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In the Path of Progress: Federal Highway Relocation Assurances

Nashville, Tennessee, famous for country and western music, is also renowned as a dramatic example of "a white road through black bedrooms." As Interstate 40 approaches Nashville, it swings suddenly in a wide loop, avoiding the downtown area, but passing north through what was once the center of Nashville's black community. Interstate 40 eliminated twenty-seven apartment buildings and 626 homes in the black community. In vain, the community appealed to the federal courts. Nashville's black community found itself in the path of progress.

Nashville is not alone. In city after city, federally funded highway plans to traverse residential areas have been challenged in the courts. Congress has responded to the problem of residential dislocation by passing a series of acts designed to cushion the impact of urban

1. [T]his route is proving itself "a white road through black bedrooms" . . . .
2. [T]hose persons who have lost homes are finding it almost impossible to locate vacant housing they can afford. Many relocatees are reportedly moving in with relatives.


2. A corridor plan avoiding such residential destruction was rejected under apparent pressure from the white business community. See 1970 URA Hearings, supra note 1, at 502; Mowbray, supra note 1, at 178-79.
3. H. LEAVITT, supra note 1, at 171. The highway also destroyed buildings used by 128 black businesses and three community colleges, along with one-third of north Nashville's park facilities. Id.; 1970 URA Hearings, supra note 1, at 503-04.

Major lawsuits have also challenged urban highways on environmental grounds. See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972). For a full listing of federal highway litigation to June 1, 1972, see Hearings on Proposed 1972 Highway Legislation before the Committee on Roads of the Senate Committee on Public Works, 92d Cong., 2d Sess., ser. 92-1137, at 910-11 (1972) [hereinafter cited as 1972 Senate Hearings].
highway construction. In particular, it has been concerned with the problem of relocation, and has passed two acts designed to insure that highway displacees are adequately rehoused. Unfortunately, implementation of the relocation acts has been ineffective. As a result, construction of urban highways continues to frustrate the national goal of providing every American with a decent home.

This Note will analyze the role the courts and the Federal Highway Administration (FHWA) have played, and could play, in implementing the relocation acts. The Note's focus will be on relocation of low-income households. It will first discuss these acts in the context of Congress' attempt to reconcile national housing and highway priorities and then analyze the housing market effects of urban highway displacement on low-income groups. Following an analysis of FHWA


8. See pp. 385-86, 392-96 infra.


10. A universally accepted definition of a "low-income household" does not exist. Discussion in this Note has been predicated on the general definition of "low-income" employed by the Department of Housing and Urban Development (HUD) which varies according to family size and geographic location. See HUD, REGULAR INCOME LIMITS FOR §§ 235, 236 HOUSING, HPMC-FHA 4400.30A (September 1, 1970). Under this definition, upper limits of low income range from $11,205 for a family of ten in Anchorage, Alaska, to $2,700 for a single person in Sioux City, Iowa. For a family of four in Davis, California, the upper limit is $6,480. In Allentown, Pennsylvania, the limit is $4,590.

11. Although the focus of this Note is the relocation problem of the low-income displacees, and the impact of urban highways on the low income section of the housing market, it should be recognized that analogous problems affect middle income families. However, the complexity of the middle-income housing market makes analysis of the market response to middle-income displacements beyond the scope of this Note. See generally Von Furstenberg & Moskof, Federally Assisted Rental Housing Programs: Which
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relocation practices, it will be argued that full implementation of the relocation acts requires that the FHWA minimize the dislocating effects of highway displacement on the housing market by constructing new housing units to replace those demolished for highways. Finally, it will be suggested that complete implementation of these acts cannot be achieved unless timely judicial procedures are provided for relocation litigation.

I. Three Congressional Mandates

A. The Federal Highway Program

The Federal Highway Trust Fund supports two major programs under which the states are reimbursed for new highway construction. Under the “ABCD” system the federal government pays fifty per cent of the cost of constructing certain roads meeting federal standards. But most recent controversies have concerned the Interstate Program Income Groups Have They Served or Whom Can They Be Expected to Serve? REPORT OF THE PRESIDENT'S COMMAN ON URBAN HOUSING (KAISER REPORT), TECHNICAL STUDIES 113-65 (1967). Thus, the recommendations concerning satisfactory assurances, p. 387, and replacement housing, pp. 387-91, have been considered only with respect to relocation involving low-income households although there is no obvious reason why they should not be generally applicable to middle-income displacements as well.


14. See 23 U.S.C. § 103(e) (1970). The Interstate System is now planned to include 42,500 miles of controlled access roads. The original concept of the Interstate Program envisioned a system linking and circling major cities. H. LEAVITT, supra note 1, at 39, 48. However, as of 1968, 4,600 of these miles had been routed through urban areas. 1972 HIGHWAY NEEDS REPORT, supra note 12, at III-8 (pt. II).

The 1972 cost estimate for completing the Interstate System is $76.3 billion, including a federal share of $68.26 billion. REPORT OF THE COMMITTEE ON PUBLIC WORKS, THE FEDERAL AID HIGHWAY ACT OF 1972, S. REP. No. 92-1081, 92d Cong., 2d Sess., at 5 (1972) [hereinafter cited as SENATE REPORT No. 1081]. This estimate is based on 1970 prices. Because the least expensive rural portions of the Interstate System were built first, many of the more expensive (and controversial) urban segments of this system remain to be constructed. As of June 30, 1972, only $42.4 billion had been obligated for com-
which provides nine dollars of federal matching funds for each dollar expended by the states.

The 1956 Highway Act, establishing the Interstate Program, was concerned with the "prompt and early completion" of this major road network. The Interstate System is now scheduled to be completed by 1976. Yet singleminded implementation of the national highway program has led to the frustration of another congressional mandate—the provision of decent housing for every American.

B. The National Housing Goal

The Housing Act of 1949 was concerned with ensuring that all Americans, including the urban poor, were provided with adequate living facilities. The Housing Act explicitly stated that this national policy:

requires housing production . . . and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family . . . .

To achieve this goal Congress has established a series of housing programs and subsidies: urban renewal, interest subsidies, public housing, code enforcement, rent allowances, and other programs.

pletion of the program. 1972 Senate Hearings, supra note 5, at 200 (Testimony of American Association of State Highway Officials). Thus, more than $30 billion remains to be spent to complete this system, most of it in urbanized areas.

15. [T]he prompt and early completion of National System of Interstate and Defense Highways . . . is essential to the national interest . . . . It is the intent of Congress that the Interstate System be completed as nearly as practicable over the period of availability of the twenty years' appropriations authorized for the purpose of expediting its construction . . . .


16. Id. Originally, the system was to be completed in 1972 but construction delays and citizen opposition have forced extensions of this date. The 1972 Highway Act proposed extension of the completion date past 1979. See H.R. 16656, 92d Cong., 2d Sess., § 107(a) (1972); S. 9939, 92d Cong., 2d Sess., § 104(a) (1972).


19. 42 U.S.C. § 1460(c) (1970). See generally sources cited note 9 supra. The 1968 Housing and Urban Development Act created an accelerated urban renewal procedure, "Neighborhood Development Programs," 42 U.S.C. § 1469(b) (1970), which has virtually superseded more traditional urban renewal programs. As used in this Note, the term "urban renewal" is a generic one, encompassing both types of projects.


23. See, e.g., 42 U.S.C. § 1421(b) (1970), the leasing program under which local housing authorities supplement the rents paid by a low-income tenant to a private landlord.
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In these acts, Congress has implicitly recognized that the private housing market cannot adequately meet the needs of low- and moderate-income segments of urban society.24

Yet the housing acts have failed to achieve their goals. In no small part, this failure has been due to the federal highway program. During the first decade of the Interstate Program, right-of-way clearance for federal highways destroyed more units of low- and moderate-income housing than were built by the federal government's public housing program.26 City planners have used highways to get rid of the oldest and least desirable housing in the existing inventory, housing usually inhabited by low- and moderate-income families.27 These units are usually located in close proximity to the central business district. But such areas also provide the optimal location for traffic arteries skirting or serving the downtown area. In addition, property in the low-income area is less expensive than elsewhere; hence, highway location through this area reduces total acquisition costs.28

24. See 1970 URA Hearings, supra note 1, at 602 (statement of Representative Cleveland); id. at 228 (testimony of California Department of Public Works); id. at 498 (testimony of Kenneth Phillips). "To expect the free market to supply housing for all Americans without subsidy requires a flight from reality." BUILDING THE AMERICAN CITY, supra note 9, at 10; See Ackerman, Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy, 80 YALE L.J. 1093, at 1117 n.29 (1971).

25. See BUILDING THE AMERICAN CITY, supra note 9, at 13-16.

26. The Douglas Commission estimated that the federal highway program destroyed 350,000 urban housing units between 1956 and 1967. BUILDING THE AMERICAN CITY, supra note 9, at 81. The great majority of housing destroyed in urban areas has been "mid-range or lower-cost housing." 1967 Highway Relocation Study, supra note 7. Additional low-cost housing has been destroyed in rural areas.

Between 1956 and 1967 a total of 239,374 public housing units were completed in the fifty states. BUILDING THE AMERICAN CITY, supra note 9, at 130.

27. Twenty-nine per cent of all housing units removed for highway construction from Sept. 30, 1966, to June 30, 1971, were low-income, or valued at less than $6,000 (sale) or $60 (rental) per month. Another forty-eight per cent of units displaced were moderate-income—valued between $6,000 and $12,000 or $60-110 (rental) per month. Thus seventy-seven per cent of all housing units destroyed by highways over this five-year period were of low- and moderate-income. SECRETARY OF THE DEPT. OF TRANSPORTATION, 1972 Annual Report on Highway Relocation Assistance 6 (1972). See A. DOWNS, LOSSES IMPOSED ON URBAN HOUSEHOLDS BY UNCOMPENSATED HIGHWAY AND RENIAL COSTS, in URBAN PROBLEMS AND PRO SPECTS 218 (1970) [hereinafter cited as Downs, Losers]; Koltne, Changing Highway Priorities: Construction, Economy and Environmental Improvement, 20 CATH. U.L. REV. 119, 128 (1970). See also Garrett v. City of Hamtramck, 335 F. Supp. 19-23 (E.D. Mich. 1971).

28. Urban highways have also focused on another source of "cheap" land—urban parks. But the Supreme Court has recently given a strict interpretation to the statutory requirement that parkland is to be taken for highways only if there is "no feasible and prudent alternative" to a corridor through the park. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 412 (1971). See 23 U.S.C. § 138 (1970); 49 U.S.C. § 1653(c) (1970). While this decision will help to preserve some open space in cities, it could intensify the problems of residential dislocation because of highway construction.

29. BUILDING THE AMERICAN CITY, supra note 9, at 82. Perhaps more important is the political impotence of low-income ethnic minorities. See 1970 URA Hearings, supra note 1, at 442 (statement of Representative Olsen).
C. A Congressional Response: The Relocation Acts

Congress has recognized the conflict between the highway program and the goal of providing every American with adequate housing. Legislation was enacted in 1968\(^{30}\) and 1970\(^{31}\) with two major purposes: to prevent residents from being displaced when insufficient relocation housing\(^{32}\) was available and to subsidize those displaced to occupy more expensive units. To achieve the first objective, the 1968 Act provided that the FHWA should not approve a federal highway project involving displacement until “satisfactory assurances” were received from the state highway department that “decent, safe and sanitary” housing units within their financial means would be available to all displacees.\(^{33}\) The second objective was achieved by providing supplemental payments to those displaced, both homeowners\(^{35}\) and tenants.\(^{36}\)


\(^{31}\) The Uniform Relocation Assistance and Land Acquisition Policies Act (URA), 42 U.S.C. §§ 4601 et seq. (1970), supersedes and effectively repeals the 1968 Highway Act, but retains much of the latter’s language. The URA applies to all federally financed relocations and land acquisition. See Hartman, Illusory Promises, supra note 9, at 769-81.

\(^{32}\) In the text of this Note, the term “relocation housing” denotes housing available to those displaced. “Replacement housing” refers only to new housing units provided by the displacing agency. Statutes and regulations, however, do not always follow this distinction.


\(^{34}\) Act of Aug. 23, 1968, Pub. L. No. 90-495, § 30, 82 Stat. 831, replaced by 42 U.S.C. § 4625(c)(3), provides that assurances must be submitted by the state to the FHWA which document that:

within a reasonable period of time prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment (emphasis added).

\(^{35}\) Act of Aug. 23, 1968, Pub. L. No. 90-495, § 30, 82 Stat. 832, replaced by 42 U.S.C. § 4623 (1970). Under this provision, a homeowner could receive up to $5,000 as the difference between the fair market value of his home and the cost of acquiring a new home. However, relatively few homeowners seem to have benefitted from this provision. Between Oct. 1, 1968 and Dec. 31, 1969, Federal Aid Highway projects displaced about 13,500 homeowners, but additive payments averaging $2,324 each were made to only 2,085 owners. 1970 URA Hearings, supra note 1, at 595 (testimony of F.C. Turner).

\(^{36}\) Under Act of Aug. 23, 1968, Pub. L. No. 90-495, § 30, 82 Stat. 832, replaced by 42 U.S.C. § 4624, tenants may receive up to $1,500 over two years in order to enable them to obtain dwellings comparable to those from which they are displaced. Payments are calculated to cover the difference between market rent, and the rent that the tenant has been paying. See FHWA Instructional Memorandum (IM) 80-1-68, Relocation Assistance and Payments—Interim Operating Procedures ¶ 9(c)(1) (Sept. 5, 1968). In practice, few tenants have managed to qualify for this payment. Of 10,799 tenants displaced over a twelve month period in 68-69, only 913 received additive payments averaging $780 per year ($61 per month). 1970 URA Hearings, supra note 1, at 617 (FHWA statistics).
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The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) strengthened each of the two thrusts of the 1968 Act. To ensure an adequate supply of housing for displacees, the 1970 Act authorized construction of replacement housing (new or rehabilitated units added to the supply).\(^{37}\) The URA also increased the payments to the individuals displaced—a homeowner may get up to $15,000,\(^{38}\) and a tenant may get up to $4,000 over a four-year period.\(^{39}\)

These acts are an important step toward reconciling the federal highway program with national housing goals. They have in common two important elements: the "market" focus on an adequate supply of relocation housing, and the "individual" focus on payments to those displaced. Although concern with individual relocation payments has characterized FHWA administration of the relocation acts, it will be argued in Part II that full implementation of these acts requires a concern for the market effects of highway displacement as well, especially in the low-income housing market. To understand these market effects, and to lay the basis for a later critique of FHWA administrative practices, a discussion of the economics of the low-income housing market is required.

II. The Impact of Urban Highways: The Low-Income Housing Market

The housing market in urban areas is rarely a uniform whole. Most often, urban housing markets are segmented into submarkets, thus limiting the responsiveness of the whole market to changes in any one submarket.\(^{40}\) Partially for this reason, low-income submarkets are

37. Uniform Relocation Act, § 206(a), 42 U.S.C. § 4626(a) (1970). This section provides in full:

   If a Federal project cannot proceed to actual construction because comparable replacement sale or rental housing is not available, and the head of the Federal agency determines that such housing cannot otherwise be made available he may take such action as is necessary or appropriate to provide such housing by use of funds authorized for such project.


Housing "submarkets" include the division of the market into rental and ownership sectors, as well as into economic strata. But one of the most important submarkets of the housing market is the spatial, or neighborhood segmentation of the housing market. The neighborhood is one of the most important limits to a flexible market supply,
subject to chronic shortages of adequate housing supply.41

Because most new housing is constructed for upper-income households,42 low-income submarkets are usually dependent on the “trickle down”43 of older housing. However, this “trickle down” process is seriously deficient as a source of supply, particularly for minorities.44 Construction of new upper-income housing can trigger some “trickle down,” but the older units which eventually become available to low-income families often do not meet housing codes.45

Shortages in the low-income housing market are aggravated by demolitions for urban highway construction.46 The demand for housing caused by displacement of both tenants and homeowners focuses most sharply on the same submarkets in which the demolition occurred as the displacees seek housing similar to that demolished—in size, neigh-


42. President’s Committee on Urban Housing, A Decent Home 95 (1968); Von Furstenberg & Moskol, supra note 11. See generally National Comm’ n on Urban Problems: How the Many Costs of Housing Fit Together (Report No. 16, 1969).

43. “Trickle down” is also referred to as “filtering.” This theory, in its simplest form, assumes that housing is passed on to successively lower-income groups as it is vacated by households with rising incomes who move on to higher quality homes. For an argument that “trickle down” does provide homes for low-income households see J. Lansing, C. Clifton & J. Morgan, New Homes and Poor People (1969). But see Grusby, supra note 40, at 84-130. For a critical evaluation of “trickle down” see Schechter & Schlefer, Housing Needs and National Goals in House Comm’n on Banking and Currency, Papers Submitted to Subcomm. on Housing Panels on Housing Production, Housing Demand, and Developing a Suitable Living Environment, 92d Cong., 1st Sess. 33-35 (1971) [hereinafter cited as Papers on Housing]; FHA Techniques, supra note 40, at 105.

44. J. Lansing, et al., supra note 45, at 67. Lansing argues, however, that “trickle down” does work for low-income whites because of the absence of discriminatory barriers. Id. at 68. The National Commission on Urban Problems disagreed:

[1]he trickle-down principle . . . falls short of supplying enough housing for low income families principally because: (1) the availability of the lowest cost housing is not always where the poor can get to it, and because (2) so much of the cheapest available housing is substandard. . . . Virtually all slum housing is filter-down housing—which is proof enough of its inadequacy.

45. See Building the American City, supra note 9, at 10, 93; Schechter & Schlefer, in Papers on Housing, supra note 43, at 54-35.

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neighborhood location and accessibility to work and public facilities; moreover, low-income and minority displacees tend to relocate within the same neighborhoods from which they are displaced. As a result of the increased demand, focusing on inelastic submarkets, the price of low-income housing may rise appreciably, especially since initial price increases are normally insufficient to generate new housing construction.

This increase in housing prices may be magnified by the relocation payments which give increased purchasing power to the displacees, both owners and tenants, at the same time as supply is decreasing. Relocation payments may enable the displacees to obtain housing that meets the "decent, safe and sanitary" standards assured by the URA. But the submarket's reduced supply and inflated prices place extra burdens on the non-displacee who must compete for housing in a tighter market without a federal subsidy.

For displaced tenants, the impact of inflation is often merely delayed. Tenant relocation payments end after four years. At the end of this period, those tenants who have enjoyed the subsidy must choose between cutting the quality of their housing, devoting a larger portion of their budget to housing, or moving out of the locality entirely.

47. Hartman, The Housing of Relocated Families, 30 J. AM. INST. OF PLANNERS 268 (1964); 1972 HIGHWAY NEEDS REPORT, supra note 12, at V-20 (Part II); Easterwood & Lowry, Socio-Economic Effects of Displacement of Persons and Business Firms in Memphis, Tennessee (Bureau of Business and Economic Research, Memphis State University) 11 (May 1970). For an analysis of economic competition within these neighborhood "submarkets" see FHA TECHNIQUES, supra note 40, at 107.

48. The extent of this inflationary effect is, of course, determined by the percentage of displacees in proportion to the total market, and the rate of their displacement. But a general rise in low-income housing prices has been noted by virtually every study of highway displacement. See studies cited note 46 supra. See also 1970 URA Hearings, supra note 1, at 446 (testimony of Kenneth Phillips); id. at 229 (testimony of Harry L. Kagan, California Division of Highways); Easterwood & Lowry, supra note 47, at 16, 18.

49. See sources cited note 42 supra.

50. An increase in purchasing power for housing that does not at the same time increase materially the supply of housing available can only result in higher prices for the existing supply....

51. FHWA regulations require displacees to find relocation housing which meets strict standards as "decent, safe and sanitary," in order to receive the supplemental relocation payment. IM 80-1-71, supra note 33, at 51, ¶ 23b.

52. There is evidence that housing supply reduction affects non-relocated households. In a "tight" submarket, the result can be an increase in rents, clearly a negative consequence for tenants, while property values for homeowners may not rise with rents if there is doubt about the future desirability of the area as a place of residence.

53. The relocation payment merely postpones the day of reckon-
ing to a time when tenants are less able to mobilize opposition to the highway.

Displacements in the moderate-income portion of the market may affect low-income households as well. In a tight market, reduction of the moderate-income housing supply can choke off the "trickle down" of older units to low-income persons.54

It is clear that in a tight housing market, highway displacements can have serious inflationary effects on the low-income submarket. If the relocation acts are to have their full effect—minimizing the impact of highway construction in urban areas—inflationary results must be avoided. Yet in many instances, state and federal highway agencies have ignored such market effects. Their neglect has inspired litigation and subsequent judicial involvement in the relocation process.

III. Satisfactory Relocation Assurances

Under the URA, state highway agencies must provide "satisfactory assurances" that adequate relocation housing will be available to all those displaced.55 The implementing regulations require that these assurances be submitted to the FHWA.56 But, in addition to "assuring" the FHWA, these documents should have the effect of "assuring" all those in a tight housing market that highway displacements will not contribute to the housing shortage.57 Such assurances must be satisfactory both in substance and in timing.58

Two kinds of relocation assurances are presently required by FHWA regulations: "statewide assurances" and "project assurances." State-

54. High rates of mobility and vacancies in the middle-income portion of the market are a precondition to adequate operation of the "trickle-down" process. W. Gruenew, supra note 40, at 130; FHA TECHNIQUES, supra note 40, at 105.

55. 42 U.S.C. § 4625(c)(3) (1970). This section provides that the federal agency supervising relocation (e.g., the FHWA) receive such assurances "within a reasonable period of time, prior to displacement . . .." Id.

56. IM 80-1-71, supra note 33, at 45, ¶ 15a. All planning, relocation, and construction is carried out by the state highway departments. The FHWA periodically reviews state relocation practices based on conformity with FHWA regulations. See generally Peterson & Keenan, The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation, 2 ELR 50001 (1972); Silen, Highway Location in California: The Federal Impact, 21 HASTINGS L.J. 781 (1970); see generally Note, Relocation, supra note 9.

57. It was argued in Part II that urban highway construction has a disruptive effect not only on individuals displaced but on a city's housing market as a whole when such a market is already characterized by a shortage of units. See pp. 370-82 supra. This phenomenon frustrates achievement of housing goals with respect to whole communities, not just a few individuals in the path of an urban expressway. Thus, the purpose of the relocation acts can only be achieved by requiring satisfactory assurances that the demand on relevant housing markets will not be seriously inflated.

58. See pp. 383-87, 391-96 infra.
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Wide assurances are simply general assertions that the state will comply with applicable FHWA regulations on all of its federal highway projects, and as such, have little relevance to the impact of highway relocation on a particular housing market. Project assurances are intended as guarantees that all those displaced by a particular highway project will be adequately rehoused.

A. "Satisfactoriness" in Substance

Current FHWA Practice. "Project assurances" must be submitted to the FHWA before relocation occurs and must demonstrate that relocation will conform to the federal statutes. The URA requires "that within a reasonable period of time prior to displacement" there must be available:

1. Decent, safe and sanitary dwellings.
2. Equal in number to the number of displaced families and individuals and available to such persons.
3. At rents or prices within the financial means of the families and individuals displaced.

59. Statewide assurances must include general guarantees that relocation payments and services will be provided, the public will be adequately informed, and no person shall be required to move without at least 90 days written notice. The states are also required to describe their administrative procedures for relocation, and procedures by which aggrieved displacees can appeal to the state highway agency. IM 80-1-71, supra note 33, at 20, 28, ¶ 17a, 9b; Keith v. Volpe, 4 ERC 1350, 1365 (C.D. Cal. July 7, 1972). Most states satisfy these requirements by sending a pro forma letter to the FHWA simply restating the applicable regulations and their intention to conform to them. Interview with Neal Ross, Relocation Officer, Connecticut Division of FHWA, Hartford, March 16, 1972. Interview with Michael Fox, attorney for Lathan plaintiffs, New Haven, Connecticut, Apr. 15, 1972. See Lathan v. Volpe, 455 F.2d 1111, 1120 (9th Cir. 1971).

60. Project assurances are required for each highway construction project. They must include specific guarantees that comparable relocation dwellings will be available, and the state's relocation plan for the project is reasonable and adequate. See IM 80-1-71, supra note 33, at 20, ¶ 7b; Keith v. Volpe, 4 ERC 1350, 1365 (C.D. Cal. July 7, 1972).

61. The requirements for assurances regarding relocation are set out in IM 80-1-71, supra note 33, at 28, ¶ 15. The FHWA has allowed some projects to proceed with relocation under the "hardship" category without benefit of these assurances. See pp. 393-96 infra; Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971); La Raza Unida v. Volpe, 337 F. Supp. 221 (N.D. Cal. 1971).

62. 42 U.S.C. § 4625(c)(3) (1970). See IM 80-1-71, supra note 33, at 37, ¶ 5 for the FHWA "decent, safe and sanitary" (DSS) standards. The FHWA has been fairly stringent in applying these DSS standards. In some suburban areas, even upper-income housing does not meet some of these requirements. Ross Interview, supra note 59.


64. 42 U.S.C. § 4625(c)(3) (1970). In practice, relocation payments are added to the amount currently being paid by a displaced tenant in order to compute this figure. In the case of a homeowner, a relocation payment is added to the fair market value of his condemned home, in order to estimate what housing is within his financial means. Ross Interview, supra note 59; Keith v. Volpe, 4 ERC 1350, 1366 (C.D. Cal. July 7, 1972). The Keith decision seems to approve of this practice. 4 ERC at 1366-67. However, as suggested at p. 381 supra, relocation payments may worsen the market position of those not displaced by inflating prices.
4. In areas not generally less desirable in regard to public utilities and public and commercial facilities.\textsuperscript{65}

5. Reasonably accessible to their places of employment.\textsuperscript{66}

Although the FHWA regulations implementing the URA are extensive,\textsuperscript{67} none requires analysis of the market impact of highway displacement.\textsuperscript{68} Because of this omission, the states have submitted—and the FHWA has accepted—relocation assurances which do not adequately protect low vacancy urban housing markets from the effects of highway displacement.\textsuperscript{69} Much of the relocation litigation discussed in this Note can be attributed to inadequate supervision and control by the FHWA over state relocation practices.\textsuperscript{70}

One result of inadequate FHWA supervision is that the states have been allowed to use questionable statistical devices to expand the estimated supply of available relocation housing. Highway projects are thus brought into apparent conformity with the URA when, in fact, the necessary relocation units do not exist.

One statistical practice, for example, has been to rely on housing "turnover" as an indicator of available relocation dwellings.\textsuperscript{71} Turnover is the percentage of housing units which are sold or which change tenants during a particular year. It describes the rate at which units change occupancy, and could occur in the complete absence of vacancies.\textsuperscript{72} HUD has prohibited the use of turnover as an indica-
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tor of available relocation housing in administering its own programs. Nevertheless, state highway agencies continue to employ it and consequently their assurances are often unrealistic.

As another method of temporarily disguising housing shortages, highway displaces are sometimes given priority for public housing and put into public housing ahead of those who have been on the waiting lists for many years. In effect, resources allocated to public housing are diverted to compensate for a highway's depletion of the housing supply. Also, many state highway agencies ignore the effects of racial segregation, which limit the relocation opportunities of displaced minorities. In addition to these practices which overstate the apparent supply of available relocation housing, many states have also minimized the demand for such housing by ignoring concurrent displacements from other highways or public projects.

In a loose or high vacancy housing market, these failures to accurately estimate the supply and demand for relocation housing would not be alarming. In this situation, the market would be elastic enough to absorb the displacements from other highways or public projects.

75. As of November 1967, there were 192,072 families on the waiting lists for 6,864 vacancies in 315,333 units of public housing throughout the United States. Thus, the ratio of the total number on the waiting list to vacancies was approximately 23:1. BUILDING THE AMERICAN CITY, supra note 9, at 131.
From Oct. 1, 1968, to Sept. 30, 1969, 32 per cent of the people furnished requested assistance under the 1968 Highway Act as federal highway displaces in urban areas were non-white. 1970 URA HEARINGS, supra note 1, at 627 (FHWA statistics).
78. The tightness of a local housing market is a function of a number of causes: vacancy levels, interest rates, construction costs, land availability, racial segregation, and other factors which limit responsiveness to demand. However, vacancy rates are the index most commonly used to indicate relative market tightness. Homeowner vacancy rates are frequently much lower than tenant vacancy rates, and it is therefore necessary to divide the market into the homeowner and tenant submarkets in order to evaluate overall vacancy rates. See FHA TECHNIQUES, supra note 40, at 101-53.
American urban housing markets have shown decreasing vacancy rates since 1955. Schechter & Schleifer in PAPERS ON HOUSING, supra note 43, at 23. In 1970, homeowner vacancy rates within Standard Metropolitan Statistical Areas (SMSA's) were 1.1% nationwide, although considerably lower in the Northeast region. Rental vacancy rates were 6%, within SMSA's and 5.5% in SMSA's in the Northeast. U.S. DEPARTMENT OF COMMERCE, 1970 CENSUS OF HOUSING, GENERAL HOUSING CHARACTERISTICS 10 (Dec. 1971) [hereinafter cited as 1970 Census].
to accept the loss of supply without serious consequences for the displacees or the low-income housing submarket. But in urban areas—where large numbers of individuals are displaced by highway construction, where many of the displacees are low-income and their supply of housing is already inadequate—the relocation payment alone is an insufficient solution. “Satisfactory assurances” must in this instance include specific guarantees that highway displacement will not place uncompensated burdens on low-income displacees and on the low-income housing submarket.79

The substantive satisfactoriness of highway relocation assurances80 was at issue in Keith v. Volpe,81 which concerned construction of the Century Freeway in Los Angeles, expected to displace over 21,000 individuals.82 Although the California Division of Highways had prepared relocation plans and assurances in conformity with FHWA requirements, these assurances relied on “turnover” rates, ignored concurrent displacements, and failed to consider adequately how many of the units in the available housing supply were “decent, safe and sanitary.”83 The court sharply criticized the turnover approach and enjoined displacements pending preparation of a satisfactory relocation program by the state.84


81. The Century Freeway is to be an interstate highway 17 miles long through the densely populated southern portion of the Los Angeles basin. The project is estimated to cost $501.8 million. Of this, the state had already spent $88.7 million. Some 2840 of the 6073 residences to be acquired were vacated as of May 3, 1972. 4 ERC at 1352.

82. 4 ERC at 1366.

83. 4 ERC at 1367-68. The standard for injunctive relief applied by the court is discussed at pp. 398-400 infra.

The Keith decision did indicate that the relocation payments could be added to the displacees' current housing cost to calculate what housing was “within the financial means” of the displacees. 4 ERC at 1366-67. However, this practice does not take account of the market effects discussed at p. 381 supra. Also, it leaves displaced tenants far worse off, when the supplemental relocation payments terminate after four years. One urban renewal case previously rejected this practice approved in the Keith holding:

[The rent supplements can only be used to make up the deficiency in low rent vacancies during the first two years after a resident's relocation. After that time, the rent supplements disappear and the displaced resident is left with a rent which he cannot afford. The use of the supplements to make up for a lack of vacancies could
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A New Standard. Questionable relocation practices by state highway departments, and the FHWA's failure to counter them, may well compel other courts to face the question of what constitutes satisfactory highway relocation assurances. A thorough evaluation of the market effects of highway displacement in an urban area would appear to require the following as essential elements of "satisfactory assurances."

1. A determination of the relevant submarkets in the housing market—rental, sale, neighborhood, racial, and price—and analysis of the inter-relationship between these various submarkets.\(^7\)
2. A determination of vacancy rates for all affected submarkets which takes account of apartment sizes and the adequacy of available units under the decent, safe, and sanitary standard.\(^6\)
3. A determination of expected concurrent displacements, both public and private.\(^7\)
4. An estimate of the average amount of relocation payment necessary to enable tenants and owners to obtain comparable decent, safe and sanitary dwellings.\(^8\)

These determinations should give a clear indication of the ability of the low-income housing market to respond to the loss of units from the supply.

Replacement Housing. When the housing market is tight,\(^9\) relocation assurances cannot be "satisfactory" unless they also indicate that new replacement housing will be built on a one-to-one basis for

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\(^7\) For discussion of housing submarkets see Kirwan & Martin, supra note 40; FHA Techniques, supra note 40, at 106-08.

\(^6\) For examples of such a procedure see 1970 URA Hearings, supra note 1, at 500 (testimony of Yale Rabin); FHA Techniques, supra note 40, at 101-53. Determining realistic vacancy rates would not require major expense or bureaucratic effort. 1970 Census data provide a good base figure for most major metropolitan areas. See 1970 Census, supra note 78. More current statistics can be obtained from public utility companies, or from the Federal Housing Administration which compiles housing market studies. See FHA Techniques, supra note 40.

\(^7\) A study of concurrent public displacements is required by IM 80-1-71, supra note 33, at 45, § 15(3)(b). Yet many state highway agencies do not follow this requirement, and are inclined to minimize the effects of concurrent private displacements near the highway right-of-way. Such displacements often occur, especially around highway interchanges, in anticipation of land use changes resulting from construction of the highway. See Hartman, Illusory Promises, supra note 9, at 771 n.102.

\(^8\) Guidelines should be established for these payments by the FHWA. When the payments must be high, in order for displaces to obtain comparable relocation dwellings, this is evidence of market inflexibility. When the tenant payment must be more than, e.g., 50% of previous rent, then the market is probably so unresponsive to demand that replacement housing should be constructed. See pp. 387-91.

\(^9\) See the discussion of the factors involved in "tightness," note 78 supra.
every unit demolished. Under section 206(a) of the URA, provision of replacement housing is authorized as reimbursable project expense. FHWA regulations should require construction of replacement housing when the vacancy rate in the relevant housing submarket is below some previously-established minimum figure which represents the point at which significant inflationary effects can be expected in the relevant submarket. When the vacancy rate is below this minimum figure, the burden should be on state highway departments to demonstrate that replacement housing is not required.

Congress clearly felt that the replacement housing provision was critical to the successful operation of the URA. As the House Report accompanying the Act stated:

[Perhaps most important of all, [the URA] gets to the heart of the dislocation problem by providing the means for positive action to increase the available housing supply for displaced low and moderate income families and individuals.]

90. When the relevant submarket is characterized by low vacancies, say 5% or less, the URA requirements for relocation housing, pp. 383-84 supra, simply cannot be met unless new units, equivalent in number to those demolished, are added to the submarket’s supply. The general recommendation that replacement housing be constructed was first made by the National Commission on Urban Problems: The Commission recommends that highway funds be used to finance the construction of new housing for low income households in a metropolitan area where demolition for highway construction reduces the supply of such housing, with the requirement that definite commitments to construct the new housing concerned be made before existing housing is demolished. BUILDING THE AMERICAN CITY, supra note 9, at 195. See HIGHWAY RESEARCH BOARD No. 110, supra note 50, at 26; 1970 URA Hearings, supra note 1, at 447 (statement of Kenneth Phillips); id. at 480-81 (statement of Yale Rabin); Downs, Losses, supra note 27, at 215; Note, Relocation, supra note 9, at 500-01.


92. FHWA regulations implementing § 206(a) of the URA were to be issued in late 1972, almost two full years after the passage of the Act. Interview with James Engleman, supra note 67. HUD, however, has issued general regulations—which must serve as guidelines for the FHWA—covering all federal programs affected by the URA. 37 Fed. Reg. 3633 (1972); 24 CFR Subtitle A, pt. 43 (1972).


94. Determining the exact minimum figure to be established as a trigger for the construction of replacement housing will be a complex process. The amount of inflation produced in a housing market by demolitions and displacements for highway construction will vary from city to city as well as from submarket to submarket within the same city. A difficult choice will be required to determine which figure to employ as an average as well as to decide what degree of inflation is significant. Congress, however, has already made such a choice in an analogous situation. 42 U.S.C. § 1455(h) (1970) requires construction of replacement housing for all urban renewal programs undertaken in communities where the vacancy rate is less than 5%. In view of the experience of urban renewal programs with the problem of residential relocation and the general interest in uniformity among federal relocation programs, it would seem reasonable to apply this 5% figure to the Federal Aid Highway Program as well. See BUILDING THE AMERICAN CITY, supra note 9, at 70.

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No court has yet been squarely faced with the issue of replacement housing. If this issue is raised, highway administrators may argue that use of this provision is purely discretionary. But the replacement housing provision seems clearly intended by Congress to be a fail-safe device in the event that the required assurances cannot be satisfactory without the addition of new units to the housing supply. Because of the market effects described in Part II (in the context of the low-income housing submarket), highway displacement in a tight market without construction of new housing would render meaningless the protections intended by the URA. Section 206(a), especially in light of other provisions of the URA, seems intended to allow highway departments to construct new replacement housing as an alternative to abandoning projects which cause heavy displacement.

96. Replacement housing has been considered in one urban renewal case. TOOR v. HUD, No. C-69-324 SAW (N.D. Cal. July 11, 1972) Memorandum Order at 6. In an earlier opinion, issued before enactment of § 206(a) of the URA, the TOOR court had ordered the San Francisco Redevelopment Agency to provide 1500-1800 units of replacement housing for displacees from the Yerba Buena Urban Renewal Project. TOOR v. HUD, No. C-69-324 SAW (N.D. Cal. November 9, 1970) Order at 2.


98. See note 90 infra. Where the rental housing market shows a vacancy rate of less than 5%, there is serious danger that assurances will be unsatisfactory owing to the inflationary effect of displacement. See 1970 URA Hearings, supra note 1, at 447 (Statement of Kenneth Phillips); HIGHWAY RESEARCH BOARD No. 110, supra note 50, at 26.

99. In the context of other sections of the URA, § 206(a) may be seen to impose a mandatory duty upon federal and state agencies to use project funds for replacement housing which would not otherwise be available. § 206(b), 42 U.S.C. § 4626(b) (1970), specifies: No person shall be required to move from his dwelling on or after January 2, 1971, on account of any Federal project, unless the Federal agency head is satisfied that replacement housing, in accordance with section 4625(c)(3) of this title, is available to such person. (Emphasis added.)

§ 205(c)(3), 42 U.S.C. § 4625(c)(3) (1970), of the Act reads:
Each relocation assistance advisory program required by subsection (a) of this section shall include such measures, facilities, or services as may be appropriate in order to . . .

(3) assure that, within a reasonable period of time, prior to displacement [replacement housing will be available].

Neither of these sections is discretionary. If the FHWA is unable to assure the provision of adequate relocation facilities as defined in the URA, the highway cannot be built. § 210 of the Act (42 U.S.C. § 4630 (1970)) makes the URA clearly applicable to all federally assisted projects, including the federal highway program.

100. The HUD regulations implementing § 206 indicate that abandonment of a project may be required if satisfactory assurances cannot be provided:
Whenever the necessary relocation housing is unavailable and cannot be made available by other means . . . there are generally only three options available: (i)
Construction of one-for-one replacement housing is not a novel remedy. It is an established requirement for urban renewal programs. The highway construction program causes approximately the same number of displacements as urban renewal, and should also be subject to a one-for-one replacement housing requirement when necessary.

State highway departments may not wish to construct or to manage replacement housing themselves. However, there are a number of techniques by which these agencies could participate in furnishing housing. For example, the FHWA could establish a procedure similar to the interest subsidy programs of the Federal Housing Administration. Under this procedure, the state highway department would contract with a private developer for construction of new units to replace those demolished. The highway department would subsidize the interest on a loan taken out by the developer, and provide supplemental payments to bring the housing within the financial means of low-income displacees. The state could also assist, through use of its power of eminent domain, in providing suitable land for development. Such replacement units should be sold or rented at

Stop, reject, or abandon the project; (2) revise the project to reduce displacement; or (3) use project funds under section 206(a) to provide the needed housing.


101. 42 U.S.C. § 1455(h) (1970). This replacement housing requirement can be waived only when local vacancy rates are more than 5%. See Hartman, Illusory Promises, supra note 9, at 751 & at n.26.

102. One recent study has concluded that annual highway construction is responsible for more displacements than urban renewal. Schechter & Schlefer, PAPERS ON HOUSING, supra note 43, at 19.

103. The argument for such a requirement receives additional support from the fact that urban highways have had a redistributional effect by conferring benefits on surrounding suburbs while imposing costs—noise, air pollution, deterioration of mass transit facilities, and disruption of housing markets—on the central cities. See Y. Raub, The IMPACT OF THE FEDERAL-AID HIGHWAY PROGRAM ON MINORITY GROUPS (Study for U.S. Commission on Civil Rights) (1972-forthcoming); ECONOMIC CONSEQUENCES, supra note 46, at 286-308; Kain & Meyer, Transportation and Poverty in THE PUBLIC INTEREST 75 (1970). Requiring replacement housing could partially offset this tendency toward regressive redistribution by shifting costs of housing market inflation from central cities to the highway program.

104. The highway agencies, both state and federal, are understandably a bit apprehensive about “getting into the housing business.” Interview with James Engleman, supra note 67. However, in view of the considerations in note 103 supra (as well as the statutory requirement of § 206(a)), it seems clear that the cost of replacement housing should be borne by the highway program. The federal highway program should no longer be allowed to shift its costs to other federal agencies, for example HUD, by requiring them to fund needed replacement housing.

105. E.g., the FHA 235 and 236 programs which provide for federal subsidy of interest costs down to one per cent to enable a non-profit sponsor or developer to produce housing that is financially feasible for moderate-income families. 12 U.S.C. § 1715(z) (1970). However, this procedure does not make housing available to the lowest-income persons. See HANDBOOK ON HOUSING LAW, supra note 72, at 16 V, 16 III & IV. Accordingly, supplemental payments will be necessary to make housing produced by this method available to the lowest-income displacees.

106. As of 1967, forty states had the power of excess condemnation—the power to take lands adjacent to highway rights of way where it is in the public interest to do so. U.S.
the same economic level as the demolished units, and should be of
an equivalent size. FHWA regulations should provide that the re-
placement units be complete before relocation occurs.\textsuperscript{107}

These proposals could be implemented by the FHWA on an ad-
ministrative basis. But if the FHWA fails to require state highway de-
partments to provide adequate replacement housing, there inevitably
will be further litigation by low-income plaintiffs seeking the sub-
stantively adequate assurances required by the relocation acts.\textsuperscript{108}

B. "Satisfactoriness": The Timing of Assurances

Although the readiness to build replacement housing is important,
the timeliness of such assurances is equally so. Should replacement
housing be required, it must be ready for occupancy by the time relo-
cation actually occurs. Thus, a determination of the need for replace-
ment housing must be made at an early stage—the "location" stage, as
it is formally known\textsuperscript{109}—in the highway planning process. Another rea-
son compelling the early preparation of satisfactory assurances is the
existence of special hardships created by the increasingly lengthy time
span of highway planning. A brief review of the formalities of the high-
way planning process demonstrates the importance of the timing com-
ponent of "satisfactoriness."

Although the highway planning process comprises a complex series
of stages,\textsuperscript{110} only three of these are relevant to a relocation program:
location, design, and right of way. Federal approval of state relocation plans is required at each of these stages.

With the request for federal approval of highway location, the state is required to submit "conceptual" relocation assurances. These include a general description of the relocation problems to be expected. More detailed "right-of-way" assurances are mandatory at the time of federal approval of the proposed highway design. Normal property acquisition and relocation occurs after design approval, during the right-of-way stage. After all relocations have occurred, the highway department must affirm that displacement has conformed to federal regulations. The FHWA will not approve reimbursement for construction costs unless it determines that adequate relocation housing has been made available.

In recent years, the time interval between federal approval of a highway's location and demolition of the housing in the highway corridor has increased to 8 or more years. The length of this planning process is to some degree the result of the "due process" involved in planning a highway so that it is responsive to public concerns. Any highway location decision is partially a product of a

111. At the location stage, the highway corridor is established. Public hearings are required on alternative highway locations; these must involve discussion of the relocation problems of alternative routes. After the corridor hearings, FHWA approval of the route is sought by the state highway department. FHWA Policy and Procedure Memorandum 20-8, Public Hearings and Location Approval, 23 C.F.R. app. A, ch. I at 13-15 [hereinafter cited as PPM 20-8].

112. Once the route has been given federal approval, the design stage begins. Design alternatives are prepared for presentation at the design public hearings which specify which land parcels will be taken. After the design hearing, federal design approval is sought. Right-of-way relocation assurances must be submitted with this request for design approval. IM 80-1-71, supra note 33, at 45, ¶ 15a; Red Tape, supra note 110, at 66.

113. After design approval has been obtained, the right-of-way stage begins. Property cannot be acquired (except under the hardship category discussed at pp. 393-96 infra) until this design approval has been obtained. For major urban highways, the relocations that take place during this period may stretch over a number of years. Such "conceptual" relocation assurances, IM 80-1-71, supra note 33, at 45, ¶ 14b, are required for each highway project. They should not be confused with statewide assurances. See p. 383 supra. Conceptual assurances must include an estimate of the number of displacees and of the "probable availability" of DSS relocation housing. IM 80-1-71, supra. But there is no requirement for a determination of vacancy rate or potential concurrent displacements, or for a decision whether or not to construct replacement housing. The "right-of-way stage assurances" are discussed at pp. 383-87 supra. These assurances must include a detailed inventory of the individual needs of the displacees, an inventory of available relocation housing, and an analysis of these inventories. IM 80-1-71, supra note 33, at 45, ¶ 15.

114. The only exceptions to this procedure are hardship acquisitions, discussed at pp. 393-96 infra, and protective buying, note 126 infra.

115. DOT order 5620.1 Replacement Housing Policy (June 24, 1970) required that no construction, including residential clearance, could begin until the FHWA division engineer had insured that adequate, DSS housing had been made available to the displacees.

116. A 1972 Government Accounting Office survey found that this interval ranged from 2.5 to 14 years, with an average of 8.7 years. 1972 Senate Hearings, supra note 5, at 431; Red Tape, supra note 110, at 6 (testimony of F.C. Turner); S. Rept. No. 1081, supra note 14, at 18.
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political process.\textsuperscript{119} It constitutes a decision that certain members of the community must bear sacrifices for the benefit of all. Thus a series of hearing and review procedures have been established to ensure that all relevant views have been considered in planning the highway.\textsuperscript{120} Any truncation of this planning process will make the ultimate highway design less responsive to the public.

However, a lengthy planning process has serious consequences for those living in the highway corridor. The corridor approved for an urban expressway is usually about 300 feet wide.\textsuperscript{121} Those living within this corridor know that they will probably be evicted by the highway. But they are never quite sure. Even if they are not eventually displaced, the highway location decision can have immediate and serious effects on residents in the corridor area.\textsuperscript{122} Such effects were succinctly described by one court:

As a practical matter, there is no longer an open market for the property in the corridor; there is only one potential buyer, the state. The inevitable effect is a lessening of the property owner's motivation to maintain his property and a depressing effect upon property values and the general physical, economic, and social tone of the area . . . .\textsuperscript{123}

In response to such problems caused by the lengthy highway planning process the FHWA has allowed state highway departments to undertake "hardship acquisitions."\textsuperscript{124} This device is designed to aid property owners in the designated highway corridor prior to normal...

\textsuperscript{119} The highway planning process has been political since the time of Julius Caesar and the Roman roads. However, the intensity of public involvement with the planning process has grown significantly in recent years. See A. Altshuler, \textit{The City Planning Process} 17-85 (1965); A. Lupi, \textit{F. Colcord & E. Fowler, Rites of Way} 1-197 (1971).

\textsuperscript{120} E.g., statutes cited note 6 supra; 23 U.S.C. § 109(h) (1970) requires that the adverse economic, social and environmental effects of all federal-aid highway projects be thoroughly evaluated and re-evaluated up until the time of final construction of the highway. See 37 Fed. Reg. 21430 (Oct. 11, 1972) (regulations implementing § 109(h)).

\textsuperscript{121} Interview with Neal Ross, supra note 59. Before 1968, corridor approvals in urban areas were sometimes for a corridor as wide as half a mile. Interview with Michael Fox, supra note 59.

\textsuperscript{122} For example, rumors of highway location often restrict the availability of bank loans to homeowners in the path of a possible highway. See United States v. Braddy, 320 F. Supp. 1239 (D. Ore. 1971).


\textsuperscript{124} FHWA Instructional Memorandum 20-1-69, Interim Criteria Promulgated under § 10c, PFM 20-8, Public Hearings and Location Approval, Relating to Right-of-Way Acquisitions (April 8, May 27, June 11, 1969). The FHWA's "criteria" are vague and require only that a "hardship" exist. They do not define what a "hardship" is. Hardship acquisitions have been allowed in such cases as an individual faced with a job transfer or an elderly owner who wished to move elsewhere for health reasons.

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acquisition. After obtaining the approval of the FHWA, the state highway department may buy the property at the request of the owner and then demolish it.

Although the owner’s sale is voluntary in theory it may be near-compulsory in practice. He knows that the state will ultimately resort to its power of eminent domain if a sale is not negotiated. He knows that some owners will seek to escape with as much as they can rather than hang on in a neighborhood disintegrating as a result of a proposed highway corridor. Once this process begins on a significant scale, it acquires its own momentum, and may foster a sophisticated form of blockbusting.

There will be some instances where genuine hardships justify advance acquisition by the state. However, under present practices, hardship acquisitions may occur without benefit of full relocation assurances. The “conceptual” relocation assurances in existence at the time of the hardship acquisition are only brief and general. Although the state is required to assure that the displaced hardship owner receives adequate relocation housing, the effects of this practice on a tight market may be severe. If they have occurred in sub-

125. Approval by the FHWA is clearly required if the FHWA is participating in the costs of right-of-way acquisition for the Interstate System. However, FHWA approval is not required if the state is acquiring right-of-way for an ABCD highway with its own funds before FHWA design approval. FHWA Instructional Memorandum 80-1-72, Protective Buying and Hardship Acquisitions (July 28, 1972); Interview with Neal Ross, supra note 59. This practice seems to leave those displaced from some federally funded highway construction projects without the guarantees and controls intended in the URA. See pp. 305-96 infra.

126. IM 20-1-69, supra note 124. The 1968 Highway Act authorized federal reimbursement for such advance acquisitions of highway rights-of-way before design approval. 23 U.S.C. § 108(a) (1970). Few states have taken advantage of this provision. California uses this advance acquisition device, not only in the “hardship” situation but also for “protective buying.” Under this approach, the state buys property in order to forestall unwanted development which might increase the cost of the right-of-way. See generally ADVANCE ACQUISITION STUDY, supra note 106.

127. One court has noted a causal relationship between hardship acquisitions and highway location: We think it sophistry to say that persons who make “hardship” sales to the state or who leave the property because the owner makes such a sale, do not move “as a result of the acquisition,” or to claim that their departures were “voluntary.” Lathan v. Volpe, 455 F.2d 1111, 1124 (9th Cir. 1971).

128. If there is community debate about the advisability of the highway, the hardship device can help the highway agency to win this debate. As owners give up and move out, the highway corridor area declines rapidly in quality while residents in the corridor witness the spectre of vacancies, boarded-up houses, vandalism, and decay. This was the situation in Seattle before the Lathan decision. Interview with Michael Fox, supra note 59; see note 132 infra.

129. See note 124 supra.

130. In Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971) the court described these possible effects: If the purpose of the [relocation] statute is to be accomplished, it must be fully implemented not later than the approval of the “corridor” or “route” of the highway. . . . “Hardship” displacements may use up all of the available housing that
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substantial numbers, hardship acquisitions may render meaningless the subsequent detailed "right-of-way" relocation assurances. Although the hardship procedure is a necessary response to the individual costs of highway location planning, it should not be used as a device to circumvent the URA's relocation requirements. Submission of detailed relocation assurances at the location stage of a highway's plan must be required to avoid the possibility of such circumvention.

In the context of displacements resulting from hardship acquisitions, the need for detailed relocation assurances at the location stage—corresponding to the right-of-way assurances previously required for federal design approval—was recognized in Lathan v. Volpe. Lathan concerned the westernmost leg of Interstate 90 passing through Seattle's black community. In 1968, when affected residents became aware of the highway's planned location, the community began to decline in quality, and the state announced that it would acquire property under the hardship procedures. No relocation assurances accompanied the state's request for federal approval of these acquisitions.

The Ninth Circuit held that the congressional purposes behind the URA required that detailed relocation assurances be prepared not later than the location stage of the highway planning process. The trial court was ordered to enjoin further acquisitions of property until the state submitted an adequate relocation plan. The opinion implies that relocation assurances must be given immediately for projects which have already received FHWA location approval.

The new requirements of the Lathan decision have not yet been

meets statutory requirements leaving the project stalled and the remaining residents trapped in a deteriorating area, because at the time of design approval, the necessary assurances cannot be given.

455 F.2d at 1119-20.

131. 455 F.2d 1111 (9th Cir. 1971).

132. As the hardship acquisitions progressed, the corridor area began to decay rapidly with vandalism, fires, and boarded-up homes. At the time the action was filed in district court, 184 of the 303 homes in the highway corridor had been "voluntarily" sold to the state. By the time of the appellate court decision, another fifty homes had been sold—among them, the home of Roosevelt Lathan and his wife, named plaintiffs in the case. Interview with Michael Fox, supra note 59.

133. The FHWA and the state argued that "a detailed relocation plan for a project cannot be approved prior to the approval of a highway's design, because until that time, the number of displacees is not known with reasonable certainty." Brief for Appellees (federal defendants) at 19, Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1971). See note 138 infra.

134. 455 F.2d at 1119. See Note, Relocation, supra note 9, at 498.

135. 455 F.2d at 1126. The district court "may, however, in case of genuine hardship, permit hardship acquisitions by the State if it complies with the URA and IM 80-1-71 in connection with such acquisitions." Id.

implemented by state highway departments. Some states may resist any requirement that detailed relocation assurances be submitted at the location stage. In part, this is a fear that those living along the highway corridor will become too excited if a survey of their relocation needs is taken. However, preparation of detailed relocation assurances at this early stage would seem preferable to the current practice of allowing coercive hardship acquisitions without the benefit of full relocation assurances. Thus, the Lathan mandate is a sensible resolution of the inherent tension between the due process requirements of highway location planning and the necessity for genuine hardship acquisitions.

C. Application of the URA to “ABCD” Federal Highways

In both Lathan and Keith the proposed highways were planned to be part of the federal Interstate System. Although such highways are constructed by the states, they are clearly “federal” projects. Because of FHWA approval procedures for highways in the ABCD system, an issue has been raised as to when such ABCD routes become federal highways, and hence subject to the provisions of the URA.

Many states obtain federal location approval for projects in the ABCD system, and then proceed to fund much of the preliminary work—including right of way acquisition—from their own highway funds. Only after obtaining federal design approval do the states decide whether to request federal reimbursement. Some states have attempted to avoid complying with FHWA relocation requirements by arguing that highways in the ABCD system are exempt from these requirements until a federal commitment for matching funds is made.

137. As of this writing, state highway departments continue to submit vague conceptual relocation assurances for location stage approval. Interview with James Engleman, note 65 supra. See pp. 396-98.

138. At the time that the 1968 relocation regulations were being issued, there was internal debate within the FHWA about the required concreteness of the conceptual assurances. John A. Swanson, former FHWA administrator for Right-of-Way, feared that interviewing of potential displacees would generate too much political opposition to highway projects at the location stage—when, indeed, the highways are more vulnerable to being stopped. Interview with James Engleman, supra note 67. See 1970 URA Hearings, supra note 1, at 603 (testimony of F.C. Turner).

139. See p. 394 supra.


141. California and Texas, for example, have extensive programs for right-of-way acquisition under the advance acquisition procedure. Interview with James Engleman, supra note 67. See generally ADVANCE AcQuisition STUDY, supra note 106.

142. These states argue that the federal-aid obligation of the federal government is based on a contract theory. Under this theory, relocation and environmental regulations do not apply until a federal commitment to reimburse is made and both parties are
The issue of when highways in the ABCD system must comply with FHWA requirements was dealt with squarely in *La Raza Unida v. Volpe*, a case involving the Foothill Freeway in Hayward, California. Although California had obtained FHWA corridor approval for this ABCD highway in 1966, and had begun acquiring property under the “hardship” procedures, no relocation assurances had been submitted to the FHWA.

Even though no federal funds had yet been expended on the project, the court held:

[F]or the purpose of applying the various federal statutes and regulations, a federal-aid project is any project for which the state has obtained location approval.

The court issued an injunction barring further acquisition of property pending state compliance with the federal relocation acts. This requirement, the court pointed out, was consistent with Congress’ intent, expressed in the URA, that federal controls must be exercised over all projects in which the FHWA might participate. Designat-bound. Brief for Appellants at 14-15, *La Raza Unida v. Volpe* (9th Cir. 1972), No. 72-1111.

The consequences of this contract theory have been sharply criticized:

[S]ince federal-aid highway funds are not designated for use in relation to any particular highway, when they are apportioned, the states are free to designate the proposed highways for which they will request federal reimbursement. A state may therefore use its own funds for highways whose progress would be primarily affected by new federal requirements and request federal reimbursement for less controversial or disruptive highways.


144. 337 F. Supp. at 224. However, “[t]his federal approval was evidenced by a federal official’s signature on the map.” Brief for Appellants, *supra* note 142, at 6.

145. By the time the action was filed, the State had expended approximately $15 million for right-of-way acquisition. But federal reimbursement had not been requested. Brief for Appellants, *supra* note 142, at 7.

146. See 337 F. Supp. at 224.

147. 337 F. Supp. at 227. In holding that the highway was a “federal” road, the Court noted:

[In] addition to the strong policy statements and the wording of the statutes and regulations, common sense dictates that the federal protective devices apply before federal funds are sought. It does little good to shut the barn doors after all the horses have run away.

337 F. Supp. at 231.

148. The House committee report accompanying the URA stated:

(a) A number of State highway departments frequently acquire right-of-way for federal-aid highways . . . with non-Federal funds, and seek Federal financial assistance only for the actual construction work. Persons required to move from such rights-of-way are recognized as displaced persons under the relocation provisions of the Federal-Aid Highway Act of 1968 and this bill affirms that principle.

H.R. REP. No. 1656, 91st Cong., 2d Sess. 4 (1970). See testimony of the OMB, 1970 *URA Hearings*, *supra* note 1, at 578. The FHWA has also indicated that the relocation guarantees are to apply to all federal projects. Id. at 924 (FHWA regulations). But see IM 80-1-72, *supra* note 125.
ing a project "federal" only at the time of federal expenditure or design approval would leave large numbers of highway displacees excluded from the protections of the URA.

The La Raza Unida opinion may have a broad effect. Under it, the congressional mandate of the relocation acts will be applied to any road on which federal funds might be expended. Once federal route approval has been obtained, state highway departments will henceforth ignore the URA at their peril.  

IV. Courts and Remedies

Satisfactory assurances are an essential element of a successful relocation program, and of full compliance with the URA. But apparent non-compliance with the URA's provisions has caused some urban displacees to seek enforcement of such assurances in the courts. In several cases, relief has been denied because of judicial hesitancy to halt displacements pending adjudication of the merits of the case.

Two cases illustrate the necessity for stays pending appeal in highway relocation lawsuits. In both Triangle Improvement Council v. Ritchie and Concerned Citizens for the Preservation of Clarksville v. Volpe, minority displacees sought the benefits of the 1968 High-

149. 337 F. Supp. at 227. The opinion applies not only to the relocation requirements but also to environmental and parkland restrictions on federal highways, 337 F. Supp. at 228-29.

150. Both House and Senate versions of the proposed 1972 Highway Act would have considerably weakened FHWA control over the ABCD highway program. Both bills would have provided an "alternative Federal-Aid Highway procedure" under which the states would have been delegated expanded administrative responsibilities for all highway programs except the Interstate System. S. 3939, 92d Cong., 2d Sess., § 135; H.R. 16656, 92d Cong., 2d Sess., § 117; S. Rep. No. 1081, supra note 14, at 18-19. However, nothing in the bill would authorize the Secretary to delegate to States requirements and obligations imposed by other statutes . . . [such as the URA].

151. See relocation cases cited note 5 supra. See generally Roberts, supra note 9.


154. This case concerned plans for I-77 through Charleston, West Virginia. Over fifteen per cent of the population of Charleston was scheduled to be displaced by this highway and other public projects over a five-year period. 1970 URA Hearings, supra note 1, at 364 (testimony of John Boettner). The highway department planned to relocate most of the displacees in public housing, ahead of a long waiting list. Brief for Petitioners at 6-9, Triangle Improvement Council v. Ritchie, 402 U.S. 497 (1971).
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way Act—assurances that they would be relocated in dwellings which were decent, safe and sanitary. The plaintiffs sought to enjoin their displacement until relocation assurances were prepared. Disagreeing with the plaintiffs' contentions on the merits, the lower courts denied the requested relief.

The district and appellate courts, however, refused to issue stays pending appeal, and as a result, the plaintiffs' displacement proceeded during the pendency of their appeal. Ultimately, the appellate courts found the cases moot, because the displaceses, as noted in one case, were "beyond the pale of whatever benefit proper assurances would have afforded." The appellate courts never reached the merits of these cases because of their reluctance to halt relocation during the appeal.

As these cases suggest, the courts must intervene decisively and promptly in the relocation process, or judicial safeguards will serve little purpose. Denial of injunctive relief is likely to render the case moot; enforcement of the relocation assurances becomes difficult; and any later victory for the plaintiffs is a paper one.

Both the Lathan and Keith courts recognized that if the plain-

state-wide assurances. See note 59 supra. Moreover, the Clarksville assurances tracked almost word for word [the applicable regulations] . . . and furnished no specific information in any form concerning the particular relocation problems presented by the Mo-Pac Expressway project or any concrete plans to achieve the relocation requirements of the Act.

445 F.2d at 490.

155. Both of these cases involved the question of whether the relocation guarantees of the 1968 Highway Act were to be held applicable to projects begun before its enactment. The lower court in Triangle held that the act was not intended to be retroactive, 314 F. Supp. 20, 30 (S.D. W. Va. 1969). Appellate courts never reached this issue.

Shortly after the district court's decision in Triangle the FHWA issued a directive making the relocation assurances of the 1968 act retroactively applicable. 429 F.2d at 425 n.4-5. On this basis, it seems, the circuit court refused to reverse, assuming that this new regulation would be applied to the Charleston project. 429 F.2d at 426 (Sobeloff, J., dissenting.) This assumption was unwarranted. Brief for Petitioners, at 36, Triangle Improvement Council v. Ritchie, 402 U.S. 497 (1971).

156. In Clarksville the lower court denied relief without a written opinion. In Triangle, the merits of the case seemed obscured by the politics of interstate highway funding: the court feared that injunctive relief for the plaintiff, would result in an additional financial burden of staggering proportions, and could result in a complete cessation of the flow of federal interstate highways aid funds into this area of West Virginia.

314 F. Supp. at 25 (emphasis added).

157. Concerned Citizens for the Preservation of Clarksville v. Volpe, 445 F.2d 486, 491 (5th Cir. 1971). The Triangle case provides graphic illustration of this point. By August 23, 1968, the date of the enactment and effective date of the 1968 Federal Aid Highway Act, only nine of the sixty-five parcels to be acquired had been optioned by the State Road Commission. Brief for Petitioners, supra note 155, at 5, 11. The plaintiffs filed their action on December 3, 1968. But because of the cumbersome mechanism of the appellate courts and the refusal to grant preliminary injunctions displacement was complete, except for nine or ten persons, by the time it reached the United States Supreme Court. See 402 U.S. 497, 503 (1971) (Douglas, J., dissenting).

158. 455 F.2d 1111 (9th Cir. 1971). See p. 395 supra.

tiffs were to obtain any effective relief, their displacement must be halted pending submission of satisfactory relocation assurances. The *Lathan* opinion considered and rejected the ordinary standard for injunctive relief, which would have required the plaintiffs to demonstrate that "the balance of irreparable harm" favored issuance of an injunction. Instead, *Lathan* seems to imply that "the balance of irreparable harm" standard does not apply to highway relocation lawsuits. However, even if this opinion is not read as introducing some new standard for injunctive relief, it does indicate that "the balance of irreparable harm" readily tips in favor of those facing imminent displacement.

By taking action when it still could be effective, the *Lathan* and *Keith* decisions have avoided the pitfalls of *Triangle* and *Clarksville*. These courts have helped to implement the congressional requirements of the relocation acts, and to insure that relocation is indeed "satisfactory."

V. An Overview

The failure of the federal highway program to account for all the economic and social costs of highway construction has contributed significantly to the problems of urban decay and urban-suburban economic polarization in America. Without the substantial modifica-

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160. The *Lathan* court felt that the basic facts were not in dispute. But, [t]he longer there is delay in applying [the relocation acts] . . . the fewer will be the residents of the corridor who receive the full benefit [of the law] . . . . In short, this is one of those comparatively rare cases in which, unless the plaintiffs receive now whatever relief they are entitled to, there is danger that it will be of little or no value to them or to anyone else when finally obtained. 455 F.2d at 1117.

161. 455 F.2d at 1116. Under the traditional test, the plaintiffs must show that they are likely to prevail on the merits, that the balance of irreparable harm favors issuance of an injunction, and that the public interest supports the claim for injunctive relief. Ohio Oil Co. v. Conway, 279 U.S. 813 (1929); Schwartz v. Covington, 341 F.2d 537 (9th Cir. 1965); 7 J. Moore, Federal Practice ¶ 65.04[1].

162. See 455 F.2d at 1116-17. The court relied on the exceptional case of United States v. City and County of San Francisco, 310 U.S. 16 (1949) which seems to apply a "public policy" standard to determine when injunctive relief shall be granted.

163. See 455 F.2d at 1117; Roberts, *supra* note 9, at 203. Compare note 157 *supra*.

164. Senators Muskie and Tunney have summarized some of the other negative effects of urban highway construction:

(a) proliferating suburban sprawl . . . .

(b) the high (and steadily increasing) costs of owning cars in an automobile
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tions of FHWA administrative procedures and judicial enforcement proposed in this Note, construction of new highways will continue to impose large external costs on urban housing markets and particularly on low-income submarkets.

Implicit in the discussion of the "market" effects of relocation is the recognition that highway relocation cannot be treated in isolation from national housing priorities. As the National Commission on Urban Problems suggested, "Relocation should be seen essentially not as a ground clearing operation, but as a direct and integral step in the march toward the national housing goal . . . ." With the construction of one-for-one replacement housing, the federal highway program can join in the effort to ensure a suitable living environment for all Americans. The congressional mandate to protect those in the path of highway "progress" requires no less.

oriented society is making transportation "have nots" of the urban and rural poor, the handicapped and others without ready access to automobiles;
(c) the looming energy crisis may severely curtail private auto use, perhaps before some of the roads authorized in present legislation will be opened;
(d) auto-related air pollution and lead from auto exhausts are increasingly perceived as unacceptable health hazards.
165. BUILDING THE AMERICAN CITY, supra note 9, at 90.