage.

The Model Cities program was designed by Congress to assist cities to revitalize slums and to permit residents of such communities to participate in programs to rejuvenate and redirect all of the above mentioned institutions and others as well. The Model Cities program requires citizen participation in the decision-making process to a far greater extent than ony other similar federal program.[7] Notwithstanding its many weaknesses, this program is potentially one of the most significant of those which comprise the federal government's anti-poverty program. And the program is important, not only in its own right, but as an example of the form community development may take under the "revenue sharing" or "bloc grant" legislation recently proposed by the President[8] and others.[9]

This article does not attempt any comprehensive exegesis of the Model Cities Program from the legal or city planning point of view.[10] Its purposes are to briefly describe the program and to draw attention to the significance of the citizen participation requirements. An analogy to the common law of collective bargaining is suggested as a useful model for legal development in this area.

Although citizen participation is not well defined in the statute or regulations, and remains substantially undefined by the courts, this article suggests that the Model Cities Act and related legislation nevertheless provides the basis for significant common law development to reform the relations between urban bureaucracies and the constituencies they are supposed to serve. As will be shown, the policies underlying the Model Cities Act are similar in important respects to those which led to labor reforms enacted during the 1930's. And just as the policies expressed in the national labor laws led to court decisions which required the sharing of industrial power with labor, so too does the Model Cities Act provide a basis for judicial recognition of the right of the poor to participate in government decisions that directly affect them.

Like the National Labor Relations Act, the Demonstration Cities and Metropolitan Development Act of 1966[11] (hereinafter Model Cities Act) was a legislative response to social unrest that attempts to establish a new mechanism for the peaceful resolution of disputes which might otherwise lead to violence. As developed by the courts, the national labor laws have succeeded in stabilizing industrial disputes, fostered the free flow of commerce, and achieved a more equitable distribution of wealth. Whether the Model Cities Act and related legislation, reinforced and concretized by a body of common law, will stabilize urban conflict and foster a more just society remains to be seen; since judicial development of this body of law is still in its infancy. The recent decision of the Third Circuit in *North City Area Wide Council v. Romney*,[12] analyzed below, is the first case in which this issue was squarely presented.

Analysis of the citizen participation aspects of the program, and discussion of the usefulness and limitations of the labor law analogy follow a description of the Model Cities program.

THE MODEL CITIES PROGRAM

TITLE I of the Model Cities Act declares that "improving the quality of urban life is the most critical problem facing the United States" and that "cities . . . do

7. Infra., pp.
8. State of the Union Message, Weekly Compilation of Presidential Documents, January 25, 1971, vol. 7, no. 4, p. 89-97, National Archives and Records Service.
9. National Association of Housing and Redevelopment Officials (NAHRO) Program Study Committee, *Report to the NAHRO Board of Governors* (December 3, 1970).
10. City planners and academicians have written extensively on the Model Cities Program. See, e.g., Kaplan, M. *et al. The Model Cities Programs An Analysis of the Planning Process in Three Cities* (Washington, 1968); Arnstein, *A Ladder of Citizen Participation* 35 Jour. Am. Inst. Planners 216 (July 1969); Piven, *Who Does the Advocate Planner Serve?* 1 Social Policy 32 (June 1970); Mogulof, *Coalition to Adversarys Citizen Participation in Three Federal Programs*, 35 Jour. Am. Inst. Planners 225 (July 1969); and Warren, *Model Cities First Rounds Politics, Planning, and Participation*, 35 Jour. Am. Inst. Planners 245 (July 1969).
11. Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. 3301, *et. seq.*
12. 428 F. 2nd 754 (3rd Cir. 1970).

not have adequate resources to deal effectively with the critical problems facing them."[13] Congress authorized HUD to provide financial and technical assistance to cities to enable them:

> to plan, develop, and carry out locally prepared and scheduled comprehensive City Development Programs containing new and imaginative proposals to rebuild or revitalize large slum and blighted areas; to expand housing, job and income opportunities; to reduce dependence on welfare payments; to improve educational facilities and programs; to combat disease and ill health; to reduce the incidence of crime and delinquency to enhance recreational and cultural opportunities; to establish better access between homes and jobs; and generally to improve living conditions for the people who live in such areas, and to accomplish these objectives through the most effective and economic concentration and coordination of Federal, State, and Local public and private efforts to improve the quality of urban life.[14]

Other important provisions in the statute require "widespread citizen participation,"[15] a program of relocation assistance and relocation payments equivalent to those provided in urban renewal,[16] and maximum feasible employment of Model Neighborhood residents in all phases of planning and program execution.[17] Regulations issued by the U.S. Department of Housing and Urban Development (HUD) contain further Model Cities requirements.[18] This comprehensive approach to a full range of neighborhood problems distinguishes Model Cities from the Urban Renewal Program, which, theoretically at least, is addressed only to physical redevelopment in general and the provision of low- to moderate-income housing in particular.[19]

The most potentially significant development in the Model Cities program is the creation of new institutions, completely separate from local government and subject to community control or significant community influence. Some of the early programs to go into execution utilized a variety of new neighborhood-controlled corporations to implement the program. This is now prohibited by the present administration[20] with the signifi-

13. 42 U.S.C. 3301, *et. seq.*
14. 42 U.S.C. 3301.
15. 42U.S.C. 3303 (a) (2).
16. 42 U.S.C. 3307.
17. 42 U.S.C. 3303 (a) (2).
18. A City Demonstration Agency (CDA) is the municipal agency created to administer the Model Cities Program on the local level. See *infra.*, p.

    CDA Letters are contained in *HUD Handbooks* issued by the Secretary of HUD pursuant to his rule-making authority, 42 U.S.C. 3357.

    Under the doctrine of *Thorpe v. The Housing Authority of the City of Durham,* 393 U.S. 268 (1968) such Handbooks have the force and effect of law. See also, *North City Area Wide Council v. Romney,* 39 L.W. 2048 (No. 18,466, 3rd Cir., July 14, 1970); *Maurice Shannon et. al. v. United States Department of Housing and Urban Development,* 305 F. Supp. 205 (1969), and *Coalition for United Community Action v. Romney,* N.D. I11 E.D. No. 69 C 1626, filed August 5, 1969, Memorandum denying Defendant's Motion to Dismiss entered April 6, 1970.

    As of February 1, 1971, the following CDA Letters had been issued:

    CDA Letter No. 1 *Model Cities Planning Requirements* (October 1967, supplemented by CDA No. 4, and HUD internal memorandum from Assistant Secretary Floyd Hyde to all CDA directors of August 22, 1969 "Submission Requirements for First Year Comprehensive Plans").

    CDA Letter No. 2 *Administrative Policies and Procedures* (revised in July, 1968 and May, 1969).

    CDA Letter No. 3 *Citizen Participation* (November, 1967).

    CDA Letter No. 4 *Comprehensive Program Submission Requirements* (July, 1968).

    CDA Letter No. 5 *Policies and Requirements for Model Cities Relocation* (February, 1970, superceding November, 1968).

    CDA Letter No. 6 *Budget Submission Requirements* (October, 1968).

    CDA Letter No. 7 *Computation of the Base for the Supplemental Grant* (November, 1968).

    CDA Letter No. 8 *Administrative and Legal Policies and Procedures for the Execution Phase* (June, 1969).

    CDA Letter No. 8, Part II, *Accounting and Financial Management Procedures of the Execution Phase of the Model Cities Program* (June, 1969).

    CDA Letter No. 9 *Model Cities Execution Phase Program Reporting* (April, 1969).

    CDA Letter No. 10A *Administrative Performance and Capability* (MC 3135.1, December, 1969).

    CDA Letter No. 10B *Joint HUD-OEO Citizen Participation Policy for Model Cities Programs* (MC 3135.1, March, 1970).

    CDA Letter No. 10C *Policy Statement on Economic Development for Model Cities Programs* (MC Econ. Devel. 405.6, undated).

    CDA Letter No. 10D *Separation of Responsibilities* (MC 3135.1, Supplement No. 3, November, 1970).

    CDA Letter No. 11 *Model Cities Resident Employment and Training Requirements* (MC 3160.1, November, 1970).

    In addition to CDA Letters, the Model Cities Administration has issued regulations in the form of a program guide, *Improving the Quality of Urban Life, a Program Guide to the Model Cities Program,* HUD PG-47 (December, 1967), Circulars, and Program Information Memos. A series of advisory Technical Assistance Bulletins was initiated, but discontinued in 1968.
19. See 42 U.S.C. 1442 and 1445(h).
20. CDA No. 10D, *supra,* note 18 provides at para. d(2): "New corporations shall be formed or inexperienced agencies shall be used to operate projects only when (a) there is no existing experienced agency or agencies refused to respond to reasonably defined needs and reasonable requirements on means of delivering services; or (c) the only existing experienced agency or agencies declined to participate or declined to make the specific commitment noted above."

cant exception of Housing Development Corporations (HDC's) and Community Development Corporations (CDCs'). HDC's have been created or are planned in most Model Neighborhoods. They provide interim financing and technical assistance to organizations sponsoring construction of FHA-subsidized housing, usually under HUD's so-called "Section 236" program.[21] Most also provide rehabilitation loans and grants to homeowners. The intent of these activities is both to improve housing in the neighborhood and foster employment of area residents in new neighborhood-based construction firms. Similarly, CDC's have been created in many Model Neighborhoods to provide planning grants, technical assistance, and venture capital to existing local businesses, or engage in new community economic development activities. Model Cities CDC's are well-funded compared to counterparts created under the Small Business Administration's Minority Enterprise Small Business Investment Company program[22] or OEO's Title I(d) program.[23]

Most Model Cities funds have not gone to an HDC, CDC, or similar new institution, but have been provided to existing city bureaucracies such as school boards, public housing authorities, and city hospitals to enable them to carry out new programs for the Model Neighborhoods. Programs funded through existing bureaucracies are less amenable to neighborhood influence than those funded through new institutions with a significant neighborhood involvement on their boards. However, since most such programs are funded on an annual basis, subject to termination if the bureaucracy operating the program does not meet the goals established by the local model cities agency and its citizen component, neighborhood influence can still be substantial under this type of arrangement. Contracts which clearly specify the obligations of the recipient agency provide additional leverage.

In the area of health, Model Cities programs which have not created and do not plan to create comprehensive Neighborhood Health Centers have provided supplemental funds to expand existing health programs run by city or county hospitals or public health departments. Some Model Cities have used this money for mass neighborhood preventive health campaigns. (Rubella vaccinations are the most common.) Others are experimenting with innovative forms of health insurance. The Model Cities programs with strongest neighborhood involvement have planned or actually developed new comprehensive health centers on the OEO model.[24] These centers provide an alternatives to city or county hospitals in that they are located in the community, have neighborhood residents on their boards and staffs, and are therefore presumably more sensitive to neighborhood health needs. Social service projects such as child day care centers and programs for the elderly are also commonly provided.

Demonstration programs with respect to education have typically provided increased funding to school boards for use in three areas: (1) special compensatory education programs for drop-outs, potential drop-outs, children with emotional problems, and children who need to learn basic skills such as reading and arithmetic; (2) use of neighborhood residents as "teacher aides" or leaders of curriculum enrichment programs; and (3) greater involvement of parents in school activities.

Many Model Cities programs have provided funds to a variety of agencies for job training similar to that formerly conducted by the Youth Corps. Expanded employment of neighborhood residents by the municipal agencies which plan and execute the Model Cities program is receiving priority attention in most cities. A recent HUD regulation requires all cities to develop a program for such expanded employment.[25]

21. 12 U.S.C. 1715z-1.
22. 12 U.S.C. 687, *et. seq.*, popularly referred to as the "MESBIC program."
23. 42 U.S.C. 2763.
24. 42 U.S.C. 2737.
25. CDA Letter No. 11, *supra*, note 18.

The fact that federal urban development programs often cause the forced displacement from housing of many more low-income individuals and families than are rehoused has been well-documented.[26] The particular programs which to date have had the most adverse impact in this regard are the urban renewal and federal-aid highway programs.[27] It is significant, therefore, that the provisions of the statute governing relocation from Model Cities projects[28] are the same as or virtually identical to the relocation requirements for urban renewal, public housing and federal-aid highways.[29] Many Model Cities programs anticipate and attempt to alleviate this problem by providing for additional neighborhood-based relocation workers responsible for evaluating the needs of displacees and locating appropriate relocation housing.

The variety of urban ills to which the Model Cities program is directed is the source of both its strength and weakness. Never before has a single government program recognized the interrelatedness of, for example, inadequate housing, ill health and underemployment; and never before has a program attempted to deal with these seemingly disparate problems as simply different aspects of the more fundamental problem of powerlessness and alienation in urban society. Recognition of the interdependent nature of what were previously regarded and treated as separate problems, while necessary to the solution of these problems, imposes heavy responsibilities on both HUD and local agencies. Not only must these agencies approach their function from a perspective to which they are unaccustomed, but they must undertake to coordinate activities which were previously performed independently. Moreover, HUD and municipal Model Cities Agencies must rely upon federal, state and local agencies over which they have little control to provide information and services, making the administrative tasks all the more difficult.

Two types of federal financial assistance are available for the execution of projects planned under the auspices of Model Cities: (1) funds which are "earmarked" for the Model Neighborhood from existing federal categorical grant-in-aid programs;[30] and (2) "supplementary funds" provided by HUD's Model Cities Administration.[31]

Administration of the Model Cities program at the federal level is primarily the responsibility of officials of the U.S. Department of Housing and Urban Development (HUD) at the Washington, Regional, and "Area" levels. At the local level, responsibility for the program has increasingly desolved upon the chief executive and local governing body of the locality.[32] The municipal agency which actually plans and executes the Model Cities program on the local level is the City Demonstration Agency (CDA). The primary functions of the CDA are planning, programming, and monitoring the

26. Cahn, et. al., *The Legal Lawbreaker: A Study in Official Lawlessness Regarding Federal Relocation Requirements* (Washington, 1970); *Hearings on the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970* [H.R. 14898], before the House Committee on Public Works, 91st Cong., 1st and 2nd Sess., pp. 379-93 (1970).

27. 404,000 housing units were demolished by urban renewal during the period 1949-1967. 330,000 housing units were demolished by highway construction during the same period. National Commission on Urban Problems, *Building the American City* (Washington, 1968) p. 82.

With respect to the problem of highway relocation, see, e.g., Roberts, *Highway Relocation Planning and Early Judicial Review*, 7 Harv. Jour. on Legis. 179 (1970); *Triangle Improvement Council v. Ritchie*, 314 F. Supp. 20 (S.D.W.Va. 1969); aff'd 429 F. 2d 423 (4th Cir. *cert, granted,* .....*U.S.*.....); and *Concerned Citizens for the Preservation of Clarksville v. Volpe*, No. A-70-CA 27 (W.D. Tex. July 15, 1970) (unreported decision) (pending decision in the United States Court of Appeals for the Fifth Circuit, Docket No. 30286).

28. See *supra.*, no. 16.

29. 42 U.S.C. §1455(c) (urban renewal); 42 U.S.C. §1415(7) (b) (iii) (public housing); 23 U.S.C. 502 (federal aid highways).

30. 42 U.S.C. 3305(c).

A "categorical" grant, in contrast to an unrestricted "bloc" grant, refers to any federal grant with a narrowly defined purpose such as urban renewal or highway construction.

It was originally the intention of the program that a "Washington Interagency Coordinating Committee" (WICC) composed of high level representatives of various federal agencies and supported by strong White House backing would be able to secure commitments from the various federal agencies to earmark significantly increased amounts of categorical funds to be spent exclusively in Model Neighborhoods. Thus, for example, it was thought that HUD might "earmark" twenty-five percent of all funds in the Urban Beautification program to be spent on Urban Beautification projects exclusively located within the boundaries of Model Neighborhoods.

program. The CDA does not operate any significant parts of the program during the execution phase, but contracts with existing or new local departments or agencies to carry out specific programs.

In connection with the planning and administration of the program, perhaps the most important features of the Act and implementing regulations are provisions which require the participation of target area residents in all aspects of the decision-making process. Until the mid-1960's government traditionally approached the dilemma of urban poverty with the view that the intervention of professional planners and technicians was required to identify and solve particular physical problems. Thus, for example, the Urban Renewal Program, originally referred to as the "slum clearance" program, was premised on the theory that by eliminating the slums, government might thereby eliminate the causes of slums. The Model Cities program is predicated on a different theory: that government must concentrate, not on the symptomatic visible problems, but on the underlying causes of poverty. These causes were identified as the powerlessness and alienation of the poor which were generated and sustained by governmental indifference. Therefore, a major purpose of the Model Cities Act is citizen involvement. The balance of this article is devoted to this aspect of the Model Cities program.

THE CITIZEN PARTICIPATION REQUIREMENTS

THE ROLE of target area[33] residents in the program is mentioned only once in the Model Cities Act, in a provision which simply requires "widespread citizen participation."[34] There is relatively little discussion of this requirement in legislative history, although HUD Secretary Weaver did stress its importance at several points in his congressional testimony.[35]

Floyd Hyde, the present HUD Assistant Secretary in charge of the Model Cities Program has since clarified the rationale originally underlying citizen participation. Stating that it was decided upon "after long and extremely searching explorations," he noted that

> federal, state and local programs involving massive physical change or significant social change for community residents were frequently not addressing citizens' concerns and were being confronted by resistance where the affected residents had not participated in the planning . . .

31. 42 U.S.C. 3304(a) and 3305(b).
The amount of Model Cities supplemental funds available for innovative demonstration programs is small in comparison with the need, but nevertheless significant. 42 U.S.C. 3301(b) authorizes up to the following amounts of supplemental funds: $400 million in 1967; $500 million in 1968; $1 billion in 1969; and $600 million in 1970. The Housing Act of 1970, P.L. 1-609, 80 Stat. 1780, Title III, §301 authorizes $200 million for fiscal 1971.
To date, cities have been unable to absorb these funds usefully as they become available because of local political battles, staffing problems, bureaucratic delays, and confusion resulting from changes in the program's philosophy. Accordingly, in no year has the amount of supplemental funds authorized equaled the amount authorized for that year. Amounts authorized for Model Cities supplemental funds by 42 U.S.C. 3311(c) compared with amounts appropriated as shown in Winchester, *Model Cities Fiscal Year 1970 Data Book* (Washington, 1970), page 16, are as follows:

Year	*Authorized*	*Appropriated*
1968	$ 400	$212
1969	1,000	312.5
1970	600	575

Furthermore, in no year has the full amount of supplemental funds appropriated been expended. *The Model Cities Data Book, supra,* p. 16 shows:

Fiscal Year	*Appropriations*	*Expenditures*
1968	212	5.2
1969	312	15.4
1970 (estimated)	575	300

42 U.S.C. 3311(c) provides for use of the unexpended funds in succeeding years: "any amounts appropriated under this section shall remain available until expended, and any amounts authorized for any fiscal year under this section but not appropriated may be appropriated for any succeeding fiscal year commencing rior to July 1, 1971."
32. CDA Letter No. 10A, *supra.*, note 18.
33. "Target area" and Model Neighborhood" are the terms popularly used to describe what the Act refers to as "the area of the city covered by the [model cities] program." 42 U.S.C. §3303(a)(1).
34. *Supra,* note 13.
35. The really great innovations are going to be the innovation as to how you do the social and the human rehabilitation, how you get this thing we talk about — people involvement — how you get people to be able to be a part of the planning.
The requirement [for widesread citizen participation] means that the city will be expected to involve area residents in the demonstration in a meaningful way. Since the cooperation and assistance of the residents of the program area will be essential to the success of the demonstration program the city should insure that the needs and desires of local residents are given a hearing and some workable mechanism for communication between citizens of the area and the City Demonstration Agency is developed.
Statement of Robert C. Weaver at HEARINGS before the Housing Subcommittee of the Committee on Banking and Currency, U.S. Senate, 89th Cong., 2nd Sess., pp. 32, 100.

> . . . The more perceptive leaders of the country were successfully demonstrating that the most productive route for the development of constructive change was to be reached through widespread involvement of people . . . People were no longer content with plans and programs that were designed for them. It had been firmly established that while the role of the professional or of established leadership was still very essential. [sic] The client community possessed ingredients that when thought out and utilized made for improved and more readily acceptable plans and programs.[36]

The Model Cities Program grew out of a major shift in American domestic policy which occurred during the 1960's. A number of recent statutes evince broad recognition of the extent of the poverty problem, its enormous social and economic costs in terms of wasted and unproductive lives, crime, ill health, and as a source of civil disorder. They further recognize the necessity of a national commitment to meet the problem. More important still is a pervasive change in the legislative approach to this commitment. Most earlier legislation dealing with poverty is highly paternalistic, implicitly assuming that society should provide minimum benefits to the deserving poor from a sense of charity. In contrast, the social legislation of the 1960's is essentially based upon the view that the poor must be given some measure of control over government programs of direct concern to them.

The first significant projects aimed at increasing the influence of the poor in decisions affecting their lives were undertaken by the Ford Foundation and the President's Committee on Juvenile Delinquency in the early 1960's.[37] These early projects were followed by the Economic Opportunity Act of 1964[38] which declared that:

> "Although the economic well-being and prosperity of the United States have progressed to a level surpassing any achieved in world history, and although these benefits are widely shared throughout the Nation, poverty continues to be the lot of a substantial number of our people. The United States can achieve its full economic and social potential as a nation only if every individual has the opportunity to contribute to the full extent of his capabilities and to participate in the workings of our society . . . "[39]

Accordingly, the Act provides for "maximum feasible participation of the poor" in the planning and implementation of programs to overcome poverty.

Administrative agencies have enacted similar guidelines. For example, pursuant to HUD regulations, participation of the poor is now required with respect to land use studies,[40] the modernization of public housing, [41] urban renewal[42] and in the programming of most other HUD-assisted projects.[43] Thus the Model Cities Act and its implementing regulations are part of a developing change in the federal government's approach to poverty, representing perhaps its most advanced form.

The first HUD regulation devoted to the subject of citizen participation in the Model Cities Program was issued in 1967.[44] It established that each model cities program would include a citizen participation component which would be expected to meet the following "performance standards:"

1—Some form of organizational structure with leaders whom neighborhood residents accept as representing them;

2—Clear and direct access to the decision-making process;

3—Sufficient information to initiate and react to proposals;

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36. Flyod Hyde, *Citizen Participation in the Model Cities Program*, HUD News, September 15, 1969.
37. Marris and Rein, *Dilemmas of Social Reform* (New York, 1967) contains a description and analysis of these programs.
38. 42 U.S.C. 2701, *et. seq.*
39. 42 U.S.C. 2702.
40. HUD, *Comprehensive Planning Assistance Handbook* (MD 6041.1) Chapter 3.
41. HUD. *Low Rent Management Handbook* (RHA 7485.2).
42. HUD, *Urban Renewal Handbook* (RHA 7217.1, Ch. 5).
43. *The HUD Workable Program for Community Improvement Handbook* (MPD 7100.1a), Ch. 7 requires citizen participation in the following HUD-assisted projects: Urban Renewal Program, Neighborhood Development Program, Concentrated Code Enforcement Program, Interim Assistance for Blighted Areas, Demolition Grant Program, Community Renewal Program, General Neighborhood Development Program, Rehabilitation Loans and Grants, and, in some instances, with respect to Mortgage Insurance and Rent Supplement Projects.
44. CDA Letter No. 3, *supra*, note 18.

4—Professional technical assistance to the citizen participation structure; and

5—Financial assistance to enable residents to participate.

HUD guidelines failed to delineate the areas of authority, powers, or appropriate structure citizen participation structures. In the absence of definitive regulations or administrative control from Washington, the power of citizen groups varied in accordance with their inclination and ability to play power politics on the municipal level. Thus the manner in which the citizen component was initially formed and its leaders chosen became a critical factor.

Methods of selecting citizen participation structures have varied. Many cities create a representative organization whose members are popularly elected by residents of the target area. Others utilize an existing civic, religious or other neighborhood organization or a coalition of such groups.[45] The experiences of most model cities has shown that residents of target areas are rarely able to learn about the program until it reaches the planning stage. But once that point was reached, the demands of neighborhood residents for greater influence, power and control usually accelerate.[46] Since the citizen participation structure is normally selected prior to the commencement of planning, difficulties arose where a non-representative citizen component, chosen during a period of community indifference, was subsequently challenged by aroused residents who finally perceived the power they might wield. Even greater difficulties occurred in cities where municipal authorities, aware of the threat to their own authority, attempted to impose representatives of their own choosing upon potentially intractable communities. Black communities, which are increasing in size in most large cities and therefore most seriously threaten existing power structures, have been the intended victims of most such attempts, as, for example, in Philadelphia.[47] But accumulated experience under the Model Cities Program has shown that black communities, which some undoubtedly expected to be unresisting, have instead mounted the most energetic and successful resistance to political takeover. Indeed, a former Regional Director of the Model Cities Program perceives that the success of the program may depend upon the reconciliation of city government to the reality of a radically changed black consciousness.

> Whatever the local peculiarities, we have clearly entered a period where old notions of community and neighborhood are being buried. We are no longer talking of a neighborhood in a geographic sense — we seem to be talking of a community of black people who have finally claimed for themselves the difference that has been thrust on them by hundreds of years of American racism. We are dealing with relationships of black and white, where any attempt by white to tamper with who represents the black makes the legitimacy of that representation suspect.[48]

At the close of the Johnson administration it was estimated that citizen groups in only 15 of the first round model cities had developed sufficient power to achieve "partnership" in the local planning of the program, but that "in all but one of these [15] cities, it was angry citizen demands, rather than city initiative, that led to the negotiated sharing of power."[49] The Nixon administration, viewing this incipient movement with alarm, cut back sharply on citizen participation. This was accomplished by the issuance of a series of policy directives intended to re-establish the primacy of city hall and concomitantly diminish neighborhood influence. The first such directive stated that the mayor and the local governing body were to have "ultimate responsibility for the development, implementation, and performance of the Model Cities program."[50] Subsequent directives prohibited citizen components from selecting more than one-third of the

45. HUD, Model Cities Technical Assistance Bulletin No. 3, *Citizen Participation in the Model Cities Program* (December, 1968), p. 6.
46. Mogulof, *supra*, n. 10.
47. See *infra, pp.* .....
48. Mogulof, *supra*, n. 10, p. 222.
49. Arnstein, *supra*, n. 10, p. 222.
50. CDA Letter No. 10A, *supra*, n. 11.

members of the governing board of any Community Development Corporation funded with supplemental Model Cities funds,[51] and prohibited creation of new neighborhood controlled institutions to perform any function that could be performed by an existing agency of local government.[52]

But these new policies, which were calculated to lessen community demands for a greater role in local decision-making, only intensified the conflict. And as confrontation became inevitable it appeared that Philadelphia would provide the first battleground.

CITIZEN PARTICIPATION IN PRACTICE: THE NORTH CITY AREA WIDE COUNCIL CASE

I.

PHILADELPHIA, with large concentrations of low-income blacks and other minorities living in blighted neighborhoods, a progressive breakdown of city institutions designed to serve poor neighborhoods, rapidly increasing political consciousness of the poor and pressure for reform exemplifies both the extent of the urban problem and the potential for change which is characteristic of many American cities. A detailed review of the history of the Model Cities Program in that city is useful to illustrate the Model Cities process and to provide a background for the most significant litigation which has yet been commenced under the citizen participation requirements.[53]

In late 1966, Mayor James H. J. Tate anticipated enactment of the Model Cities Act and mobilized his administration to prepare an application for a planning grant. Neither the task force which prepared this application nor the policy committee which reviewed it originally included any authentic representatives of residents of the intended target area, a predominantly black section in North Philadelphia. However, after municipal officials and a limited number of community leaders appointed by the mayor completed the 400 page application, grass roots representatives of the community were appointed to two task force subcommittees on "administration structure" and "citizen participation." These community representatives refused to endorse the application as drafted and sought and obtained the city's permission to redraft certain sections. In view of the short time available, they focused their attention upon the creation of a partnership model for citizen participation and elimination of sections of the application which they felt represented a paternalistic approach to the community.

The partnership proposal was jointly developed by representatives of more than 140 diverse groups in the target area, including Puerto Rican and white organizations as well as black ones.[54] It contemplated creation of a coalition of substantially all community groups in the target area. This coalition would call itself the North City Area Wide Council (AWC). The AWC was to enter into a contract with the city under which it would receive a portion of HUD's planning grant to be used to provide the mechanism by which citizens could participate in the planning of the Model Cities program.

The application which was sent to HUD in early March 1970 adopted the community's partnership proposal almost verbatim. In the preface it stated that:

> Recognizing that the quality of citizen participation in government programs has often fallen short of the mark, even when it was sincerely sought, the [Model Cities

51. CDA Letter No. 10C, *supra*, n. 11.
52. CDA Letter No. 10D, *supra*, n. 11.
53. The following description of the facts surrounding the history of the Model Cities Program in Philadelphia relies in part upon published accounts which appear in articles entitled: *Maximum Feasible Manipulations* *What the Power Structure Did To Us* and *Postscripts* *The Conflict in Context*, in CITY, (a bimonthly magazine published by the National Urban Coalition) (October-November 1969) pp. 30-39 [hereinafter cited as CITY].
54. "More than 140 representatives from community groups helped work out the details of that proposal. It was the first time that so many groups with such diverse and competing interests had gotten together. We were black, Puerto Rican, and white organizations. We were conservatives and militants. We were from both sides of Broad Street, which had always been an organizational dividing line in the community. It was beautiful." *Id.*, p. 32.

> Program] in Philadelphia will strive to incorporate within its very core guarantees of citizen's authority to determine basic goals and policies for planning and implementing the program.

In order to provide the broadest possible representation for all citizens of the target area and all organizations in it, prior to signing the contract, the AWC established 16 local community organizations called "Hubs" staffed by volunteers. Each of the Hubs had a full-time field worker to assist it in determining the desires of the residents of the community with regard to the Model Cities Program. The Hubs were located in offices provided by neighborhood settlement houses, churches, or community agencies. An Executive Board, consisting of the chairman of and four delegates from each Hub as well as twelve members-at-large, was formed to provide uniform administration and, to the extent possible, to reconcile the views of the Hubs. Several standing committees were also created to correspond to the city's various model cities task forces.[55]

In November, 1967, eight months after it submitted its application, Philadelphia finally received a HUD grant for the planning and development of a Model Cities Program in an amount less than one-third of that sought. Two months later, after negotiations over how much of the HUD grant would be transferred to the AWC, the city and the AWC entered into a contract whereby the latter received $18,000 per month, substantially less than was originally anticipated. Roughly seven months later, however, this monthly amount was increased to $46,000.

As contemplated in the partnership proposal, the contract granted the AWC the power to initiate plans of its own, to engage in joint planning with CDA committees, and to review plans initiated by the CDA and other city agencies. It was expressly provided that if any differences of opinion arose regarding plans proposed by the CDA the CDA would enter into negotiations with the AWC until a mutually acceptable solution was arrived at. Upon the failure of mediation to resolve the dispute, the matter would be submitted to the mayor for a final decision. Further, representatives of the AWC were entitled to attend all meetings of CDA task forces and planning committees.

In short, then, at this point the AWC was not only the duly authorized citizen participation component for the Philadelphia Model Cities Program, but it had the power, the financial resources and the independence to act as an equal partner in all significant planning decisions.

Although the planning period of a little over one year was not without disputes, neither was it marked by any serious breakdown in the relations between the city and the AWC.[56] The general feeling of the parties was expressed as follows in the city's first action year plan which was submitted to HUD in January 1969:

> This joint planning relationship between the city and the community, as could have been anticipated, has not been without its share of conflict . . . [But] there is every indication that, with time, Philadelphia will become a model for the country of what form joint planning with citizens should assume . . .

After HUD advised them that only approximately half the requesting funding would be available, the city and the AWC on April 30th submitted a revised plan. This plan analyzed the causes for the conditions in the North Philadelphia ghetto and concluded that "The two basic problems in the [target area] are poverty and powerlessness." It emphasized the problem of "powerlessness" by stating:

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55. These four task forces were respectively concerned with physical environment, human resources, employment and manpower. *Id.*, p. 32.

56. As stated by leaders of the AWC,
> We worked night and day, weekends, and holidays to put together our ideas and the city's ideas. We had many differences in approach, but with our partnership arrangement, we were able to trade off so that they got some of their priorities, but so did we."

The mayor expressed a similar view:
> "Most rewarding [in the development of the Model Cities application] was the destruction of the myth that a model cities community and a governmentol body politic cannot enjoy a successful partnership."

Id., p. 35.

> If a single factor can be isolated from the syndrome of causes that have served to perpetuate the prevailing condition, it is the absence of any opportunity for Model Cities residents to influence decisions that have had a negative impact upon their community as well as their personal lives . . . Programs . . . should have the capacity for resident decision-making, as well as evaluation, built in from the outset.

The priorities which were agreed upon by the city and the AWC and expressed in the revised plan showed that roughly half of the budget would be devoted to economic development, almost one-quarter for comprehensive community education; about one fifth for improving the physical environment; and the balance for developing "social service delivery systems."

Among the particular projects proposed were:

- an economic developing corporation with the power to borrow and lend money and to purchase land, machinery and buildings.
- a land utilization corporation or land bank to acquire needed land for community purchases.
- a housing development corporation to construct new housing and rehabilitate old houses.
- an urban education institute to train and retrain teachers and sensitize them to the values of minority communities.
- six communications centers where residents would have the opportunity to develop communications skills and learn to use films and videotapes to convincingly present points of view and to increase their ability to evaluate public programs.
- projects for on-the-job training in managerial skills.
- a career institute to train residents for the multitude of jobs that would be created in Philadelphia by the Model Cities Program itself.

A number of these and other proposed projects were to be carried out by seven non-profit corporations acting under contract with the city. In order to provide the citizen decision-making which it considered essential to alleviate the problem of powerlessness, the revised plan stated that a majority of the directors of four of the non-profit corporations and significant minorities on the remaining three would be selected by residents of the target area through the AWC.

In late May 1970, HUD Assistant Secretary Floyd Hyde stated in a letter to the mayor that HUD reviewers found certain "technical problems" in the revised plan.[57] He listed three major categories of problems.

First: "Unusually heavy reliance on new corporations to carry out extraordinarily difficult assignments.

Second: "Heavy involvement in these operating corporations of the same citizen group which is the major neighborhood representative for model cities planning, monitoring, evaluating, and resource allocation.

Third: "Insufficient involvement of the city of Philadelphia and of established institutions, business, and voluntary agencies in most parts of the program."

In other words, the plan gave too little power to city government and "established institutions," and too much to the people. In response to the Hyde letter, the mayor sent HUD a Supplementary Statement prepared by the CDA director which, he said, represented a "critical clarification of the role to be played by Philadelphia in its model cities program." The Supplementary Statement, which was prepared without the knowledge of the AWC, attempted to meet HUD's three objections by limiting the participation of residents of the target area through the AWC and by increasing the authority of the CDA director. It also provided that only one-third of the directors of any of the seven non-profit corporations would be appointed through the AWC. The remaining directors would be appointed by organizations selected by, and under the control of, the CDA. In addition the Supplementary Statement reserved to the CDA director the right to appoint to the boards of directors such

57. Although not stated in Mr. Hyde's letter, these objections were based upon a change in federal policy later clearly expressed in CDA Letters 10A, B and C. See *supra* text at notes 50-53.

additional governmental representatives as she deemed appropriate.

On July 3, 1969, HUD accepted the Suplementary Statement but unilaterally added two more restricitions upon AWC's participation: First, no member of the board of directors of the operating corporations could be a member of the AWC after the first year of operations; and second, no board members could be selected by the AWC after the first year.

Because it had never been given an opportunity to review the Supplementary Statement or the requirements additionally imposed by HUD, and because it considered these changes unlawful, the AWC refused to enter into a proferred contract to continue to serve as the citizen participation component (although the contract provided for payment of $540,000 to meet AWC's operating expenses for one year).

The city then accepted a preliminary grant from HUD in excess of $3 million and began organizing a new citizen group to represent the interests of the target area. The AWC thereupon filed a class action in federal court to enjoin the entire Philadelphia Model Cities Program on the grounds that the city's submission to HUD of the Supplementary Statement without its participation, review or endorsement, and the subsequent approval of the Supplementary Statement by HUD, violated the "widespread citizen participation" requirement of the Model Cities Act.

II.

In a remarkable decision,[58] the district court dismissed the complaint on the grounds that the AWC lacked standing to sue, that the challenged administrative action was not subject to judicial review, and that HUD was a non-suable entity protected by the doctrine of sovereign immunity.

With respect to standing, the court relied upon cases of doubtful relevance[59] which, in any event, were decided prior to *Flast v. Cohen*[60] and other recent cases[61] which substantially liberalized standing requirements. The court's judgment that the Secretary's actions were not subject to judicial review was likewise based on an unexplained refusal to follow recent cases which compel the opposite conclusion.[62] Perhaps the most incomprehensible aspect of the decision was the court's application of the doctrine of sovereign immunity to bar suit against the Secretary of HUD.[63] Such a theory would effectively render unenforceable extensive legislation pertaining to federally administered housing and urban development programs, a result never intended by Congress.

Moreover, notwithstanding its procedural rulings, the district court gratuitously observed that "plaintiffs' would lose on the merits." This observation was based on the following reasoning:

> If one group, namely ACW, is considered by the plaintiffs to be sufficiently widespread so as to meet the requirement of widespread citizen participation, then it is preposterous to assume that the addition of another citizens' group thereto would defeat the requirement of widespread citizen participation. If anything, the addition of another group would be even more widespread.[64]

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58. *North City Wide Council, Inc. v. Romney,* ..... F. Supp. ..... (E.D.Pa. 1970).

59. The court relied primarily upon *Benson v. Minneapolis,* 286 F.Supp. 614, 619 (D. Minn. 1968), a suit which challenged the constitutionality of the Model Cities Act by plaintiffs who, unlike the Area Wide Council, lacked a direct interest in any specific statutory requirement. The Court also relied upon *Berry v. HHFA,* 340 F.2d 939 (2d Cir. 1965); *Greenstreet Ass'n v. Daley,* 323 F2d 1, 8 (7th Cir. 1967), *cert. denied,* 373 U.S. 914 (1963), which were also suits in which the plaintiffs did not assert rights under particular statutory provisions. *Greenstreet* was rejected by *Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F.2d 920 (2d Cir. 1968).

60. 392 U.S. 83 (1968). *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970), and, *Barlow v. Collins,* 397 U.S. 159 (1970), which carried the reasoning of *Flast* even further, had not been decided at the time of the district court's decisions.

61. See, e.g., *Norwalk CORE v. Norwalk Redevelopment Agency, supra,* n. 51; *Powelton Civic Home Owners Ass'n v. HUD,* 284 F.Supp. 809 (E.D. Pa. 1968); and *Western Addition Community Organization v. Weaver,* 294 F.Supp. 433 (N.D. Cal. 1968).

62. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140 (1967). See also, *Powelton Civic Home Owners Ass'n v. HUD, supra.,* and *Western Addition Community Organization v. Weaver, supra,* and *Shannon v. HUD,* No. 18,397 (3rd Cir. Dec. 30, 1970).

This analysis of the facts misses the essential points. As will be discussed later, the purely legal issue presented involved not so much the substance of the actions of HUD and the city as the unilateral manner in which they were taken. Moreover, the district court ignored allegations that the purpose of involving other citizen groups was not to widen citizen participation, but rather to dilute the influence of the AWC, an exceedingly broad-based coalition, whose representative character was never genuinely disputed.

Predictably, the district court's decision was reversed on appeal. In a brief unanimous opinion,[65] the court of appeals did not even discuss the matter of sovereign immunity and noted that the issue of standing was not pressed by the government on appeal in view of the Supreme Court's recent decisions in *Data Processing v. Barlow*. On the basis of *Norwalk CORE v. Norwalk Redevelopment Agency*[66] and the recent decision in *Coalition for United Community Action v. Romney*,[67] the Court assumed that the AWC had standing to challenge the Secretary's grant to the city. As to judicial review, the court noted that the Secretarys' actions were reviewable under the Administrative Procedure Act since the Model Cities Act has no provision which expressly precludes judicial review and the issue on appeal was not "agency action . . . committed to agency discretion by law"[68] but whether HUD had conformed with statutory requirements, a proper subject for review.[69]

The court of appeals properly perceived the issues on the merits as whether the AWC had the right to be consulted and to participate in the planning and carrying out of the program, and, if so, whether HUD and the city violated that right. The court answered both questions in the affirmative. After describing provisions in the Model Cities Act[70] and HUD regulations[71] which define "widespread citizen participation," the court concluded that neither the Supplementary Statement sent to HUD by the city on June 9th, nor the requirements added by HUD on July 3rd, involved the necessary citizen participation. As stated by the court:

> . . . the issue is not citizen veto or even approval, but citizen participation, negotiation, and consultation in the major decisions which are made for a particular Model Cities Program. While not every decision regarding a Program may require full citizen participation, certainly decisions which change the basic strategy of the Program do require such participation. The June 9th decision of the City and the July 3rd statement of HUD made such fundamental changes in the Philadelphia Program. Previously, that Program had contemplated a much heavier involvement by the designated citizen participation component, AWC. This involvement was drastically reduced by the unilateral actions of the City and HUD. The Secretary therefore violated the Act when he accepted a proposal for major modification of the Model Cities Program from the City which made clear on its face there had been no citizen participation in its formulation, and when he imposed additional significant terms of his own without citizen consultation.[72]

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63. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) and *Delaware Valley Conservation Association v. Resor*, 392 F. 2d 331 (3rd Cir. 1968), *cert. denied*, 392 U.S. 915 (1968), which were relied upon by the district court, clearly recognize the right to bring an action against an officer of the United States to restrain actions "not within an officer's statutory powers." As stated in *Zirin v. McGinnes*, 282 F. 2d 113 (3rd Cir. 1960), *cert. denied*, 364 U.S. 921 (1960), "The law is settled that if a federal officer does or attempts to do acts which are in excess of his authority . . . , equity has jurisdiction to restrain him." The issue of sovereign immunity should not have arisen, in any event, since such immunity is waived by the Administrative Procedure Act in those actions to which it applies. *Estrada v. Ahrens*, 296 F. 2d 690 (5th Cir. 1961).
64. ..... F.Supp. at .....
65. *North City Area Wide Council, Inc. v. Romney*, 428 F. 2d 754 (3d Cir. 1970).
66. 395 F.2d 920 (2d Cir. 1968).
67. No. 69 C 1626 (N.D. Ill. April 6, 1970) (unreported decision denying defendants motion to dismiss complaint.)
68. 5 U.S.C. §701(a)(2).
69. See *Scanwell Laboratories v. Shaffer*, 424 F.2d 859, (D.C. Cir. 1970).
70. See 42 U.S.C. §3303(b)(1).
71. The court quoted from the statement in CDA Letter No. 3, *supra*, that:
". . . improving the quality of life of the residents of a model neighborhood can be accomplished only by the affirmative action of the people themselves. This requires a means of building self-esteem, competnce and a desire to participate effectively in solving the social and physical problems of their community."
72. 428 F.2d at 758.

THE APPELLATE decision in *Area Wide Council* would be important even if it did no more than establish the standing of aggrieved organizations and the reviewability of alleged violations of the citizen participation requirements. The practical significance of 'standing to sue' may be seen in connection with the history of urban renewal. Until 1968, no urban renewal project had ever been judicially enjoined as a result of the failure of HUD and local redevelopment officials to provide adequate replacement housing for displacees, as required by the Housing Act of 1949;[73] even though it was widely known that such officials regularly violated this requirement.[74] The extremely few cases which sought such relief were unsuccessful because the courts refused to recognize the standing of displacees to enforce provisions designed to protect them.[75] This situation changed radically, however, with the decision of the Court of Appeals for the Second Circuit in *Norwalk CORE v. Norwalk Redevelopment Agency,* in which such standing was recognized for the first time. Within one year of *Norwalk CORE* five major suits were commenced by urban renewal displacees which sought and obtained injunctive orders against HUD and local government officials in four cities.[76] Whether *Area Wide Council* will have the same effect nationally remains to be seen; though at least four similar suits have been commenced by citizen organizations in Los Angeles, Chicago, Detroit and Columbus, Ohio,[77] and HUD reportedly fears that more are in store.[78]

Notwithstanding the victory won in *Area Wide Council* and its significance as a case of first impression, the decision did not undertake any definitive analysis of the right of citizen participation and leaves many important questions unresolved. Since the issue was not squarely presented, the court avoided the question whether it is necessary for a CDA to obtain any form of citizen endorsement of proposed changes. Nor does the opinion indicate the standards, if any, which may determine the legal propriety of a government decision to proceed with plans which were disapproved after submission to a citizen component. Notwithstanding the court's silence on these critical issues, *Area Wide Council* cannot be reasonably interpreted as meaning that a CDA (or HUD) can comply with the citizen participation requirement merely by submitting proposed plans to citizen groups prior to acting upon them. For to do so would reduce the act to a meaningless formality. While it is highly unlikely that the courts will establish the right of model cities citizen components to exercise any type of veto power over the decisions of government agencies, it is not hoping for too much to expect that they will at least impose upon such agencies the duty to negotiate with community representatives whom they have formally recognized. And it is in this connection that the opinion in *Area Wide Council* may have its greatest significance. The Court of Appeals emphasized that the government could not "unilaterally" alter a model cities plan which, under law, must be the subject of citizen participation. What is

73. See 42 U.S.C. §1455(c). The provisions of this statute are incorporated by reference in the Model Cities Act. 42 U.S.C. §3307(a). See also, 42 U.S.C. §1415 (7)(b)(iii) (public housing) and 49 U.S.C. §1606(a) (urban mass-transportation program).

74. See Cahn, *supra.*, n. 26 and National Commission on Urban Problems, *supra.*, n. 27, and Tondro, *Urban Renewal Relocations Problems in the Enforcement of Conditions on Federal Grants to Local Agencies,* 117 U. Pa. L. Rev. 183 1968).

75. See, e.g., *Greenstreet Ass'n v. Daley,* 373 F.2d 1 (7th Cir. *cert. denied,* 387 U.S. 932 (1967).

76. *Powelton Civic Home Owners Ass'n v. HUD,* 284 F. Supp. 809 (E.D. Pa. 1968); *Western Addition Community Organization v. Weaver,* 294 F.Supp. 433 (N.D. Cal. 1968); *Garrett v. City of Hamtramck,* No. 32004 (E.D. Mich., March 7, 1969) (unreported decision); *Tenants and Owners in Opposition to Redevelopment v. Romney,* No. C-69-324 (N.D. Cal April 29, 1970); and *Talbot v. Romney,* 70 Civ. 2402 (S.D. N.Y. August 20, 1970).

77. *Congress of Mexican-American Unity v. Yorty,* No. 70-1835-CC (C.D. Cal.) filed August 28, 1970); *General Assembly v. Sensenbrenner,* No. 70-74 (S.D. Ohio) (filed August 4, 1970); *Model Cities Citizens Governing Board v. City of Detroit,* No. 33871 (E.D. Mich.) (filed November 10, 1969); and *Coalition for United Community Action v. Romney,* No. 69-C-1626 (N.D. Ill.) (filed August 5, 1969).

78. See *Business Week,* August 1, 1970, p. 65, where a HUD lawyer is reported as having stated that: "We already have indications from a couple of cities that the news [of the *Area Wide Council* case] is getting around . . . [and HUD sees] the threat of suits in other cities."

more, the opinion seems to mean that even a proposal to modify the nature or extent of a citizen component's *right* to participate can be effectuated only after prior negotiations with the existing component as presently constituted. What the court appears to have done, without articulation, is to apply to citizen participation in the Model Cities Program the standards of good faith which apply to collective bargaining under the national labor laws.

COLLECTIVE BARGAINING — THE LABOR LAW ANALOGY

LIKE the National Labor Relations Act, which will be discussed presently, the Model Cities Act was in many respects a response to violence. The riots which occurred in cities across the nation during the 1960's are still too well remembered to require description here. But what may not be so well remembered is that the civil disorders of the sixties were not motivated solely by racial injustice. As the Report of the Kerner Commission[79] makes clear in excruciating detail, several less obvious factors converged to produce this volatile situation. First, "a widening gulf in communications between local government and the residents of the erupting ghettos" and "a profound sense of isolation and alienation from the processes and programs of government."[80] The Report noted that while this lack of communication exists for all residents of our larger cities, it is far more difficult to overcome for low-income citizens who are disproportionately supported by and dependent upon programs administered by agencies of local government. And, as stated in the Report, "[t]he lack of communication and the absence of regular contacts with ghetto residents prevents city leaders from learning about problems and grievances as they develop."[81]

The second factor was that "many city governments are poorly organized to respond effectively to the needs of ghetto residents, even when these needs are made known to appropriate public officials."[82] It was pointed out that middle class citizens, although subject to many of the same frustrations and resentments in dealing with the public bureaucracy as ghetto residents, find it relatively easy to locate the appropriate agency for assistance and redress. And if they fail, they can rely upon a variety of alternative remedies — assistance of elected representatives, friends in government or a lawyer. In short, unlike the ghetto resident who has complicated social and economic problems which often require the services of many public and private agencies, the middle-class city dweller has fewer needs for public services and is well positioned to move the system to his benefit. The Kerner Commission also observed that the plight of ghetto residents was further exacerbated by pressures for administrative efficiency and cost-cutting which brought about the withdrawal of many of the operations of city government from direct contact with the neighborhood and the citizen. In most of the riot cities surveyed, the Commission "found little or no meaningful coordination among city agencies either in responding to the needs of ghetto residents on an ongoing basis or in planning to head off disturbances."[83]

The third factor which according to the Commission had led to violence was that "ghetto residents increasingly believe that they are excluded from the decision-making process which affects their lives and community. This feeling of exclusion . . . has engendered a deep seated hostility toward the institutions of government. It has severely compromised the effectiveness of programs intended to provide improved services to ghetto

79. Report of the National Advisory Commission on Civil Disorders (Bantam Books 1968) [hereinafter cited as "Kerner Commission Report"].

80. *Id.* 284.

81. *Id.* 285.

82. *Id.* 285.

83. *Id.* 286.

residents."[84] In this regard the Commission saw fit to reproduce the following statement of the Mayor of St. Louis:

> We have found that ghetto neighborhoods cannot be operated on from outside alone. The people within them should have a voice, and our experience has shown that it is often a voice that speaks with good sense, since the practical aspects of the needs of the ghetto people are so much clearer to the people there than they are to anyone else."[85]

The Commission also believed it relevant in this connection that in many of the riot cities studied, ghetto residents expressed the feeling that federal programs, particularly those administered by HUD and OEO, provided "to little community participation and decision-making."[86]

In view of the above findings, the Commission concluded that despite extremist rhetoric, the riots did not attempt to subvert the social order of the United States. "Instead, most of those who attacked white authority and property seemed to be demanding further participation in the social order and the material benefits enjoyed by the vast majority of American citizens."[87]

The legislative history of the Model Cities Act shows that the armed conflict in Watts, Chicago, Philadelphia and other cities, which was then occurring, was very much on the collective mind of the Congress which enacted it.[88] And the provisions of the Act show that Congress intended it to eliminate some of the underlying grievances the Kerner Commission found to be important sources of that conflict. Thus the Act — and particularly the citizen participation requirements — were calculated to narrow the communication gap between local government and the urban poor, to compel such government to respond to the felt needs of the poor in a coordinated manner, and, most important, to include the poor in the decision-making process. It was hardly coincidental that the cities whose application for federal funds under the Model Cities Program were approved most quickly were ones which had experienced high levels of violence.[89]

The urban disorders of the sixties were not an unprecedented example of violence generated by indifference to demands of powerless and alienated citizens to participate in the decision-making processes which directly affect them. Nor was the Model Cities Act by any means the first example of legislative response to such violence by creation of a mechanism for participation and the peaceful resolution of disputes.

Labor disputes have produced more violence over a longer period of time in America than in any other industrial country in the world. From the 1890's to the 1930's, there was hardly a year in which some serious clash did not take place between workers and management, resulting in serious property damage and personal injuries or even death. Notwithstanding the high level of violence in

84. *Id.* 286, As noted in the Kerner Commission Report, a study prepared for the Senate Subcommittee on Employment, Manpower and Poverty presented just prior to the riot in Detroit, found that:
Area residents . . . complain almost continually that their demands for program changes are not heeded, that they have little voice in what goes on . . . As much as the area residents are involved, listened to, and even heeded, . . . it becomes fairly clear that the relationship is still one of equals . . . The procedures by which HRD [the Mayor's Committee for Human Resources Development, the Detroit Community Action Agency] operates by and large, admits the contributions of area residents only after programs have been written, after policies have already operated for a time or already been formulated, and to a large degree, only in formal and infrequent meetings rather than in day-to-day operations . . . The meaningfulness of resident involvement is reduced by its after the-fact nature and by relatively limited resources they have at their disposal.
Examination of War on Poverty, Staff and Consultants Reports, prepared by Center for Urban Studies, University of Chicago, for the Subcommittee on Employment, Manpower and Poverty, Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., (Sept. 1967), pp. 1721 *et. seq.*
85. Kerner Commission Report, *supra*, n. 79, 287.
86. *Id.* 147.
87. *Id.* 110-111.
88. For example, in testimony before a Senate Subcommittee considering the bill which became the Model Cities Act, the President of the U.S. Conference of Mayors observed that "armed conflict . . . [does] not provide the best backdrop for a discussion of domestic program needs"; and the President of the National Housing Conference stated that, as everyone knew, "large areas of blight, dilapidation, and poverty are also the building grounds for social disorders which are a blot on the image of American Society, at home, and in the world." HEARINGS before Subcom. on Housing of Committee on Banking and Currency, U.S. Senate, 89th Cong., 2d Sess., on S. 2842 (April 19-26, 1966) pp. 214, 416-417.
89. Kerner Commission Report, *supra*, n. 79, 199, n. 240.

Watts in 1965 and Newark and Detroit in 1967, the civil disorders of the sixties do not match the guerrilla warfare which was waged by labor during the late 19th and early 20th Century. Nor was the level of rhetoric during the sixties as consistently revolutionary and indeed anarchistic as that which prevailed in elements of the labor movement at the turn of the century.[90] The Molly Maguires terrorized portions of Pennsylvania, "Coxey's army" marched on Washington, the Wobblies became openly revolutionary and summoned workers to a class war, and bombings became a common affair.[91] By the time officials of the American Federation of Labor confessed to bombing the Los Angeles Times Building in 1910, the nation was "on the verge of cataclysm"[92] — a cataclysm which was finally reached in the depression. The causes of this violent maelstrom were many and complex, but a major grievance of the working class in revolt was an industrial system which left them powerless to change the conditions which oppressed them. Enactment of the NLRA in 1935 was a belated attempt to redress this grievance.

As the very language of the statute demonstrates, the NLRA was a legislative attempt to provide a mechanism for the resolution of disputes so as to make recourse to violence unnecessary. After noting the inequality of bargaining power between management and labor and that the denial by management of the right of workers to organize and bargain collectively had led to strikes "and other forms of industrial unrest," Congress stated as follows in the first section of the original NLRA:[93]

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes, arising out of differences as to wages, hours or other working conditions, and by restoring equality of bargaining power between employers and employees.
>
> It is hereby declared to be the policy of the United States to [therefore] eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid protection.

Section 7 of the NLRA, the keystone of the original Act, contained a statement of the basic right of workers to organize and engage in concerted activities for the purpose of collective bargaining "or other mutual aid or protection."[94] In Section 8 Congress defined five specific employer "unfair labor practices,"[95] including interference, restraint or coercion of employees in the exercise of rights guaranteed in section 7[96] and refusal to bar-

90. See, generally, Adamic, *Dynamite—The Story of Class Violence in America* (Chelsea House, 1969).

91. Instructions for the manufacture and use of bombs were widely distributed. One of the most popular was a booklet published in 1892 in New York by Johann Most, a German anarchist active in the American labor movement entitled *Science of Revolutionary Warfare — A Manual of Instruction in the Use and Preparation of Nitroglycerine, Dynamite, Gun-Cotton, Fulminating Mercury, Bombs, Fuses, Poisons, Etc.* An article which appeared on February 21, 1885 in a labor newspaper published in Chicago entitled *Alarm* commenced with the following advice:
Dynamite! Of all the good stuff, that is the stuff! Stuff several pounds of this sublime stuff into an inch pipe(gas or water pipe), plug up both ends, insert a cap with a fuse attached, place this in the immediate vicinity of a lot of rich loafers who live by the sweat of other people's brows, and light the fuse. A most cheerful and gratifying result will follow . . . A pound of this good stuff beats a bushel of ballots all hollow — and don't you forget it!
This entire article is reproduced in Adamic, *supra.*, n. 90, at 47.

92. Handlin, *America — A History*, (New York 1968) p. 703.

93. 49 Stat. 449-450, §1 (1935). The NLRA (popularly known as the Wagner Act) was later amended by the Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), as amended, and by the Labor Management Reporting and Disclosure Act (Landrum-Griffin Act) 73 Stat. 519 (1959), 29 U.S.C. §141-88 (1964). The statute will be referred to as the NLRA or the "Act" throughout this article.

94. 49 Stat. 452, §7 (1935).

95. 49 Stat. 452-453, §8 (1935). The Labor Management Relations Act of 197, *supra.*, n. 93, changed old §8 into §(a) and in new §8(b) defined seven *union* unfair labor practices. 29 U.S.C. §158(b).

96. 49 Stat. 452, §8(1) (1935). See 29 U.S.C. §158 (a)(1).

gain collectively with employee representatives.[97] Section 9 set forth the theory of exclusive representation and established certain procedures to effectuate the theory.[98]

In the sense that the NLRA was thus basically an effort to permit employees to participate in the industrial decision-making process in order to promote industrial peace, it is fundamentally analogous to the Model Cities Act, which sought, among other things, to promote urban peace. Admittedly, however, the analogy cannot be carried too far. Among other differences, the Model Cities Act does not contain any theory of exclusive representation and does not define the subjects of the bargaining process;[99] nor did it establish an agency to supervise citizen participation in the manner that collective bargaining under the NLRA is supervised by the National Labor Relations Board (NLRB).[100] Notwithstanding these and other differences, however, for present purposes the analogy between the NLRA and the Model Cities Act remain sufficiently viable. Like the NLRA, the Model Cities Act was a legislative atempt to create an equal partnership in the decision-making process in response to increasingly militant demands by groups who, although affected, were neither permitted to participate in the process nor even consulted. In order to achieve equality of "bargaining power" in the Model Cities Program, the new laws impose upon the traditionally stronger partner (government agencies) the legal duty to recognize and protect the new rights given to the previously weaker parties (citizens and their representative organizations). The Act requires that HUD "emphasize local initiative in the planning, development, and implementation" of local programs,[101] to insure "prompt response to local initiative" on the part of the federal government,[102] and to insure that all Model Cities plans provide for "widespread citizen participation in the program."[103] City government is given the express responsibility to "insure" that the citizen component of the program be "fully involved in policy-making, planning and the execution of all program elements."[104] And to guarantee that such involvement shall be meaningful, the regulations further require that city government provide citizen groups with "access" to the decision-making process, sufficient information to be able to initiate and react to proposals, as well as necessary technical and financial assistance.[105]

Notwithstanding the foregoing requirements, the substantive and procedural elements of the right of the citizen participation are not really defined in the Model Cities Act or in HUD regulations.

But neither did the NLRA definitively establish the practical nature of the duty to bargain. As has been noted, the words of section 8 of the NLRA "were chosen with the generality of constitutional provisions rather than the exactitude of cor-

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97. 49 Stat. 452, 8(5) (1935). See 2 U.S.C. §158(a)(5).

98. The Section stated in material part that:
"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ." 49 Stat. 453, §9 (1935). The foregoing language, with additional provisos, exists in the NLRA in its current amended form. 29 U.S.C. §159.

99. However, although the Act indicated that wages, hours and "other working conditions" were to be the subjects of collective bargaining, 49 Stat. 449, §1 (1935), these were capable of so broad an interpretation as to justify bargaining upon almost any subject conceivably related to employment.

100. Though HUD does not possess many of the statutory powers of the NLRB, such as the powers to commence proceedings against a party for an unfair labor practice, and various investigative powers (See 29 U.S.C. §160-162), it does possess the legal authority and the *de facto* power to monitor the process of citizen participation and, as shown in *Area Wide Council, supra,* it does exercise that power. Further, in some respects the NLRB has not been particularly instrumental in defining collective bargaining practices. As Professors Cox and Dunlop pointed out in 1950, " . . . management and unions have thus far shaped their own relationships without too much regard for the NLRB." Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement,* 63 Harv. L. Rev. 1097, 1133 (1950).

101. 42 U.S.C. §3303(b)(1).

102. 42 U.S.C. §3303(b)(2).

103. 42 U.S.C. §3303(a)(2).

104. CDA Letter No. 3, *supra,* n. 16.

105. *Id.*

porate trust indentures."[106] Moreover, as the Supreme Court has pointed out on a number of occasions, the right of employees to organize for the purpose of collective bargaining is a "fundamental" right[107] which Congress did not create in the NLRA, but merely reaffirmed.[108] As the Court stated in one case, section 8 of the NLRA "generally has been considered to absorb and give statutory approval to the philosophy of collective bargaining as worked out in the labor movement in the United States."[109]

The applicability of this analysis to the citizen participation requirements of the Model Cities Act should be obvious. In a recent speech delivered before the American Institute of Planners, Mitchell Sviridoff accurately observed that, the law aside, the last few years have made unmistakably clear that no planner and no public official can function effectively without a participation strategy vis-à-vis his constituents:

> In this country the response of leadership to these pressures for participation is reminiscent in many ways of the labor crisis of the thirties... But in the thirties there came a time when the intensity of such ideological strife eased, because it became futile and counter-productive and eventually irrelevant. After a while it became clear that unions were here to stay, and leadership on both sides settled down to make the necessary accommodations. If the analogy holds, the same arrangement must be made with those pressing for citizen participation in the Sixties. For these pressures stem from forces that have deep roots in our society. Like the unions these forces are here to stay.[110]

As mentioned earlier, explicit statutory recognition of the right of citizens to participate directly in the administration of certain federal programs begun in the mid-1960's. And it is noteworthy that since that time Congress has not been alone among our institutions of government in responding affirmatively to mounting pressures for citizen participation. Recent court decisions liberalizing the doctrine of "standing to sue"[111] and expanding the related "private attorney general" concept[112] reflect judicial sensitivity to the same social pressures. Thus, for example, in the *Scenic Hudson* case[113] which involved a challenge by conservationist organizations to the construction of a hydroelectric project, the court concluded that the Federal Power Act impliedly recognized specific public interests in the preservation of aesthetically desirable, conservational, and recreational land sites; and that, therefore, the Federal Power Commission (FPC) in exercising its licensing function, must take particular care to protect those values. In determining who could obtain judicial review of FPC orders allegedly inconsistent with these recognized interests, the court held that "those who by their activities and conduct have exhibited a special interest in such areas [conservation, etc.] must be held to be included in the class

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106. Cox & Dunlop, *supra*, n. 100, at 1104. The authors refer to Justice Cardozo's statement in a different context that:
"The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply an answer to the riddle."
Welch v. Helvering, 290 U.S. 111, 115 (1933).

107. *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1,33,34 (1936).

108. *Amalgamated Utility Workers v. Consolidated Edison Co. of N.Y.*, 309 U.S. 261, 263 (1940). As stated by Judge Hand: "Section 7 of the National Labor Relations Act did not 'create a new right,' but merely 'secured' an old one." *United Elec. Radio & Machine Workers v. Int'l Brotherhood of Elec. Workers*, 115 F. 2d 488, (2d Cir. 1940).

109. *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 346 (1944).

110. Sviridoff, *Planning and Participation*, Address delivered before the American Institute of Planners (Wash., D.C., January 24, 1969) Ford Foundation Reprint, pp. 3-4. Mr. Sviridoff also pointed out in his address that:
This is a nation, after all, with a strong democratic tradition. This tradition ebbs and flows between Jeffersonian and Hamiltonian tendencies, variously described as the conflict between "the people" and the "government," or between decentralized and centralized authority, or between freedom and efficiency, or between process and product. It appears that we are now in a Jeffersonian phase. In many quarters, participation by the people is more to be desired than expertise, efficiency in government, a higher rate of housing construction, or better planned cities. *Id.* p. 4.

111. See, e.g., *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *Flast v. Cohen*, 392 U.S. 83 (1968); and *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F. 2d 920 (2d Cir. 1968).

112. See, e.g., *Office of Communication of United Church of Christ v. FCC*, 359 F. 2d 994 (D.. ir. 1966); *Scenic Hudson Preservation onference v. FPC*, 345 F. 2d 608 (2d Cir. 1965); *cert. denied, Consolidated Edison Co. of N.Y., Inc. v. Scenic Hudson Preservation Conf.*, 384 U.S. 941 (1966); and *Road Review League Town of Bedford v. Boyd*, 270 F. Supp. 650 (S.D. N.Y. 1967).

113. *Id.*

of 'aggrieved' parties.[114] Similarly, in *Powelton Civic Home Owners Ass'n v. HUD*,[115] which built upon *Scenic Hudson*, the court accorded standing to a citizen group challenging an urban renewal project on the basis of the conclusion "that the provisions of the National Housing Act recognizing and protecting the values of rehabilitation, relocation and integrated local planning manifest a congressional intent that nonprofit civic organizations representing the citizens who will be displaced by the proposed project are to be considered 'aggrieved' by agency action allegedly disregarding their interests."[116]

But cases like *Scenic Hudson* and *Powelton* essentially involved judicial definition of citizens' *procedural* rights to participate in the administration of federal programs. What we are here more concerned with is the *substantive* nature of this right as it relates to the Model Cities Program. We have suggested that judicial efforts in this area should build upon the expertise accumulated by the courts in interpreting and enforcing the NLRA, [117] and it is to this matter that we now return.

At the time the NLRA was passed by Congress it was a common understanding that the Act did no more than simply require the parties to a labor dispute to sit down and bargain collectively; and that the *manner* in which they bargained was not a proper subject of government inquiry.[118] But the law which has since developed under the NLRA does not fulfill that original expectation| On the contrary, it reveals that most significant controversies which have arisen under the Act involved parties to a labor dispute who mutually accepted the duty to bargain but disagreed on the propriety of particular bargaining methods. Thus, in order to stabilize the bargaining process and thereby effectuate the policies set forth in the NLRA, the courts were compelled to define the nature of collective bargaining to a far greater extent than was undertaken by Congress. And as a result, the law now tells the parties to a labor dispute with relative clarity how each may and may not act during the bargaining process.[119]

This same issue — the mutual rights and duties of the paties during the process of negotiation — will inevitably be a major subject of legal controversy under the citizen participation requirements of the Model Cities Act. Notwithstanding the highly publicized remarks of Daniel Moynihan to the contrary,[120] government officials are too far committed by law and their own announced policies to challenge the *principle* of citizen participation. But it is only realistic to expect that they will attempt to limit the responsibilities which the principle imposes upon them by restricting the extent of citizen participation which must be allowed, much the same as employers once attempted to limit the duty to bargain collectively with employees by asserting that the duty was fulfilled just by sitting down at the bargaining table.

In order to solve the problem of the employer who engaged in the form of

114. 354 F. 2d at 616.
115. 284 F. Supp. 809 (E.D. Pa. 1968).
116. 284 F. Supp. at 828.
117. Although it must be recognized that here again there are theoretical limits to the posed analogy, as the result of 1947 amendments to the NLRA the courts are directly authorized to entertain suits for violation of contracts between an employer and a labor organization. 29 U.S.C. §15(a). But judicial review is not directly authorized with respect to disputes arising under written agreements between a CDA and a model cities component. However, as clarified in *Area Wide Council, supra.*, the Administrative Procedure Act, 5 U.S.C. §702-706, does authorize judicial review of certain action by HUD approving or disapproving arrangements between a CDA and a citizen group. Since HUD action is required in many cases, as a practical matter the courts can exercise enormous influence in determining the legal rights and duties of the respective parties regarding citizen participation.
118. In Congressional debate regarding the provision in the NLRA which made it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," 49 Stat. 453, §8(5) (1935), the Chairman of the Senate Committee on Education and Labor said:
When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of the employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.
79 CONG. REC. 7660 (1935) (statement of Senator Walsh), quoted in Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1402 (1958).
119. See Cox, *id.*, at 1402.
120. Moynihan, *Maximum Feasible Misunderstanding* (New York 1969).

collective bargaining without the substance, the courts adopted and developed the concept of "good faith bargaining." One who simply went through the motions superficially knowing that they were a sham was said to lack good faith and held to violate the requirements of the NLRA notwithstanding outward appearances. The traditional test used to determine good faith was a subjective test which determined the states of mind of the parties involved. Thus the courts have said that the duty to bargain in good faith is an "obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement . . ." The parties must demonstrate an "open mind and a sincere desire to reach an agreement" along with "a sincere effort . . . to reach a common ground."[121] The proof of an intent not to bargain in good faith is ordinarily obtained by inference from external conduct.

> Many kinds of evidence have been found convincing. The weight of any item depends upon the circumstances. Stalling the negotiations by unexplained delays . . . sending negotiators without authority to do more than argue or listen . . . repudiating the commitments made by the company's bargaining representative after it led the union to believe that he had full authority to conclude an agreement . . . In every case, the basic question is whether the employer acted with a mind closed against agreement with the union . . . [i.e.,] whether a normal employer, willing to agree with a labor union, would have followed the same course of action.[122]

It is submitted that the good faith test, as developed under the NLRA, is altogether adaptable and suitable as a means to determine whether government agencies have violated their statutory duty to permit citizen participation in the planning and execution of model cities plans. In view of the decision in *Area Wide Council* it may be anticipated that HUD and city governments will henceforth be more circumspect in any attempts to limit citizen participation in the Model Cities Program. It can be expected, for example, that before putting proposed program changes into effect they will now at least sit down with citizen groups. But the likelihood of increasing governmental recognition of the form of participation at present carries with it no concomitant likelihood of an increasing commitment to the substance of participation. And adherence to the formal requirements will undoubtedly make it more difficult for citizen groups to obtain judicial redress; that is, unless the courts agree that, as under the NLRA, the state of mind with which negotiations are undertaken is a proper matter for judicial inquiry.

The facts in *Area Wide Council*, which are not atypical, provide a good point of departure for demonstrating that the good faith test should apply to regulate citizen participation under the Model Cities Act. As earlier described, the opinion of the district court stated that even if the AWC were not estopped by various procedural obstacles it would nevertheless lose on the merits since the government action complained of — i.e., the shifting of power to additional citizen groups — did not defeat but rather enhanced the goal of "widespread citizen participation." By reference to the good faith test, however, it may be shown that such unilateral action should have been invalidated regardless of whether there had been prior negotiations with the AWC and even indulging the apparently unwarranted assumption that the AWC was not already fully representative of the community.

During the early years of the NLRA, the NLRB and subsequently the courts were confronted with a multitude of cases in which unilateral action by an employer

121. *NLRB v. Montgomery Ward & Co.*, 133 F. 2d 676, 686 (9th Cir 1943), quoting in part from *NLRB v. Reed & Prince Mfg. Co.*, 118 F. 2d 874, 885 (1st Cir.), *cert. denied*, 313 U.S. 595 (1941). In the second *Reed & Prince* case, Judge Magruder declined to define "good faith" and instead defined its opposite, "bad faith," as "a desire not to reach an agreement with the union." *NLRB v. Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (1st Cir.), *cert denied*, 346 U.S. 887 (1953).

122. Cox, *supra*, n. 118, 1418-1419.

was claimed to be a per se violation of the duty to bargain or at least evidence of bad faith. A brief exposition of some of the major cases and the rationale of the decisions is useful to demonstrate the applicability of this body of law to the developing law of citizen participation.

In *Medo Photo Supply Corp. v. NLRB,*[123] the earliest case to reach the Supreme Court, the union approached the employer and demanded recognition. The employer agreed to negotiate and a date was set for the first bargaining session. Prior to this session, however, a majority of the employees made it clear to the company that they were not interested in being members of the union if they could obtain wage increases on their own. A few days later the employees were told that their wage demands, which were the same as those of the union, would be granted. The employees then notified the union that they no longer desired it as their collective-bargaining agent. Other than the acts described, there was no evidence of anti-union hostility on the part of the company. On the basis of these facts the NLRB found a violation of the Act[124] and the Supreme Court affirmed. As stated by the Court:

> It is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority . . . Bargaining carried on by the employer directly with the employees, whether a minority or a majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained.[125]

The Court held that the negotiations with the individual employees constituted an unfair labor practice regardless of whether the employer was willing to continue or begin negotiations with the union itself. The Court held, in other words, that notwithstanding the fact that the employees' demands were satisfied by the acts of the employer without negotiations with the union, the employer violated the Act by his conduct. While on its face this decision may not appear to have accomplished anything for the employees — whose interests the NLRA seeks to protect — in fact it does. For as the Court realized, if the NLRA is to work, the *union* must be given certain protections in order to stabilize the bargaining process; this is for the long-range benefit of employees and enhances industrial peace.

In *May Dept. Stores Co. v. NLRB,*[126] decided one year later, the NLRB found that the company's application to the National War Labor Board for an upward wage adjustment for employees was a violation of the Act because the employer had not first bargained on the subject with the union. The company contended that its unilateral action was justified because at the time the action was taken it was challenging the appropriateness of the union by refusing to bargain at all, and that if it had consulted the union with respect to the proposed wage adjustment it would have undermined its position that the union had no right to recognition. In rejecting this argument the Court stated that action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees was indistinguishable from bargaining with individuals or minorities. The Court also reasoned that "such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent."[127]

The next unilateral action case presented to the Supreme Court was *NLRB v. Crompton-Highland Mills, Inc.*[128] There the union had been certified by the NLRB and negotiations between the parties had continued until there was an impasse. Although a wage scale had not

123. 321 U.S. 678 (1944).
24. *Medo Photo Supply Corp.*, 43 N.L.R.B. 989 (1942), *enforced*, 135 F. 2d 279 (2d Cir. 1943).
125. 321 U.S. at 684.
126. 326 U.S. 376 (1945).
127. *Id.* at 385.
128. 337 U.S. 217 (1949).

been agreed upon, the employer had at the last meeting offered to grant a wage increase of one and one-half cents. Shortly thereafter, without prior consultation with or notice to the union, the employer announced a wage increase of two to six cents to the employees of the bargaining unit. It did so on the alleged ground that its policy had always been to grant wage increases when it determined that competitors were going to do so and wished to be the first company in the industry to grant such increases. The Court, basing its determination on the fact that the wage increase had been granted unilaterally, nevertheless found a violation of the Act. The Court held that it is an unfair labor practice for an employer to take unilateral action with respect to general rates of pay that are substantially different from, or greater than, any that the employer had proposed during its negotiations with the union. It is clear from the Court's opinion that the conclusion that the employer lacked good faith was based entirely on the unilateral nature of its action.

NLRB v. Katz[129] presented a more complicated set of facts than the earlier cases. There the employer was charged with violating the Act by committing several unilateral acts; a change in sick-leave benefits, an increase in wage rates, and some merit increases. Unlike *Crompton-Highland Mills,* however, there was no charge or finding that the employer had negotiated in bad faith. The court of appeals[130] had not found a violation because it believed there could be none when bargaining in fact was being conducted and there was no subjective finding of bad faith by the NLRB. The Supreme Court reversed, upholding the NLRB's decision that the employer had violated the Act. The decision seems to have turned on the conclusion that, although it was unclear whether the sick leave plan put into effect during the negotiations was favored or opposed by a majority of the employees, the failure to consult with the union before announcing the plan "plainly frustrated the statutory objective of establishing working conditions through bargaining."[131] In addition to changing sick leave benefits, the employer in *Katz* also unilaterally granted increases in wages that were substantially higher than those he had offered the union at the collective-bargaining table; and he also unilaterally granted merit increases. On the basis of its earlier decision in *Crompton-Highland Mills,* the Court affirmed the findings of violations based on these acts as well, stating that "even after an impasse is reached [the employer] has no license to grant wage increases greater than any he has ever offered the union at the bargaining table, for such action is necessarily inconsistent with a sincere desire to conclude an agreement with the union."[132]

In all of the foregoing cases, and certain others in which the courts and the NLRB reached similar conclusions[133] the unilateral employer act which was condemned involved an increase in benefits which was relatively final. In early cases like *Medo Photo Supply* the employer acted without notice or consultation, and in later cases like *Crompton-Highland Mills* negotiations had begun but had reached an impasse. Although there are a number of important distinctions among these and various other related fact situations,[134] there is also a common thread: that an employer violates section 8 of the NLRA by unilaterally removing from negotiations the very matters that Congress wanted determined, if possible, through

129. 369 U.S. 736 (1962).
130. *NLRB v. Katz,* 289 F. 2d 700 (2d Cir. 1961), *rev'd,* 369 U.S. 736 (1962).
131. 369 U.S. at 744.
132. *Id.,* at 745.
133. See, e.g., *N.L.R.B. v. C&C Plywood Corp.,* 386 U.S. 939 (1967); *N.L.R.B. v. J. H. Allison & Co.,* 165 F. 2d 766 (6th Cir. 19....), *cert. denied,* 335 U.S. 814; *Valley Broadcasting Co.,* 87 N.L.R.B. 1144 (1949), *modified on other grounds,* 189 F. 2d 582 (6th Cir. 1951); *Andrew Jergens Co.,* 76 N.L.R.B. 363 (1948), *enforced,* 175 F. 2d 130 (9th Cir. 1949). See also *N.L.R.B. v. Insurange Agents Union,* 361 U.S. 477 (1960), which involved unilateral action by the union, and *Fibreboard Paper Products Corp. v .N.L.R.B.,* 379 U.S. 203 (1964) which concerned a decrease in working conditions unilaterally invoked by the employer.
134. For a good analysis of the different type of unilateral action cases that have arisen under the NLRA see Schatzki, *The Employer's Unilateral Act — A Per Se Violation — Sometimes,* 44 Tex. L. Rev. 470 (1966).

collective bargaining[135] — precisely the type of issue, which, in the context of the Model Cities Act, was presented in *Area Wide Council.*

These decisions do not mean, and the courts have never held, that every exercise of economic power by an employer involved in collective bargaining is an unfair labor practice. Thus, for example, employers are not compelled to accept union proposals or capitulate to a strike; and they are not prohibited from building a backlog prior to negotiations to be better able to withstand a strike, or from replacing strikers with other workers. *But employers are prohibited from making decisions about conditions of work without consulting and if necessary, bargaining with those who will be directly affected by such decisions.* For to allow them to do so would undermine the mechanism of collective bargaining and destroy the equal partnership which Congress sought to establish and protect through the NLRA.

It would seem that this same reasoning should apply to protect the mechanism of citizen participation. If local government may ignore the "bargaining representatives' 'of residents of a model neighborhood and impose program changes unilaterally, the process of citizen participation would rapidly become meaningless. And, as the courts have recognized in the context of labor relations, even unilateral action which accords benefits must be condemned; for the benefits are inevitably outweighed by the fact that unilateral action *ipso facto* interferes with the right to participate in decision-making and tends to diminish the desire to exercise the right. It is, in short, an insidious form of *noblesse oblige* which is inimical to the policies articulated in the Model Cities Act.[136] Thus, even if it be asumed that the government action in *Area Wide Council* was in furtherance of the goal of "widespread citizen participation," as found by the district court, that fact would not suffice to justify the city's failure to consult with the AWC to obtain its views. Such consultation might have resulted in a mutually acceptable plan to widen the AWC's constituency. But even if it did not, at least the community would have been informed about a matter of great significance to it, and would have had the opportunity to respond with an alternative proposal which might at least have been the subject of further negotiations. The failure of the city to so inform the AWC necessarily demeaned the function of citizen participation by eliminating any possibility of a negotiated solution. It deserves to be emphasized in this connection that in *Area Wide Council,* unlike almost all the unilateral action cases under the NLRA, the challenged action did not respond to any expressed desire of particular citizens represented by the AWC, but rather to the expressed desire of a third party — HUD. Moreover, the AWC and its members were wholly uninformed of the events which led up to the action until they were presented with a *fait acompli.* Thus the case is distinguishable from *Medo Photo Supply,* where the action of the employer was at least calculated to grant the expressed desires of individual employees. For this reason the government action in *Area Wide Council* should have been condemned, not only because it was unilateral, but as well because of the failure of the city to previously inform the community of the reasons for the action. Under the common law which has developed under the NLRA, there is no question of the general obligation of an employer to provide information of this sort;[137] and under HUD regulations there is a similar duty to provide a model cities citizen component like the AWC with "sufficient information to initiate and react to proposals."[138]

135. *Id.* 508.

136. The principle HUD regulation concerning citizen participation states that:
". . . improving the quality of life of the residents of a model neighborhood can be accomplished only by the affirmative action of the people themselves. This requires a means of building self-esteem, competence and a desire to participate effectively in solving the social and physical problems of their community."
CDA Letter No. 3, *Supra.,* n. 18.

137. See *N.L.R.B. v. Truitt Mfg. Co.,* 351 U.S. 149 (1956).

138. CDA Letter No. 3, *Supra.,* n. 18.

Furthermore, at the time the city acted to diminish the power of the AWC, a contract between the city and the AWC was in effect which granted the AWC the power to review plans or proposed changes initiated by the CDA and other city agencies. While this agreement did not constitute an exclusive bargaining arrangement, certainly it imposed certain rights and duties which the city violated. And to this extent at least the policies which support the theory of exclusive bargaining are relevant. It has been well-established under the NLRA that an employer is under a duty to bargain with, and only with, the recognized bargaining agent of its employees,[139] and may not refuse to exclusively recognize the genuineness of a union's claim to be the bargaining representative of its employees evcept on the basis of good faith doubt.[140] The salutary purpose of this principle needs little eludication. If an employer (or a government agency with a similar responsibility to reach negotiated agreement) may ignore the bargaining representatives of the parties with whom it must reach agreement the bargaining process could not operate. In *Area Wide Council* the city not only ignored the duly constituted "bargaining representative," but was endeavoring to diminish that representatives' power and authority by shifting some measure of power to new and different elements in the community. Concededly, the Model Cities Act does not contain provisions, like those in section 9 of the NLRA,[141] which require exclusive recognition of a single bargaining representative. But in view of the fact that if it desires a city can render a citizen group powerless unless the group rubber-stamps city proposals simply by shifting recognition to other groups, there are persuasive reasons for the courts to at least impose upon a city the burden of demonstrating a basis for a good faith belief that the citizen group which has been in some manner disenfranchised is not adequately representative of the community or is otherwise not entitled to serve as the sole "bargaining agent." Such a burden would not prevent the city from "widening" citizen participation where that is truly necessary but it might eliminate arbitrary action really designed to diminish the influence of a genuinely representative organization. While there are in this area important distinctions between the power of employers under the NLRA and the power of local government under the Model Cities Act, they are distinctions which require greater judicial scrutiny of government action than of employer action. Unlike employers, local government agencies possess the power to actually designate or at least influence the choice of a group or coalition of groups that will participate in the decision-making process. And since there is no requirement of exclusive representation, the city will undoubtedly be tempted to distribute apparent power in a manner calculated to factionalize the community and render it incapable of speaking with a united voice. According to the leaders of the AWC, this is just what happened in Philadelphia: "As long as we were able to centralize the community's demands for change, the city feared us, and we were able to achieve stunning victories. When they finally managed to splinter us, we lost the only real power we had — people power."[142]

There are a number of reasons to apply this same reasoning to protect citizen groups in the "bargaining process" which takes place under the Model Cities Act. First, the theoretical partnership prescribed by that Act, and the congressional policies inherent therein, are seriously threatened by the superior "bargaining power' 'of local governments naturally disinclined to share that power. And HUD, the federal financing agency, has shown an increasing unwillingness to re-

139. See *N.L.R.B. v. White Motor Corp*, 404 F. 2d 1100 (6th Cir. 1969); *Brown v. Sterling Aluminum Prods. Corp.*, 246 F. Supp. 279 (E.D. Mo. 1965).

140. See *N.L.R.B v. Richman Bros. Co.*, 387 F. 2d 809 (7th Cir. 1967); *N.L.R.B. v. Lifetime Door Co.*, 390 F. 2d 272 (4th Cir. 1968); *N.L.R.B. v. Movie Star, Inc.*, 361 F. 2d 346 (5th Cir. 1966); and *N.L.R.B. v. Storack Corp.*, 357 F. 2d 893 (7th Cir. 1966).

141. 29 U.S.C. §159.

142. CITY, *supra.*, n. 53, p. 31.

quire the sharing of power which the Act ordains — as demonstrated, for example, by the facts in *Area Wide Council.*

Secondly, the values at stake are as worthy of judicial protection as those Congress sought to protect in the NLRA. Certainly the manner in which a community may be fundamentally affected by a model cities plan is of no less legitimate concern to community residents than are wages, hours and other conditions of employment to labor. And it therefore seems difficult to argue that community residents should have any less power in the relevant decision-making process than does labor.

Finally, notwithstanding the legal distinctions which can be drawn, the process of citizen participation is as a practical matter so similar to that of collective bargaining that the relevance of the general principles developed with respect to the latter is simply too obvious to ignore.

Conclusion

However individuals may differ about the propriety and legality of citizen participation in the administration of certain federal assistance programs, it must be recognized that demands for such participation can no longer be safely disregarded. Communities are organizing for this purpose in cities across the nation; these organizations are here to stay and are growing more powerful. By recognizing and defining the right of such organizations to participate in the decision-making processes which affect them, and by conferring upon them the privileges enjoyed by other participants in this process, the courts can promote harmonious relations of equal standing and equal responsibility before the law. This involves nothing hostile to the true interests and rights of either. The principles of collective bargaining were developed by the courts for precisely this purpose; and these principles should play an important role in defining the nature of the legislative mandate for "widespread citizen participation." The mechanism of collective bargaining — which is only recently beginning to receive the attention it deserves from lawyers for the poor[144] — has too much potential as a mechanism for the peaceful resolution of disputes to remain confined to the field of labor relations.

But just as trade unions did not rely solely on legal victories to emancipate themselves from an oppressive industrial system, neither can the efforts of the urban poor await development of new legal theories. Bureaucrats will fulfill their responsibility to involve the governed in the process of government only when they fully recognize that it is in their self-interest to do so and that the citizens concerned will no longer tolerate indifference to or interference with their legitimate aspirations. With respect to the Model Cities Program, the responsibility to compel this recognition without recourse to violence will fall most heavily upon black community leaders, since they program predominantly operates in black urban neighborhoods. As shown in Philadelphia, the contemporary consciousness of black communities will settle for no less than the right to engineer their own development. And, as has already been noted by those who fashioned the Model Cities Program — "it is around these facts of black communalism, and its attendant focus on self-determination, that future issues of citizen participation will have to be agitated and decided."[145]

143. See, e.g., Note, *Tenant Unions Collective Bargaining and the Low-Income Tenant,* 77 Yale L.J. 1368 (1968).

144. Mogulof, *supra.,* n. 10, p. 232.

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