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To show how lawyers and preservation groups use the preservation statutes, I will focus on *Save the Courthouse Committee v. Lynn,*[1] a case brought in the United States District Court for the Southern District of New York. The case involved the proposed demolition of a six-building complex in White Plains known as the old Westchester County Courthouse. That Courthouse site was to be the central piece of a major urban renewal project planned by the U.S. Department of Housing and Urban Development (HUD)[2] and the White Plains Urban Renewal Agency.[3] These agencies had had this plan in mind since the early 1960s, well before the enactment of either the National Environmental Policy Act of 1969 (NEPA)[4] or the National Historic Preservation Act of 1966.[5] A contract had been signed with HUD for the Urban Renewal Agency program in general, which included demolition of the buildings.

The buildings, however, had been identified by a serious Westchester student of architecture and preservation as significant or potentially significant, and it appeared to the Department of the Interior[6] and to the New York State Historic Preservation Officer[7] that the buildings were eligible for inclusion on the National Register.[8] Furthermore, HUD and the Urban Renewal Agency had been advised of the significance of the buildings at the time of their acquisition. Therefore, when the Urban Renewal Agency proposed to destroy the buildings in December of 1974, ten years after the contract, the community was aroused.

A group known as the Save the Courthouse Committee, an ordinary community-based group with no particular corporate status or formal procedures, came into being under the chairmanship of an architectural student named Brian McMann.[9] That group sought to dissuade the Urban Renewal Agency and HUD from destroying the buildings, contending that the build-

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ings were of sufficient historical importance that they could not be replaced: the buildings had been built over a period of 120 years and were a unique historical reflection of the development of White Plains and central Westchester over that period of time.

The Urban Renewal Agency insisted on proceeding because it wanted to sell the site for development as a major retail shopping mall. It became apparent, despite numerous requests from the Department of the Interior, the State Historic Preservation Officer, the Advisory Council on Historic Preservation,[10] and the Save the Courthouse Committee, that the Urban Renewal Agency intended, with HUD's acquiescence, to destroy the buildings. An action was acccordingly brought which included the following allegations: no environmental impact statement had ever been made for the entire Urban Renewal Project or for the proposed demolition of the Courthouse; no referral had ever been made to the Advisory Council for its comments under either NEPA, the Historic Preservation Act, Executive Order 11593,[11] or the Advisory Council's own guidelines; and HUD had failed to follow its own internal guidelines for review of historic properties and to comply with other judicial requirements concerning the making of these various other decisions. The plaintiffs were raising issues of law which should have been decided promptly.

The defendants, including the Urban Renewal Agency, HUD, and the City of White Plains, which intervened as a defendant, sought to use many procedural devices to delay the decision on the merits. They attacked the standing of the plaintiffs, notwithstanding the clear ability of community groups to raise environmental concerns under relevant Supreme Court decisions.[12] They contended that the court had no subject matter jurisdiction over the dispute, a frivolous claim. They attacked the plaintiff for waiting too long under the doctrine of laches, notwithstanding the fact that the plaintiff had been attempting throughout the period to dissuade the Urban Renewal Agency, HUD, and the City from destroying the buildings. In short, the defendants raised a series of objections that were intended to avoid a decision on their own statutory responsibilities; all the objections were dismissed by the court.

Finally, the defendants, in customary American litigation

posture, sought to foreclose the decision by requiring the plaintiffs to post a large security bond pending the decision of the court concerning the case. The complaint had been filed on a Monday, after about a year and a half of negotiating or pleading. On Thursday, the agency announced its immediate intention to destroy the buildings. The agency contended that the ensuing delay while the court considered the matter was going to destroy the Urban Renewal Program and cost them a great deal of money. As a result, the court required the plaintiffs to post, within 48 hours, a $7,000 surety bond. To everybody's surprise, the plaintiffs raised that money within the 48-hour period.[13]

After lengthy motions and briefing by all sides, the court held that HUD had failed to comply with its own internal regulations under NEPA and under the Historic Preservation Act and that it had failed to adhere to Advisory Council guidelines deemed incorporated by reference. The significance of that decision as a matter of law is not the subject of this discussion, but until that time the Advisory Council's own guidelines had never been enforced by a court. The *Courthouse* case was the first case to hold that agencies which fail to develop their own procedures for seeking Advisory Council review of proposed actions will be deemed to have adopted Advisory Council procedures.[14]

The *Courthouse* case raised a problem for the United States Attorney defending HUD because the only real defense was that the guidelines of the Advisory Council were not enforceable against another federal agency. The two federal agencies, HUD and the Advisory Council, were in conflict. It was a difficult problem for the U.S. Attorney, who solved the dilemma by stating that this was an open question. The court was sensitive to that problem and solved it by deeming HUD to have adopted those guidelines on its own rather than squarely holding that the guidelines were enforceable against HUD.

An important issue addressed by the *Courthouse* case is the question of whether the Advisory Council guideline procedures apply to the review of projects planned prior to the adoption of the statute in 1966, the promulgation of the Executive Order, or the adoption of the guidelines. The building at issue had been slated for demolition since 1966 but, despite amendments to the Urban Renewal Plan, had never been demolished. Prior case law suggested that the guidelines were inapplicable. We had trouble

with those cases when we wrote our brief, and we distinguished them. The *South Hill*[15] and *Kent County*[16] cases both held that action taken before the adoption of the statute or before the implementation of the Executive Order precluded the review of the proposed demolition by the Advisory Council even where the demolition was to occur at a later date. The court in the *Courthouse* case held, however, that the Advisory Council guidelines had been incorporated and adopted by reference by HUD, and, according to HUD's internal procedures, HUD had to comply with the new guideline procedures. Those guidelines were correctly construed by the court to apply to buildings eligible for inclusion on the National Register but not yet listed.

The court also held that action by a nonfederal partner, in this case the Urban Renewal Agency, which was sufficiently under the control of HUD was enough to hold HUD accountable for the ultimate demolition action. That was an important part of the case, and it troubled HUD on a national basis. We persuaded the court that HUD's standard form of land disposition agreement reserved sufficient powers to HUD and that HUD remained substantially responsible for decisions made in connection with the pertinent project. That finding in the *Courthouse* case was equally applicable to the NEPA part of the claim and was also the basis of the court's conclusion that HUD had failed to comply with its own NEPA regulation.

With a finding by the court that eligibility for nomination was enough to make review by the Advisory Council obligatory and that the guideline procedures had been adopted by HUD, the earlier *South Hill* and *Kent County* cases were no longer significant.

Following the decision, which also expanded the internal procedures for HUD and other agencies making NEPA-type determinations, the parties entered into a stipulation of settlement. The settlement provided that HUD and the agency would make a detailed study of the reuse potential of the buildings and of their historic and cultural significance to the surrounding White Plains community.

The *Courthouse* case was not a total victory for the plaintiffs, however, because they were able to secure from HUD only the commitment to undertake that review pursuant to the Advisory Council procedures and not pursuant to the overall NEPA

requirements. A study costing about $150,000 was undertaken by Landauer Associates and others, including the architectural firm of Goldstone & Heins, to review the historic significance of the buildings and the possibilities of reuse. The report concluded that the buildings were of historic significance but that reuse of the properties was not economically feasible. A year and a half after that report had been received and public hearings held on it, HUD, the Urban Renewal Agency, the Advisory Council staff, and the Save the Courthouse Committee participated in extensive negotiations and meetings. Finally, the Advisory Council accepted the conclusions of the Landauer report.

This determination was a bitter disappointment for the Save the Courthouse Committee. As a result of that determination and the realities of litigation reviewing standards, the committee was forced to enter into a further stipulation that permitted the buildings to be demolished in early 1977.

Prior to the demolition, the Save the Courthouse Committee was permitted to remove significant artifacts and fixtures from the buildings. A small trust fund was established by the City of White Plains, in the amount of $75,000, so that a scale model of the buildings and other historic information concerning the buildings could be prepared. More significantly, the trust was established so that major historic preservation programs and activities could be carried out in the White Plains and Westchester communities with the balance of that $75,000. In addition, mindful of their own obligations, the Save the Courthouse Committee induced the defendants to pay $7,000 for the remaining plaintiff attorneys' fees and other litigation expenses. It was not a completely satisfactory solution for the Save the Courthouse Committee, but it was a victory of principle.

The *Courthouse* case was a major legal victory for the preservation movement but, at the same time, a defeat as far as that particular building was concerned. To understand the decision, it is necessary to recognize that there were other limiting factors not readily apparent in the *Courthouse* case. When the Save the Courthouse Committee came to our firm, we had a problem deciding whether to take the case. The White Plains Urban Renewal Program had displaced most of the black community and the low income community and had promised that there would be substantial development of housing. That had not yet oc-

curred. Our firm was unwilling to represent plaintiffs if the objective was to stall the whole Urban Renewal Program for another five or ten years. But that was not the plaintiffs' position. The objective of most members of the preservationist committee was not to preserve the Courthouse at all costs, but to get a fair hearing on the feasibility of Courthouse reuse. They wanted to demonstrate its worth and its ability to play a productive role in the future of the community.

There were probably some members of the committee who wanted to stop all government redevelopment. For them the lawsuit was problematic because the goal of the suit was to stop the entire redevelopment program only while an environmental impact statement was prepared. This goal led, in part, to the decision to pursue the Advisory Council procedures rather than the NEPA procedures. Those who thought that the objective was to stop the Urban Renewal Program completely were particularly dissatisfied with the decision. They began a second action as a separate organization. While the Save the Courthouse Committee action had deferred any consideration of the overall environmental aspects of the entire Urban Renewal Plan, the splinter action focused primarily on those considerations.

This was unfortunate because the action was assigned to the same judge as the original action, and he immediately dismissed the second case on the ground of laches. The judge found excessive delay, and he did not believe that the splinter group was a different organization. Furthermore, the environmental policy requirements of NEPA were deemed inapplicable to the entire White Plains Urban Renewal Plan on the ground of *res judicata*. The agency had, therefore, avoided any requirements for review of the entire planning process, except the state procedures, that had been satisfied.

The *Courthouse* case leads to several observations about that particular litigation and the future of successful historic preservation. HUD, in addition to its continuing intransigence and disregard for the spirit of the Historic Preservation Act and for the guidelines of the Advisory Council and of NEPA, did not undertake a meaningful assessment of its power to compel change. The local Urban Renewal Agency never intended to make adaptive reuse of the Courthouse buildings. The Advisory Council staff was not able to bring to the review process the re-

sources, professional experience, and funds that were needed for a serious review of what might have been done to avoid demolition.

The National Trust and other groups which funded the plaintiff group organization could have done more than simply fund litigation expenses. It was also necessary to fund subsequent analysis and review of the economic aspects of the reuse. Unless that process is pursued as well, future litigation will not succeed in preserving landmark buildings.

Furthermore, the plaintiffs resisted too long what might have been viable compromises. It might have been possible to save one or two of the buildings from the Courthouse district and move them to another site. That compromise might have been possible and probably would have preserved much of the historic value of the overall complex.

The Save the Courthouse Committee was successful, energetic and creative in its ideas, but it is not enough to be successful litigants. A developer's point of view is needed to save buildings. Having won the first skirmish, one must figure out an economic way for making the buildings work, whether through use of federal resources or through more conventional methods.

Preservation cannot be considered as a simple choice between funds going for low-income groups or for buildings of historical and cultural significance. It would be a short-sighted point of view for the preservationist movement to compete for federal and local funds on that basis. The importance of historic preservation lies in its broader implications for urban vitality. Many smaller cities need to retain those historical and architectural elements that have made them different from the surrounding suburban communities. In the long run, preservation will benefit all groups in the city by making the cities viable and by giving them the socio-economic base that they have been losing. Preservationists must be cognizant of the immediate and tangible claims of low-income groups living in the central cities. In order to achieve the kind of public support needed for the movement's success, the preservation movement must try to make the benefits of preservation responsive to the desires and the perceptions of urban groups.

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1. 408 F. Supp. 1323 (S.D.N.Y. 1975).

2. The Department of Housing and Urban Development (HUD) is the principal Federal agency responsible for programs concerned with housing needs, fair housing opportunities, and improving and developing the Nation's communities.

To carry out its overall purpose of assisting the sound development of our communities, HUD administers mortgage insurance programs that help families to become home owners; a rental subsidy program for lower income families who otherwise could not af-

ford decent housing; programs designed to eliminate discrimination in housing activities; and programs that aid neighborhood rehabilitation and the preservation of our urban centers from blight and decay. HUD also protects the home buyer in the marketplace and fosters programs that stimulate and guide the housing industry to provide not only housing but a suitable living environment. *See* United States Government Manual 321 (1980-81).

3. The White Plains Urban Renewal Agency was created by the New York State Legislature in 1964 to carry out the White Plains Urban Renewal Plan.

4. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1976 & Supp. III 1979).

5. National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470t (1976 & Supp. III 1979), *amended by* 16 U.S.C.A. §§ 470-470w-6 (West Pam. 1981).

6. The U.S. Department of Interior published its finding that the Courthouse appeared to meet the criteria for inclusion on the National Register at 38 Fed. Reg. 33,429 (1973).

7. The New York State Division for Historic Preservation notified Westchester County officials of the suggestion of the inclusion of the Courthouse on the National Register in the latter part of 1973.

8. 16 U.S.C. § 470a.

9. The committee was an unincorporated citizen's association established for the purpose of preserving the Westchester County Courthouse as an historical and architectural landmark. The committee numbered approximately 100 persons, the great majority of whom were residents of White Plains, N.Y. Two of the plaintiffs owned property in the vicinity of the Courthouse, and one claimed a reversionary interest in the Courthouse site.

10. The Advisory Council on Historic Preservation was established by § 201 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470i.

11. Exec. Order No. 11,593, 3 C.F.R. 559 (1971-75 Comp.), *reprinted in* 16 U.S.C. app. § 470 (1976). The purpose of the order was to foster implementation of the goals of the Historic Preservation Act by directing federal agencies to provide leadership in the area of historic and environmental preservation.

12. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970) (the Administrative Procedure Act grants standing to persons who aggrieved interests are protected by the statute or the constitution; interests may include aesthetic, conservational, recreational, as well as economic, values); Sierra Club v. Morton, 405 U.S. 727 (1972) (aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) (the fact that the loss of an environmental benefit cannot be accurately measured does not mean that its loss will not support a finding of standing).

13. Save the Courthouse Comm. v. Lynn, 408 F. Supp. at 1337-38. Section 1 (3) of Executive Order No. 11,593, *supra* note 11, imposed the affirmative duty on federal agencies to adopt procedures "to assure that Federal Plans and programs contribute to the preservation and enhancement of non-federally owned" cultural resources. The court found that because HUD failed to adopt independently derived procedures, it had necessarily adopted the procedures of the Advisory Council.

14. Save the Courthouse Comm. v. Lynn, 408 F. Supp. at 1338.

15. South Hill Neighborhood Ass'n v. Romney, 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970).

16. Kent County Council for Historic Preservation v. Romney, 304 F. Supp. 885

(W.D. Mich. 1969).