

# University of Michigan Journal of Law Reform

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Volume 5

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1972

## The Proposed Housing Consolidation and Simplification Act of 1971

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### Recommended Citation

William A. Newman, *The Proposed Housing Consolidation and Simplification Act of 1971*, 5 U. MICH. J. L. REFORM 361 (1972).

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## LEGISLATIVE NOTES

### THE PROPOSED HOUSING CONSOLIDATION AND SIMPLIFICATION ACT OF 1971

The current federal housing assistance effort is spread among fifty to sixty programs. Congress is now considering a proposal called the Housing Consolidation and Simplification Act of 1971,<sup>1</sup> which if enacted would substantially rewrite most of these programs. The supporters of this bill argue that statutory consolidation and simplification will facilitate the production of housing.<sup>2</sup> However, although a recodification would be advantageous to those who deal with, administer or are housed under federal programs, consolidation and simplification in and of themselves would have only a minor impact on housing production and might also prove counterproductive.

This note will describe the operation of selected housing programs and suggest some of the difficulties posed by the current statutory bases for these programs. It will then evaluate the effectiveness of the modifications contained in the proposed bill.

#### I. CURRENT FEDERAL HOUSING ASSISTANCE

Two important enactments now contain virtually every federal housing program. The National Housing Act<sup>3</sup> governs those programs whose assistance involves mortgage insurance. The United States Housing Act<sup>4</sup> provides the framework for the low-rent, or "public housing," program.

##### *A. The National Housing Act*

The National Housing Act authorizes approximately fifty housing assistance programs.<sup>5</sup> The original act, passed by Congress in

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<sup>1</sup> S. 2049, 92nd Cong., 1st Sess. (1971); H.R. 9331, 92nd Cong., 1st Sess. (1971).

<sup>2</sup> See, e.g., *Hearings Before the Subcomm. on Housing of the House Comm. on Banking and Currency on H.R. 9688, H.R. 9331, and H.R. 8853*, 92nd Cong., 1st Sess., pt. 1, at 87-88 (1971) (remarks of Secretary of Housing and Urban Development Romney) [hereinafter *1971 House Hearings*]. See also note 56 *infra*.

<sup>3</sup> 12 U.S.C. §§ 1701-1750g (1970).

<sup>4</sup> 42 U.S.C. §§ 1401-1436 (1970).

<sup>5</sup> See *Hearings on H.R. 16643 Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 91st Cong., 2d Sess., pt. 1, at 8 (1970) (remarks of Secretary of Housing and Urban Development Romney) [hereinafter *1970 House Hearings*].

1934,<sup>6</sup> significantly changed then existing mortgage loan practices by guaranteeing that if the mortgagor defaulted, the federal government would pay the outstanding mortgage debt. In return for this insurance, however, the mortgagee had to make a long term loan and accept a relatively low down payment. The borrower would repay the loan in equal monthly installments which assured amortization over the term of the loan. The effect of these new lending practices was to support a floundering homebuilding industry and encourage prospective homeowners with limited means.<sup>7</sup>

The basic mortgage insurance program is contained in section 203 of the National Housing Act<sup>8</sup> which authorizes insurance on a portion of the value of a single-family home mortgage. In 1937 an amendment, section 207,<sup>9</sup> extended mortgage insurance to multi-family projects. Since the 1937 amendment the basic pattern of federal mortgage insurance has grown to include: cooperative housing,<sup>10</sup> housing in urban renewal areas,<sup>11</sup> housing for servicemen,<sup>12</sup> housing for elderly and handicapped persons,<sup>13</sup> condominium housing,<sup>14</sup> nursing homes,<sup>15</sup> and nonprofit hospitals.<sup>16</sup> Although the concepts underlying these programs are similar, most were enacted with discrete statutory requirements.

The National Housing Act created the Federal Housing Administration (FHA) to administer the insurance program.<sup>17</sup> Before the FHA will insure a mortgage, it must find that the structure involved meets an extensive series of standards.<sup>18</sup> The mortgagor

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<sup>6</sup> Pub. L. 479, June 27, 1934, 48 Stat. 1246.

<sup>7</sup> NATIONAL COMMISSION OF URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 95-96 (1968) [hereinafter DOUGLAS COMM.].

<sup>8</sup> 12 U.S.C. § 1709 (1970).

<sup>9</sup> *Id.* § 1713.

<sup>10</sup> National Housing Act § 213, 12 U.S.C. § 1715e (1970).

<sup>11</sup> *Id.* § 220, 12 U.S.C. § 1715k.

<sup>12</sup> *Id.* § 222, 12 U.S.C. § 1715m.

<sup>13</sup> *Id.* § 231, 12 U.S.C. § 1715v.

<sup>14</sup> *Id.* § 234, 12 U.S.C. § 1715y.

<sup>15</sup> *Id.* § 232, 12 U.S.C. § 1715w.

<sup>16</sup> *Id.* § 242, 12 U.S.C. § 1715z-7.

<sup>17</sup> Pub. L. 479, tit. 1, § 1, June 27, 1934, 48 Stat. 1246. In 1965 the FHA was incorporated into the newly-formed Department of Housing and Urban Development (hereinafter, HUD) by Pub. L. 89-174, § 5(a), Sept. 9, 1965, 79 Stat. 667, 669. Between 1945 and 1960 the FHA provided mortgage insurance for 15 percent of the new housing built. DOUGLAS COMM., *supra* note 7, at 95. The rate dropped substantially from 22 percent of all single-family home starts in 1960 to 16 percent in 1966; from 16 percent of all multi-family starts in 1960 to 8 percent in 1966. From 1938 to 1966 average participation in the multi-family programs was 31 percent. Fitzpatrick, *FHA and FNMA Assistance for Multifamily Housing*, 32 LAW & CONTEMP. PROB. 439, 462-63 (1967).

<sup>18</sup> 24 C.F.R. §§ 200.140-.146 (1971).

then purchases the insurance by including the amount of the premium in his monthly installment payments to the mortgagee.<sup>19</sup>

In 1961 Congress amended the Act to include the first FHA-assisted program specifically designed to serve persons earning less than median incomes.<sup>20</sup> This program, known as the section 221(d)(3) below-market interest rate (BMIR) program, couples mortgage insurance with a reduction in the mortgagor's debt service requirements to as low as 3 percent.<sup>21</sup> By purchasing the mortgage at par value from the original lender and charging the mortgagor the reduced rate, the Government National Mortgage Association (GNMA) assumes the difference between the conventional lending rate and 3 percent.<sup>22</sup>

Section 221(d)(3) BMIR was the first FHA-administered program which made public funds available for the housing needs of families with limited incomes. The purchase of the mortgage by the GNMA is charged in full to the budget for the fiscal year. This mode of subsidy is now being phased out in favor of direct interest reduction payments to the mortgagee<sup>23</sup> which cost the government less when made on an annual basis.<sup>24</sup>

The Housing and Urban Development Act of 1968 added two significant assistance programs to the National Housing Act.<sup>25</sup> These programs, section 235 for home ownership and section 236 for rental housing, were designed to increase the availability of

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<sup>19</sup> 12 U.S.C. § 1713(d) (1970). Fewer than 10 percent of all insured owners have defaulted. Fitzpatrick, *supra* note 17, at 460.

<sup>20</sup> National Housing Act § 221, 12 U.S.C. § 1715l (1970).

<sup>21</sup> Because the mortgagor under this program pays less than a market interest rate, the rent necessary to amortize the indebtedness can be less than 80 percent of the rent necessary under a conventional mortgage. M. SCHUSSHEIM, TOWARD NEW HOUSING POLICY: THE LEGACY OF THE SIXTIES 13 (1970). Occupancy in a section 221(d)(3) BMIR project is accordingly limited to families and individuals earning less than the median income for a given area. 1970 *House Hearings* 10.

In addition to providing for the BMIR program, section 221 of the National Housing Act also establishes a program whereby a mortgagor may obtain federal mortgage insurance while paying the market interest rate. This program is known as the market interest rate (MIR) program and is codified in 12 U.S.C. § 1715l(d) (1970). Because the cost limitations applicable to the MIR program [*id.* § 1715l(d)(3)(ii)] are substantially less than those under the section 207 multi-family program [*id.* § 1713(c)(3)], mortgagors under some circumstances prefer to obtain federal insurance under the MIR program.

<sup>22</sup> Originally, the Federal National Mortgage Association (FNMA) was authorized to purchase the mortgage. The Housing and Urban Development Act of 1968, Pub. L. 90-448, tit. VIII, § 802(t), 82 Stat. 476, 538, bestowed this special function upon the GNMA.

<sup>23</sup> See text accompanying note 29 *infra*. According to 12 U.S.C. § 1715l(f) (1970), HUD may issue no new insurance commitments under this program after October 1, 1972. However, the cut-off date has been extended at least four times previously.

<sup>24</sup> M. SCHUSSHEIM, *supra* note 21, at 17-18, details the severe budgetary impact of the outright purchase of mortgages.

<sup>25</sup> 12 U.S.C. §§ 1715z and 1715z-1 (1970).

housing to persons with limited incomes by lowering the debt service requirements beyond the reduction accomplished by section 221(d)(3) BMIR.<sup>26</sup> Both limited-dividend and non-profit mortgagors can sponsor the housing.<sup>27</sup> The benefits of sections 235 and 236 programs were aimed at those families and individuals who were earning more than was permitted for eligibility in public housing but less than the minimum income required to qualify for section 221(d)(3) BMIR housing.<sup>28</sup>

Both programs employ a direct payment to the mortgagee on behalf of the mortgagor. Reduced rental rates and reduced mortgage amortization requirements reflect the assistance payments made.<sup>29</sup> The homeowner under section 235 must pay at least 20 percent of his income for his basic housing expenses;<sup>30</sup> he pays other necessary maintenance and operating costs from the remainder of his income. The tenant in a development financed by a section 236 program mortgage pays 25 percent of his adjusted monthly income for rent, provided this amount is sufficient to meet a defined portion of project costs.<sup>31</sup>

### B. *The United States Housing Act*

In 1937 Congress enacted the United States Housing Act,<sup>32</sup> which created the public housing program. The aim of this program is to provide safe, decent, and sanitary housing for families

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<sup>26</sup> A recent report had strongly commended the introduction of direct interest reduction payments, on the ground that these subsidies reached those who could not afford decent housing and involved the private sector in meeting the nation's housing needs. PRESIDENT'S COMMITTEE ON URBAN HOUSING, *A DECENT HOME* 4, 65-66 (1968) [hereinafter cited as *KAISER COMM.*]. The report demonstrated that debt retirement was the largest single factor in the monthly housing cost, constituting 53 percent of the payment made by a single-family homeowner and 42 percent of the expense of a renter in an "elevator building." *Id.* at 11.

<sup>27</sup> 12 U.S.C. §§ 1715z-1 (j)(1)-(4) (1970). Generally speaking, a *limited dividend sponsor* is a corporation that is willing to limit the return on its equity to a relatively low rate; a *non-profit sponsor* is a corporation or association allowed no return on its investment beyond that necessary for expenses.

<sup>28</sup> 12 U.S.C. §§ 1715z(h)(2) and 1715z-1(i)(2) (1970).

<sup>29</sup> *Id.* §§ 1715z(a) and (c), and 1715z-1(a) and (c).

<sup>30</sup> The income referred to in the discussion of section 235 and 236 programs is calculated by deducting from gross income (1) \$300 for every minor family member who is residing in the household and (2) any earnings of such persons. *Id.* §§ 1715z(l) and 1715z-1(m).

<sup>31</sup> *Id.* § 1715z-1(f). For example, under the section 236 program an apartment with attributable mortgage principal of \$15,000 payable at 8.5 percent for thirty years requires monthly payments of \$115 before the subsidy. The full subsidy reduces the interest rate to 1 percent and would absorb up to \$67 of the monthly payment. The costs are computed in 1970 dollars. R. TAGGART, *LOW-INCOME HOUSING: A CRITIQUE OF FEDERAL AID* 66-67 (1970).

<sup>32</sup> Pub. L. 412, Sept. 1, 1937, 50 Stat. 888, as amended, 42 U.S.C. §§ 1401-1436 (1970). The history of the bill's enactment is set out in L. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION* 101-04 (1968).

and individuals who cannot afford the rents charged in the private market.<sup>33</sup> Although Congress tied the program to slum clearance and the alleviation of unemployment,<sup>34</sup> in practice the program operates basically as a housing subsidy.<sup>35</sup> By absorbing the costs of developing or acquiring a project, the federal government enables rents to be reduced to a level where they need support only maintenance, operating, and administrative expenses, plus a payment in lieu of local property taxes.<sup>36</sup>

This program is administered at the local level by public housing authorities, established pursuant to state enabling legislation.<sup>37</sup> In most cases the federal government subsidizes the project cost by making annual contributions to the local housing authorities.<sup>38</sup> The local authorities then apply these contributions to interest payments made to those who hold the bonds which were used to finance the project on a permanent basis.<sup>39</sup>

The local housing authorities carry the burden of initiating this program. An authority must obtain pledges from the local governments in whose jurisdictions it operates that they will accept an annual payment in lieu of taxes, calculated at 10 percent of the rents to be charged,<sup>40</sup> and provide a standard level of local services.<sup>41</sup> In determining income limits for admissions into any proposed project, the authority must demonstrate the need for low-rent housing.<sup>42</sup> Once the Department of Housing and Urban Development (HUD) issues a preliminary commitment and authorizes an allocation of funds for the project, the local authority undertakes the planning and development of the project.<sup>43</sup>

<sup>33</sup> 42 U.S.C. § 1441 (1970).

<sup>34</sup> *Id.* § 1401.

<sup>35</sup> Through fiscal year 1969 the program accounted for two-thirds of all federally subsidized units in the nation. M. SCHUSSHEIM, *supra* note 21, at 22.

<sup>36</sup> DOUGLAS COMM., *supra* note 7, at 109. In 1968 the median rent for a family in public housing with an elderly head of household was \$37; for all others in public housing, the median rent was \$60. R. TAGGART, *supra* note 31, at 23.

<sup>37</sup> 42 U.S.C. § 1402(11) (1970). In *United States v. Certain Lands*, 9 F.Supp. 137 (W.D. Ky. 1935), *aff'd*, 78 F.2d 684 (6th Cir. 1935), *dismissed on motion of the Solicitor General*, 294 U.S. 735 (1935), 297 U.S. 726 (1936), the federal government was precluded from making direct use of its eminent domain powers in order to acquire land for the construction of housing.

<sup>38</sup> 42 U.S.C. § 1410 (1970).

<sup>39</sup> L. FRIEDMAN, *supra* note 32, at 107-08. The bonds are tax-exempt, low-interest and long-term. Ledbetter, Jr., *Public Housing—A Social Experiment Seeks Acceptance*, 32 LAW & CONTEMP. PROB. 491, 495 (1967). During fiscal year 1967 the federal government paid \$322 million in such contributions. R. TAGGART, *supra* note 31, at 21. In 1965 the federal administration of this program became a function of HUD. Pub. L. 89-174, § 5(a), Sept. 9, 1965, 79 Stat. 667, 669.

<sup>40</sup> 42 U.S.C. § 1410(h) (1970).

<sup>41</sup> *Id.* § 1415(7)(b)(i).

<sup>42</sup> *Id.* § 1415(7)(b)(ii).

<sup>43</sup> The local authority must obtain HUD's approval several times during development of the project. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, LOW-RENT

In 1965 Congress added to the public housing framework a program<sup>44</sup> allowing the local housing authority to lease "decent, safe, and sanitary dwelling accommodations" from private owners.<sup>45</sup> The authority pays a negotiated market rent to the landlord, while charging the low-income tenant a reduced rent.<sup>46</sup> HUD then pays the difference to the local housing authority through annual contributions.<sup>47</sup>

That same year Congress also enacted a similar program, the rent supplement program, for subsidizing units in certain privately-financed but federally-insured projects.<sup>48</sup> The tenant of a unit which receives a rent supplement subsidy must earn an income within public housing limits<sup>49</sup> and must also meet additional eligibility criteria.<sup>50</sup> The tenant pays 25 percent of his income as rent, while the federal government pays the remainder of the negotiated market rent to the landlord.<sup>51</sup> The tenant's share must constitute at least 30 percent of the market rent.<sup>52</sup>

### C. *The Present Laws as a Framework for Reform*

The broad structures of the National Housing Act and the United States Housing Act represent the accretion of ad hoc, categorical housing assistance programs. These statutes define and implement in substantial detail single-family and multi-family mortgage insurance, below-market interest rates, interest reduc-

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HOUSING TURNKEY HANDBOOK, HUD HANDBOOK RHA 7420.1 (June, 1969), provides for HUD approval of the following items, among others: preparation of advertisement which solicits proposals; selection of developers; two or three design conferences; final specifications and drawings; land appraisals; cost estimates; the contract of sale between developer and local housing authority; and availability for occupancy.

<sup>44</sup> 42 U.S.C. § 1421b (1970).

<sup>45</sup> *Id.* § 1421b(a)(3).

<sup>46</sup> *Id.* § 1421b(d)(2).

<sup>47</sup> *Id.* §§ 1421b(a) and (e). This "leased housing" program has become very popular among builders and local housing authorities. By December 31, 1969 there were 54,304 leased units available for occupancy. R. TAGGART, *supra* note 31, at 48.

In 1968 HUD made a drastic turnabout in its leasing policy. Whereas in fiscal 1969 only 7 percent of all leased units were to have been newly constructed, 48 percent was set as the target for fiscal 1970. *Id.* at 48-49. Before this change, HUD had apparently considered the sole aim of leasing to be the reduction of excessive vacancy rates.

<sup>48</sup> 12 U.S.C. § 1701s (1970). These units are generally found in either section 221(d)(3) MIR or section 236 multi-family projects. *Id.* §§ 1701s(b) and (h)(1)(D).

<sup>49</sup> *Id.* § 1701s(c)(1).

<sup>50</sup> *Id.* § 1701s(c)(2).

<sup>51</sup> *Id.* § 1701s(d).

<sup>52</sup> R. TAGGART, *supra* note 31, at 54. Congressional appropriations for the program have not been as high as authorized. Of the total \$150 million authorized for the program, only 56.9 million in payments were made through fiscal 1969. *Id.* at 57. By the close of June, 1970, only 12,229 dwelling units were occupied under the program. *Id.* at 56. Welfeld, *Rent Supplements and the Subsidy Dilemma*, 32 LAW & CONTEMP. PROB. 465, 466-72 (1967), chronicles the Congressional emasculation of the program.

tion payments, full assumption of debt service, and rent subsidies.<sup>53</sup> In justifying the use of these several mechanisms, the President's Committee on Urban Housing (Kaiser Committee) stated in 1968:

There must be continued reliance, at least for the next few years, on a variety of project subsidy techniques capable of integrated use. . . . At present the availability of a multiplicity of tools is desirable. However, programs extremely narrow in terms of sponsors or eligible beneficiaries should be avoided and all subsidy techniques should be capable of integrated use.<sup>54</sup>

On the other hand, the proponents of consolidation argue that these housing programs are not capable of integrated use in their present statutory form. Rather, they argue, the housing legislation is so detailed as to make similarities among programs virtually nonexistent. As a result, sponsors and builders are frequently frustrated in their attempts to use the several programs. Moreover, federal and local administration require excessive time and cost because of programmatic variations. Most importantly, those in need of safe, decent and sanitary housing at low cost are often ineligible for benefits which others, not demonstrably dissimilar to themselves, may receive.<sup>55</sup>

## II. THE ARGUMENT FOR CONSOLIDATION AND SIMPLIFICATION

### *A. Lack of Sufficient Housing Production*

The introduction of the Housing Consolidation and Simplification Act of 1971 was based on the argument that present housing assistance mechanisms are not producing a sufficient supply of housing, and that a consolidation and simplification of current programs would stimulate the production of low, moderate, and middle income housing.<sup>56</sup> Underproduction of housing for

<sup>53</sup> The basic similarity between all of these housing programs is that the housing unit, and not the family or individual with limited income, is subsidized. Although HUD is now undertaking a housing allowance program on a limited scale under the aegis of 12 U.S.C. § 1701z-3 (1970), the widely used subsidies are aimed at the financing component or the private landlord. See Welfeld, *A New Framework for Federal Housing Aids*, 69 COLUM. L. REV. 1355, 1361 (1969).

<sup>54</sup> KAISER COMM., *supra* note 26, at 72.

<sup>55</sup> A family with an income within the public housing limits living in a leased housing unit pays a subsidized rent. Another family with the same income who lives in a unit not included in the program must pay market rent.

<sup>56</sup> 1970 *House Hearings* 5 (remarks of Secretary of Housing and Urban Development Romney). See also Lilley, *Best-Laid Plans Aren't Enough to Rebuild HUD Housing Programs*, 2 NATIONAL JOURNAL 923 (1970).



families and individuals with low incomes is related to underproduction of housing in the general economy. Two presidential study groups in 1968 emphasized the lack of suitable and sufficient housing. The National Commission on Urban Problems (Douglas Commission) set a goal of 2,000,000 to 2,225,000 new units per year, of which 500,000 were to house families who could not afford safe, decent and sanitary housing on the private market.<sup>57</sup> The Kaiser Committee established a goal of 26,000,000 new and rehabilitated units to be completed within ten years,<sup>58</sup> of which 6,000,000 to 8,000,000 were to be produced with federal assistance.

The fact that the federal housing assistance programs enacted prior to 1968 have had less than the desired effect on the housing supply justifies the concern of these two committees over housing production. Special housing programs, excluding the unsubsidized mortgage insurance plans, constituted less than 4 percent of the annual increment to the housing market.<sup>59</sup> Both the rate of new construction and the proportion of the gross national product represented by residential construction fell during the Kennedy and Johnson administrations from the levels maintained during the Eisenhower years.<sup>60</sup> Even after Congress had affirmed the national housing goal recommended by the Kaiser Committee,<sup>61</sup> production continued to lag, and there is today a 25 percent gap between the subsidized housing goals established and the subsidized units produced.<sup>62</sup> Compounding this situation is a large backlog of program applications, evidencing a ready supply of sponsors and prospective occupants.<sup>63</sup>

The issue with which this note is most concerned is the relationship between the federal housing assistance programs and underproduction. Certainly, underproduction is to some extent a function of non-statutory considerations, such as political opposition to federal involvement in housing affairs, disapproval of the substantial expenditures involved, the desire of many Americans to keep the poor at a distance, and racial prejudice.<sup>64</sup> Nonethe-

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<sup>57</sup> DOUGLAS COMM., *supra* note 7, at 180-81. Of the 500,000 units, 100,000 were to be made available to families earning less than \$2,200 annually.

<sup>58</sup> KAISER COMM., *supra* note 26, at 9. A 40 percent increase in the present housing supply would be required to reach this goal. The normal rate of production is 1.5 million units annually.

<sup>59</sup> M. SCHUSSHEIM, *supra* note 21, at 22.

<sup>60</sup> *Id.* at 53 and 63.

<sup>61</sup> 42 U.S.C. § 1441a (1970).

<sup>62</sup> 1971 *House Hearings* 975 (statement of Mr. Walsh).

<sup>63</sup> *Id.*

<sup>64</sup> DOUGLAS COMM., *supra* note 7, at 129. Litigation involving local approval as a prerequisite to the development of subsidized housing has illustrated the enmity toward

less, the supporters of consolidation argue that it will increase the production of assisted housing by expediting participation of the private sector in housing programs, decreasing administrative delays and red tape, and increasing the effective demand for subsidized housing by making those who are in need eligible on a more uniform basis.<sup>65</sup>

### *B. Constraints on Producers of Housing*

The existing housing programs are drawn in such detail and differ so greatly among themselves that they place a premium on specialization and prohibit interprogrammatic activities.<sup>66</sup> A developer who specializes runs the risk that the program he uses may suffer a decrease in funding or that economic conditions may make compliance with the program requirements infeasible.<sup>67</sup> The land owned by a developer may be appropriate for one program but not for another,<sup>68</sup> or an architect may not be able to prepare one design which will function for several programs, thereby increasing his costs.

In each venture by the housing producer, the aim is to make the project "work," that is, to insure that the return on rentals or sales will exceed the costs of development and financing, in the case of FHA-insured housing programs, or costs of operation and administration, in public housing programs. Yet the major factors a builder examines in determining the economic feasibility of a project vary among the programs.<sup>69</sup> Factors of such importance as

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these programs. *See, e.g., James v. Valtiera*, 402 U.S. 137 (1971) (holding that a provision in the California constitution requiring a referendum as a prerequisite to the development of public housing did not violate the equal protection clause of the U.S. Constitution); *Ranjel v. Lansing*, 417 F.2d 321 (6th Cir. 1969), *cert. den.*, 397 U.S. 980, *reh. den.* 397 U.S. 1059 (1970) (referendum on zoning ordinance which would have allowed development of public housing could not be enjoined because the referendum was motivated by racial prejudices).

<sup>65</sup> 1970 *House Hearings* 5-6 (remarks of Secretary of Housing and Urban Development Romney).

<sup>66</sup> *See, e.g., 1970 House Hearings* 310 (remarks of Mr. Brownstein); 1970 *House Hearings* 756-57 (remarks of Mr. Barba).

<sup>67</sup> A dramatic rise in construction costs may make compliance with cost limits infeasible and thereby foreclose a developer from building under the program until Congress sets new limits. If rates of return on investments are higher on conventional mortgage instruments than on FHA-insured mortgages, an investor will presumably not provide funds for FHA-insured loans until the statutory ceiling is raised.

<sup>68</sup> Because the various programs under the present law have different cost limitations, from a practical standpoint expensive parcels of land can be used only for those programs with the highest cost limitations, *e.g.,* section 203 single-family and 207 multi-family programs [12 U.S.C. §§ 1709(b)(2) and 1713(c)(3) (1970)]. Interview with representatives of the Joseph Skilken Co., Columbus, Ohio, and Victor Funtjar, Chief Underwriter, FHA Insuring Office, Columbus, Ohio, in Columbus, July 9, 1971.

<sup>69</sup> The basis for this analysis was suggested by Fitzpatrick, *supra* note 17. A number of the various programs currently available under the law are set forth in notes 8-16 *supra* and accompanying text.

cost limitations on units or rooms,<sup>70</sup> total value of the insurable mortgage,<sup>71</sup> standards for the inclusion of commercial facilities,<sup>72</sup> and builders' fees<sup>73</sup> are not uniform, but are individually set by each program statute. If any of these factors actually inhibits the use of a particular program because the requirement cannot be complied with,<sup>74</sup> the particular restrictive provision can be altered only by statutory amendment.

Recently Congress has recognized that in order to be responsive to the housing market, factors of importance to producers of housing should be administratively determined.<sup>75</sup> Whereas each program statute formerly imposed a ceiling on the interest rate on mortgages insured under the terms of the statute, in 1968 Congress authorized the Secretary of HUD to set the maximum mortgage rate for all programs at a rate necessary to meet the

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<sup>70</sup> The cost limitations for units insured under sections 207, 213, and 220 of the National Housing Act [12 U.S.C. §§ 1713(c)(3), 1715e(b)(2), and 1715k(d)(3)(B)(iii) (1970)] vary from those imposed on units built under sections 221(d)(3) and 221(d)(4) [*id.* §§ 1715l(d)(3)(iii) and (d)(4)(ii)], which differ in turn from those set out by section 231 [*id.* § 1715v(c)(2)]. In single-family home construction, section 235 limitations [*id.* § 1715z(b)(2)] are as much as \$15,000 less than those for a house insured under section 203 [*id.* § 1709(b)(2)].

<sup>71</sup> The total amount of the insurable mortgage varies in two ways. First, there is an absolute limit which changes according to program and, within some programs, according to class of sponsor. An appropriate public agency which sponsors a section 213 cooperative project may have a maximum mortgage of \$25,000,000, but a profit-motivated developer of the same program is limited by statute to \$20,000,000. *Id.* § 1715y(e)(2).

Second, only a specified portion of the value of the proposed development may be obtained by the mortgage. That portion varies among programs, and, within some programs, according to class of sponsor. A non-profit sponsor of a section 221(d)(3) BMIR project may obtain a mortgage equal in principal amount to the full replacement cost of the project [*id.* § 1715l(d)(3)(iii)], while the sponsor of a section 207 multi-family development may obtain a mortgage on only 90 percent of the estimated value of the development [*id.* § 1713(c)(2)]. Note that in this specific case even the bases for valuation are not uniform.

<sup>72</sup> While a section 207 multi-family project may contain such commercial and community facilities as are deemed adequate to serve the occupants [*id.* § 1713(c)(2)], in a section 220 multi-family development such facilities must be part of a comprehensive urban renewal plan [*id.* § 1715k(d)(3)(B)(iv)], and in a section 236 project must contribute to economic feasibility [*id.* § 1715z-1(j)(5)(A)].

<sup>73</sup> As a return in some programs a builder is allowed a construction fee similar to that earned on a comparable uninsured project. *See, e.g., id.* § 1715v(c)(3). In other programs, the pertinent statutes allow a profit of 10 percent on all costs except the cost of purchasing the land. *See, e.g., id.* § 1715k(d)(3)(B)(ii). These fees more than compensate for construction costs.

<sup>74</sup> 12 U.S.C. § 1715r (1970) requires that the actual costs for all FHA projects be certified at the completion of construction. The actual costs include an allowance for the builders' fee and overhead, and an estimate of the fair market value of the land. Some costs, such as the discount paid by the builders to obtain a construction loan, are not included. If this cost is excessive, the builder either obtains a legitimate estimate on land in excess of the purchase price or such ancillary cost comes out of his profit. Some programs contain an additional builders' and sponsors' risk allowance which takes financing discounts on both temporary and permanent financing into consideration. Interviews with representatives of M. Meyers Associates, Chicago, Ill., in Chicago, June 18, 1971, and of Galbraith Mortgage Co., Columbus, Ohio, in Columbus, July 7, 1971.

<sup>75</sup> R. TAGGART, *supra* note 31, at 28-29.

<sup>76</sup> *See* legislative history of Pub. L. 90-301, § 3(a), May 7, 1968, 82 Stat. 113, 1968 U.S. CODE CONG. & AD. NEWS 1923 (1968).

current mortgage market.<sup>76</sup> In 1970 Congress abolished the specific cost limitations of the public housing program, substituting a prototype unit cost which will be administratively determined.<sup>77</sup> Both actions recognized the value of administrative flexibility, but did not confront the need for interprogrammatic uniformity.

Where statutory rigidity results from narrowly drafted programs, the efforts of the housing producers are fragmented. Moreover, because a developer may hesitate to invest a great deal in one program, underproduction results.

### C. *The Administrative Context of the Constraints*

Secretary of Housing and Urban Development Romney has stated that this intricate system of statutory constraints makes the federal housing programs exceedingly difficult to administer.<sup>78</sup> Nevertheless, consolidation would alleviate this problem only if those constraints removed are not indiscriminately re-enacted as administrative regulations. Additionally, in order to reduce administrative costs for developers, consolidation would have to reduce the time used by HUD to process applications and review plans, but there is little evidence that consolidation alone will accomplish this.<sup>79</sup> Simplification seems the only solution; otherwise, the limited staff in HUD's area offices will be unable to cope with the severe demands placed upon them, and processing time will lag.<sup>80</sup>

At the local level, several additional factors work to inhibit the operation of the public housing program. The local housing authorities which administer this program are in the difficult position of being local bureaucracies which function only at the leave of the federal government. The program is costly to the locality because the payment in lieu of property taxes is generally less than one-third of the amount generated by comparable privately owned structures.<sup>81</sup> Moreover, the public housing agencies are hesitant

<sup>76</sup> 12 U.S.C. § 1709-1 (1970).

<sup>77</sup> 42 U.S.C. § 1415(5) (1970).

<sup>78</sup> 1970 *House Hearings*, 4-5 (remarks of Secretary of Housing and Urban Development Romney), and *Hearings on S. 2049 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 92nd Cong. 1st Sess. at 38 (1971) (remarks of Secretary of Housing and Urban Development Romney) [hereinafter *Senate Hearings*].

<sup>79</sup> Processing time has been greatly reduced since 1965. The optimal time for processing an application for a section 235 or 236 program is now approximately nine months. Interview with Funtjar, *supra* note 68. The optimum time for processing public housing applications is now also nine months, as opposed to the three years or more formerly required. Telephone interview with L. Haddad, Director of Production, Housing Assistance Administration HUD Regional Office, Chicago, Ill., on July 13, 1971.

<sup>80</sup> *Senate Hearings* 61 (remarks of Secretary of Housing and Urban Development Romney).

<sup>81</sup> R. TAGGART, *supra* note 31, at 22.

to develop new housing, because in recent years operating and maintenance costs have been outstripping rents received.<sup>82</sup> In 1968 Congress made available special subsidies of up to \$120 per family in certain categories in order to keep authorities financially solvent.<sup>83</sup> In late 1970 new legislation authorized the Secretary of HUD to make such annual contributions to local authorities as were necessary to assist them in maintaining the low-income character of the project.<sup>84</sup>

#### *D. Constraints Faced by the Intended Beneficiaries*

The eligibility criteria for families and individuals with low incomes also affect housing production. By addressing only particular segments of the income distribution, the current housing effort underestimates the actual need for subsidized housing.<sup>85</sup> Within that portion of the population earning less than a median income the statutory income limits for housing programs leave several gaps.<sup>86</sup> Those whose incomes are so low that they cannot afford to pay rents in either the public housing or rent supplement programs are excluded. Those who earn more than the public housing limits but not enough to expend 20 or 25 percent of their incomes to meet the basic required payment of the section 235, 236, or 221(d)(3) BMIR programs form the next gap. A third gap appears when a family earns in excess of the maximum set for three subsidized FHA programs but cannot afford decent conventional housing.

Moreover, in some programs even those persons who meet the eligibility criteria may not be eligible for the prescribed benefits. For example, the general rule in the section 235 single-family homeownership program is that the low-income homeowner who receives federal assistance must pay the mortgagee 20 percent of his income monthly. But if the sum of the debt service, computed at 1 percent annually, plus utilities, repairs, and local taxes exceeds 20 percent of his income, the homeowner must also pay that difference.<sup>87</sup> Therefore, in times of inflation when housing

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<sup>82</sup> 1970 *House Hearings* 18 (statement of Secretary of Housing and Urban Development Romney).

<sup>83</sup> Pub. L. No. 90-448, tit. II, §§ 206(b), 82 Stat. 503, 505. The cost of these expenditures for fiscal 1969 was \$17.8 million. R. TAGGART, *supra* note 31, at 22.

<sup>84</sup> 42 U.S.C. § 1410(a) (1970).

<sup>85</sup> 1970 *House Hearings* 6-7 (remarks of Secretary of Housing and Urban Development Romney); *Senate Hearings* 40 (remarks of Secretary of Housing and Urban Development Romney).

<sup>86</sup> Statement of Senator Brooke, 117 CONG. REC. 14376 (daily ed. Sept. 16, 1971).

<sup>87</sup> R. TAGGART, *supra* note 31, at 78-80. See also, text accompanying notes 25-31 *supra*.

costs increase, eligible families with limited incomes who apply for benefits will be unable to support the required mortgage payment and therefore will not be as acceptable to the mortgagee and the FHA as eligible families with larger incomes. The logical result is that, given a range of eligible families, those with higher incomes are more likely to obtain subsidized housing.<sup>88</sup>

Because of a general rise in the cost of housing, the required monthly payment on houses sold in the last year and a half has increased.<sup>89</sup> Concomitantly, the income of families admitted to the benefits of the program is greater than formerly was the case.<sup>90</sup>

At present nearly every assisted program has its own method of computing the adjusted income of individuals upon which eligibility is based. In the public housing programs the local housing authority establishes income limits with the approval of the Secretary of HUD.<sup>91</sup> The adjusted income itself is computed by deducting the earnings of any minor member of the family who resides in the household, all non-recurring income, an amount for each dependent and secondary wage-earner, plus certain expenses.<sup>92</sup> The rent supplement program uses the public housing limits, but does not use any deductions to ascertain adjusted income.<sup>93</sup> The limits set for the section 235 and 236 programs are partially based on public housing limits, but allow deductions only for any minor in the family who resides in the household.<sup>94</sup> The result is that the treatment of income is far from uniform. This lack of uniformity confuses and to some extent intimidates potential occupants of federal housing.

If eligibility for subsidized housing programs were more comprehensive and uniform, there would be more families and individuals who could purchase or rent housing built under these

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<sup>88</sup> A similar phenomenon occurred in the section 221(d)(3) BMIR program. Von Furstenberg & Moskof, *Federally Assisted Rental Programs: Which Income Groups Have They Served or Whom Can They be Expected to Serve*, REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING, TECHNICAL STUDIES, vol. I, 147, 155-58 (1968).

<sup>89</sup> Department of Housing and Urban Development, Characteristics of Home Mortgage Transactions Insured by FHA under section 235(i), First Quarter, 1971, in *Senate Hearings* 6-7.

<sup>90</sup> During the first quarter of 1971, the typical annual income required for a four-person family to purchase a home under a section 235 program increased by \$440, or 7.7 percent, to \$6,150. This increase followed a significant increase in the price of new and existing housing. During the same period the proportion of families in section 235 program reporting monthly adjusted incomes under \$300 decreased from 25 percent to 11 percent. *Id.* at 8.

<sup>91</sup> 42 U.S.C. § 1402(1) (1970).

<sup>92</sup> *Id.*

<sup>93</sup> 12 U.S.C. § 1701s(c)(1) (1970).

<sup>94</sup> See notes 28-30 *supra*.

programs. In effect, their presence in the housing market would increase demand and result in the production of more housing.

### III. THE TERMS OF THE PROPOSED BILL

#### A. *The Revised National Housing Act*

1. *Unassisted Programs*—Title I of the proposed bill<sup>95</sup> would replace the National Housing Act with eight basic programs which would provide insurance or subsidies for unassisted single-family housing, unassisted multi-family housing, assisted single-family housing, assisted multi-family housing, health facilities, land development, supplemental loans to multi-family projects, and home improvement and mobile home loans.<sup>96</sup> This note will focus on the first four housing programs.

Under the proposed bill the programs governing both assisted and unassisted single-family housing would apply to one- to four-family residences and one-family condominium units.<sup>97</sup> For the unassisted program a series of loan-value ratios would be imposed<sup>98</sup> which are similar in form but at higher levels than the ratios presently in effect.<sup>99</sup> Additionally, the cost of the residence or condominium unit could not exceed the applicable prototype cost by more than 100 percent,<sup>100</sup> and the term of the insurable mortgage, rather than being fixed by statute,<sup>101</sup> would be administratively determined.<sup>102</sup> The required initial payment would be reduced from 3 percent of the total sales price<sup>103</sup> to the amount of the closing costs.<sup>104</sup> Finally, the seller would have to give the mortgagor a one year warranty pledging that "the dwelling is

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<sup>95</sup> The present version of the proposed bill is based on a substantially similar bill submitted to the second session of the Ninety-First Congress. H.R. 16643, 91st Cong., 2d Sess. (1970). See NENNO, *Washington News, Nixon Housing Bill Combines Current Programs*, 27 J. HOUSING 121 (1970). The House Subcommittee on Housing did not endorse the bill, because its provisions "could not be adequately examined in the brief period available to the committee." H.R. REP. NO. 91-1556, 91st Cong., 2d Sess. 4 (1970). See NENNO, *Washington News: 1971 Looms as Big Year in Housing Legislation*, 27 J. HOUSING 577-78 (1970).

<sup>96</sup> *Senate Hearings* 330 (Section-by-section summary, Housing Consolidation and Simplification Act of 1971). Unassisted programs are those which rely solely upon mortgage insurance; assisted programs are those which involve interest reduction payments.

<sup>97</sup> H.R. 9331, tit. I, §§ 1(e), 401(a).

<sup>98</sup> *Id.* § 401(b)(1). A loan-value ratio is simply the ratio of the amount of the loan to the value of the property.

<sup>99</sup> 12 U.S.C. § 1709(b)(2) (1970).

<sup>100</sup> H.R. 9331, tit. I, § 3(a)(ii).

<sup>101</sup> 12 U.S.C. §§ 1709(b)(3), (4), and (6) (1970).

<sup>102</sup> H.R. 9331, tit. I, § 401(b)(2).

<sup>103</sup> 12 U.S.C. § 1709(b)(9) (1970).

<sup>104</sup> H.R. 9331, tit. I, § 401(b)(3).

constructed in substantial conformity with the plans and specifications . . . on which the Secretary based his valuation of the dwelling."<sup>105</sup>

Both multi-family housing programs would apply to housing with five or more units in which rent is charged for occupancy, housing owned by a non-profit cooperative, or housing projects in which units are to be sold as single-family houses or as one-family condominium units.<sup>106</sup> The uniform basis of valuation would be the housing's replacement cost.<sup>107</sup> This provision would not only unify the basis on which eligible mortgages could be determined, but also provide a single method by which a developer could calculate his rate of return on his investment.<sup>108</sup> Moreover, this part of the bill would impose more uniform loan-value ratios on eligible mortgagors.<sup>109</sup> The term of the mortgage would be administratively determined.<sup>110</sup> The project would be required to be predominantly residential, but might have non-dwelling facilities, provided such facilities were economically feasible.<sup>111</sup> Costs of units designed for these unassisted projects may not exceed applicable prototype costs by more than 100 percent.<sup>112</sup>

These new programs for unassisted housing are essentially a recodification of the existing programs under sections 203, 207, 213, 220, 231 and 234.<sup>113</sup> The new provisions would eliminate a few statutory anomalies and give administrators somewhat greater discretion in deciding whether to insure a mortgage. Yet, these provisions may have little effect on developers who participate in some of these programs. The sections of the National Housing Act which they revise, particularly sections 203 and 207, have been the programs most used,<sup>114</sup> and mortgagees who apply for insurance under these programs are probably sufficiently versed in them to make development routine.

Finally, since under the proposed bill the prototype cost for an assisted unit cannot be exceeded by more than 10 percent,<sup>115</sup> the units designed for the unassisted program may not be in-

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<sup>105</sup> *Id.* § 401(f).

<sup>106</sup> *Id.* § 501(a)(1). These new provisions would incorporate the programs set out in 12 U.S.C. §§ 1713(a)(6), 1715e(a), and 1715z(j) (1970).

<sup>107</sup> H.R. 9331, tit. I, § 501(a)(2) would define "replacement cost" to include a builder's and sponsor's profit and risk allowance.

<sup>108</sup> See note 73 *supra*.

<sup>109</sup> H.R. 9331, tit. I, § 501(d) would limit the obligation to 90 percent of replacement cost.

<sup>110</sup> *Id.* § 501(h).

<sup>111</sup> *Id.* § 501(i).

<sup>112</sup> *Id.* § 3(a)(ii).

<sup>113</sup> See text accompanying notes 8-15 *supra*.

<sup>114</sup> Fitzpatrick, *supra* note 17, at 462-63.

<sup>115</sup> H.R. 9331, tit. I, § 3(a)(j).



terchangeable with those designed for the subsidized programs. If the cost of land or a particular building design were high, a developer could not use them under the assisted programs. The consolidation of the programs into two tiers might then have the effect of accentuating the differences between assisted and unassisted housing.

2. *Assisted Programs*—The proposed assisted single-family homeownership program, based on the existing section 235 program,<sup>116</sup> would authorize periodic assistance payments to mortgagees on behalf of eligible homeowners.<sup>117</sup> The amount of these payments would not exceed the lesser of (1) the balance of the full monthly payment for principal, interest, taxes, insurance, and mortgage insurance premium remaining unpaid after applying 20 percent of the mortgagor's income to such uses, or (2) the difference between the monthly payment (not including taxes and insurance) which the mortgagor is obligated to pay under the mortgage and the monthly payment he would make if his mortgage were to bear interest of 1 percent.<sup>118</sup>

Moreover, the proposed statute would prohibit the mortgage from having a principal amount in excess of the appraised value of the property or, if the unit has been rehabilitated, the value of the property before rehabilitation plus the value of the rehabilitation work.<sup>119</sup>

The proposed bill's most apparent change in this area would make all families "whose incomes do not exceed the median income for the area" eligible for direct interest reduction payments.<sup>120</sup> The current statutes provide that all families who earn up to 135 percent of public housing income limits for admission are eligible for the program, except that not more than 20 percent of the program payments shall be made on behalf of persons with incomes within 90 percent of the upper limits established for the section 221(d)(3) BMIR program.<sup>121</sup>

The proposed assisted multi-family program, which is derived

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<sup>116</sup> *Id.* § 402. This is in large part a restatement of 12 U.S.C. § 1715z (1970). The terms of section 402 apply to all single-family home purchases, whether the sale is made by an individual selling one home or by an enterprise which has developed a project of eligible units.

<sup>117</sup> H.R. 9331, tit. I, § 402.

<sup>118</sup> *Id.* § 402(c).

<sup>119</sup> *Id.* § 402(h)(2). A \$200 down payment is the only cost excepted from the amount of the insurable mortgage.

<sup>120</sup> *Id.* § 402(i). The Secretary of HUD is to set median incomes for geographic areas according to family size.

<sup>121</sup> 12 U.S.C. § 1715z(h)(2) (1970). The proposed bill retains the deductions from gross family income for each resident minor family member and his earnings. H.R. 9331, tit. I, § 402(j).

from the current section 236 program,<sup>122</sup> would authorize assistance payments to mortgagees on behalf of owners of projects that rent to lower income families.<sup>123</sup> The amount of the payment would not exceed the difference between the full monthly debt service expense which the owner is to pay under his mortgage and the amount the owner would be obligated to pay if his debt service were to be computed at a rate of 1 percent.<sup>124</sup> Under this arrangement a basic rental charge would be determined by first computing the proportional amount which each unit would have to contribute if the debt service were 1 percent. The owner would then fix the rental charge at the greater of either 25 percent of the tenant's adjusted income or the amount of the basic rental charge.<sup>125</sup>

For up to 20 percent of the units in a given project, HUD would be authorized to make additional payments to the owner on behalf of tenants whose incomes are too low to afford basic rentals.<sup>126</sup> The additional payment is to be the lesser of (1) the amount required to reduce the rental paid by the tenant to 25 percent of his income, or (2) the amount required to reduce the rent paid by the tenant to 30 percent of the basic rental charge. This provision would subsume the present rent supplement program.<sup>127</sup> If this section were enacted, eligibility standards for the rent supplement program would no longer be the same as those for public housing.<sup>128</sup>

If the project owner is a cooperative or a non-profit association, or builds with the intention of selling to either a cooperative or a non-profit association, the permissible loan-value ratio of the mortgage would be 100 percent.<sup>129</sup> If the mortgagor is a limited dividend company, then the applicable ratio would be 90 percent.<sup>130</sup>

Finally, the bill would contain a new provision authorizing HUD to contract with the states to share the cost of the assisted

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<sup>122</sup> 12 U.S.C. § 1715z-1 (1970).

<sup>123</sup> H.R. 9331, tit. I, § 502(a). Subsection 502(j)(2) would define lower income families according to median income, the same standard that section 402 would employ for home ownership assistance.

<sup>124</sup> *Id.* § 502(c). This subsection substantially repeats 12 U.S.C. § 1715z-1(c) (1970).

<sup>125</sup> H.R. 9331, tit. I, § 502(f)(1). This subsection substantially repeats 12 U.S.C. § 1715z-1(f) (1970).

<sup>126</sup> H.R. 9331, tit. I, § 502(f)(2).

<sup>127</sup> 12 U.S.C. § 1701s (1970). *See* text accompanying notes 48-52 *supra*.

<sup>128</sup> *See* note 49 *supra*.

<sup>129</sup> H.R. 9331, tit. I, § 502(i)(2). This subsection substantially repeats 12 U.S.C. § 1715z-1(j)(3) (1970).

<sup>130</sup> H.R. 9331, tit. I, § 502(i)(3). This subsection substantially repeats 12 U.S.C. § 1715z-1(d)(3)(iii) (1970).

multi-family housing program.<sup>131</sup> To be eligible, HUD must first approve the state-assisted project and must also be assured that the state will be able to provide sufficient funds for the project.

### *B. The Revised United States Housing Act*

Title II of the proposed bill would simplify the United States Housing Act by (1) clarifying assistance mechanisms so as to establish separate statutory provisions for development and operating subsidies, (2) establishing a new home ownership plan for eligible families, and (3) eliminating obsolete provisions.<sup>132</sup>

Under the proposed statute public housing would be available to those families "who are in the lowest income group and who cannot afford to pay enough to cause private enterprise in their locality or metropolitan area to build an adequate supply of decent, safe and sanitary dwellings for their use."<sup>133</sup> Eligibility would be substantially expanded, for the bill would lower the minimum age for elderly occupancy to fifty.<sup>134</sup>

The bill limits the amount of the annual contribution by the federal government to a sum equal to the annual amount of principal and interest due on the bonds used to finance the project.<sup>135</sup> The amounts required to cover the costs of a newly constructed project will function as a ceiling for the amounts to be paid to subsidize the acquisition, rehabilitation or leasing of comparable units.<sup>136</sup> The new provision would also no longer require that the locality remove a number of "unsafe or insanitary units" equivalent to the number of new units constructed.<sup>137</sup>

The bill would retain the requirement that the locality make a determination of need, evidenced by the approval of the local governing body<sup>138</sup> and the execution of a cooperation agreement.<sup>139</sup> Although the current statute requires the local body to demonstrate a 20 percent gap between the upper rental limits for admission to public housing and the lowest rents which private

<sup>131</sup> H.R. 9331, tit. I, § 502(l).

<sup>132</sup> *Senate Hearings* 360 (Section-by-section summary, Housing Consolidation and Simplification Act of 1971). To emphasize homeownership opportunities, the program would be referred to as "low-income" rather than "low-rent" housing. *Senate Hearings* 510.

<sup>133</sup> H.R. 9331, tit. II, § 3(2). This subsection repeats 42 U.S.C. § 1402(2) (1970).

<sup>134</sup> H.R. 9331, tit. II, § 3(2). 42 U.S.C. § 1402(2) (1970) establishes eligibility requirements by reference to the Social Security Act.

<sup>135</sup> H.R. 9331, tit. II, § 5(a).

<sup>136</sup> *Id.*

<sup>137</sup> The "equivalent elimination clause" is currently contained in 42 U.S.C. § 1410(a) (1970).

<sup>138</sup> H.R. 9331, tit. II, § 5(e). This subsection repeats 42 U.S.C. § 1415(7)(a) (1970).

H.R. 9331, tit. II, § 6(d). This subsection repeats 42 U.S.C. § 1415(b)(i) (1970). See text accompanying notes 40-41 *supra*.

enterprise is charging for comparable housing<sup>140</sup> as well as to demonstrate adequate relocation resources,<sup>141</sup> the proposed bill would delete these requirements.<sup>142</sup>

Under the proposed bill, cost limitations are determined by the use of prototype costs: the development cost of a project, not including the costs of non-dwelling facilities and relocation payments, could not exceed the applicable prototype cost by more than 10 percent.<sup>143</sup> The current prototype cost limitation is more liberal, since it excludes the costs of land acquisition, demolition, as well as non-dwelling facilities,<sup>144</sup> thus resulting in a less restrictive cost limit.

Many of the terms of the annual contributions contract which are prescribed by statute would not be altered. Subsection 6(c) provides that HUD may request that the local authority raise its income limits,<sup>145</sup> that occupants be recertified every two years,<sup>146</sup> and that notice and hearing be provided to unsuccessful applicants for occupancy.<sup>147</sup> The contract would continue to require that the projects be exempt from local property taxes and that a payment in lieu of taxes be made.<sup>148</sup>

The bill would alter only slightly the leased housing program. The current requirement that 30 percent of the authorized funds for the entire public housing program be used for leasing<sup>149</sup> is omitted from the proposed bill, but a new provision allowing the local authority to purchase a structure containing one or more units of leased housing for resale to tenants or groups of tenants has been added.<sup>150</sup>

The proposed bill would also separate the operating subsidy which replaces the \$120 per family subsidy and the additional funds supplied for operating expenses<sup>151</sup> from the debt service contribution.<sup>152</sup> This change would permit HUD to contribute such sums as are required (1) to assure the low-income character

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<sup>140</sup> 42 U.S.C. § 1415(7)(b)(ii) (1970).

<sup>141</sup> *Id.* § 1415(7)(b)(iii) (1970).

<sup>142</sup> The Uniform Relocation Assistance and Real Property Acquisition Act of 1970, Pub. L. 91-646, Jan. 2, 1971, 84 Stat. 1894, governs any federal housing programs which displace persons or businesses.

<sup>143</sup> H.R. 9331, tit. II, § 6(b).

<sup>144</sup> 42 U.S.C. § 1415(5) (1970).

<sup>145</sup> This repeats 42 U.S.C. § 1410(g)(1) (1970).

<sup>146</sup> This substantially repeats 42 U.S.C. § 1410(g)(3) (1970).

<sup>147</sup> This substantially repeats 42 U.S.C. § 1410(g)(4) (1970).

<sup>148</sup> H.R. 9331, tit. II, § 6(d). This subsection substantially repeats 42 U.S.C. § 1410(h) (1970).

<sup>149</sup> 42 U.S.C. § 1410(e) (1970).

<sup>150</sup> H.R. 9331, tit. II, § 8(f).

<sup>151</sup> See text accompanying notes 82-84 *supra*.

<sup>152</sup> H.R. 9331, tit. II, § 9.

of the projects involved and (2) to achieve adequate operating services. These operating services would include tenant services and programs, in addition to maintenance and administration.<sup>153</sup> If the local authority applies for this subsidy, it must require a rental payment from each tenant which is not less than 20 percent of his income, adjusted only for minor resident family members.<sup>154</sup>

The proposed bill would significantly alter the present program for homeownership in public housing.<sup>155</sup> While the present program is limited to those units "sufficiently separable from other property retained by the public housing authority," the proposed bill would authorize the local authority to obtain or construct housing for sale, or to sell that which it now rents. The purchaser, who may be an individual or a non-profit entity, would obtain title at the sale and give the local authority a mortgage which bears interest at the same rate as mortgages insured under section 402 of the Revised National Housing Act.<sup>156</sup> The purchaser must pay the greater of 20 percent of his income, or the monthly homeownership expense, less the entire payment for principal and interest.<sup>157</sup> This elimination of debt service would potentially be the deepest housing assistance subsidy yet enacted.

#### IV. EVALUATING THE PROPOSED ASSISTANCE PROGRAMS

##### *A. Effect Upon Housing Producers*

The impact of enactment of the proposed bill on production is difficult to predict. Certainly the costs to developers as a result of the transition from existing to new programs should be slight because of the technical simplicity of the new programs. For those who now participate in the section 235 and 236 assisted housing programs, the change will be effortless.<sup>158</sup> For those who operate under the programs to be eliminated, the adaptation may be only slightly more difficult, since the future of these other programs, particularly section 221(d)(3) BMIR and rent supplement, was clouded at best. The proposed changes in public housing enlarge the opportunity for participation by the private sector.

Enactment of the proposed bill would enable private enterprise to increase its housing production. The enlarged scope of the

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<sup>153</sup> *Id.* § 3(4).

<sup>154</sup> *Id.* §§ 9(b) and (c).

<sup>155</sup> 42 U.S.C. § 1415(9) (1970).

<sup>156</sup> H.R. 9331, tit. II, §§ 10(b)(3) and (4).

<sup>157</sup> *Id.* § 10(b)(6).

<sup>158</sup> See text accompanying notes 116 and 122 *supra*.

low-income housing program (increased leasing and home ownership opportunities) is bound to attract developers, provided that funding is forthcoming. Increased production may also result from consolidation, because rather than having their resources spread over an array of assistance programs, developers and lenders will be able to concentrate on two fairly interchangeable programs. If the costs of learning federal programs have been so high as to inhibit entry into the field,<sup>159</sup> a substantial reduction in statutory language may be sufficient to encourage participation. Finally, since the cost limits for the three assistance programs would be roughly equivalent, inter-programmatic activity may develop.

### *B. Effect Upon Program Administration*

An increase in production resulting from statutory changes, however, assumes that administrative complexities will also be reduced. If all that is inhibiting in a statute is merely transferred to a regulatory scheme at the administrative level, little decrease in administrative costs will result. Although the provisions of the interest-reduction programs are made rather uniform by statute, little attempt is made to harmonize the statutory and administrative requirements of public housing with the other assistance programs. Indeed, as the FHA programs are being consolidated in the proposed bill, the public housing programs, such as leasing and home ownership, are proliferating. The proposed bill would continue to require two sets of administrative agencies.

Administrative costs which substantially affect the developer would remain despite the proposed modifications. Although a developer may be able to obtain approval for the general concept of his plans from both the local FHA insuring office and the public housing authority, he still must contend with different men and differing technical standards before completing the project. The approval processes for federal housing programs are excruciatingly particularistic, and a prudent developer will not undertake a project, assisted or unassisted, unless his return will more than cover the costs of fulfilling the ad hoc requirements of local housing authorities, FHA underwriters and HUD architectural reviewers. Consolidation is likely to increase the amount of discretion resting in these more "minor" officials who will in turn impose potentially onerous requirements on developers and local authorities.

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<sup>159</sup> See text accompanying notes 66-74 *supra*.

### C. *Effect Upon Eligibility*

If there is a relationship between eligibility for housing assistance programs and production, enactment of the proposed bill might stimulate production. Eligibility of families for public housing benefits would, however, remain unchanged,<sup>160</sup> and the range of eligibility for the interest subsidy programs may not be quite as broad as would initially appear. It is first necessary to know what the median income for a particular area is in relation to 135 percent of the public housing limits or 90 percent of the section 221(d)(3) BMIR limits, these being the income limits for the current section 235 and 236 programs respectively.<sup>161</sup> There may be areas where the increase in the number of eligible families or individuals is marginal or non-existent. Second, the fallacy of the section 235 and 236 programs may be repeated, for the proposed bill requires that a family pay the greater of 1 percent of the debt service or a fixed portion of its income and also ties the minimum requirement to the cost of the unit. Therefore, the program may serve only the higher ranges of eligible incomes.<sup>162</sup> Even with the deep subsidy provisions in the proposed bill,<sup>163</sup> in some areas, such as New York City, prototype costs may be so high that this subsidy will reach no deeper than current mechanisms. The eligibility criteria and subsidies in the proposed bill are not structured so as to prevent gaps from developing.

### D. *The Proposed Housing Reform Amendments Act*

In response to some of these difficulties, on December 10, 1971, Senators Brooke and Mondale introduced the proposed Housing Reform Amendments Act of 1971 which is designed to complement the Housing Consolidation and Simplification Act.<sup>164</sup> These amendments would remedy the lack of uniformity in eligibility requirements and make broad eligibility financially feasible. To achieve these ends, the Senators propose that the public housing and interest-reduction programs have the following common elements: cost prototypes, income limits, definitions of income, and rental payments.<sup>165</sup> The subsidy structure would also

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<sup>160</sup> See notes 91, 133 and 134 *supra*.

<sup>161</sup> 12 U.S.C. §§ 1715z(h)(2) and 1715z-1(i)(2) (1970).

<sup>162</sup> See text accompanying notes 87-90 *supra*.

<sup>163</sup> See text accompanying note 126 *supra*.

<sup>164</sup> 117 CONG. REC. 14376-80 (daily ed. Sept. 16, 1971) contains a summary version of the first draft of these proposed amendments. The full form appears in 117 CONG. REC. 21159-71 (daily ed. Dec. 10, 1971).

<sup>165</sup> 117 CONG. REC. 21158 (daily ed. Dec. 10, 1971).

be made uniform and would be defined as the full difference between total monthly costs of the project and the ability to pay of those families eligible for assistance. The deepest subsidy would, like the proposed homeownership subsidy for low-income housing, eliminate the debt service requirement from the monthly payment.<sup>166</sup> Local housing authorities would be able to act as sponsors for interest-reduction projects, and to initiate such projects where they are needed. No projects would be exempt from local taxes, and as a further incentive public service grants would be made to communities where new subsidized housing is built.<sup>167</sup>

The amendments would give added power to the federal government by making it the housing producer of last resort. Thus, if within two years of enactment of this legislation there are substantial unsatisfied needs for subsidized housing in a given area, HUD would be authorized to act directly or through a sponsor to build such housing.<sup>168</sup>

## V. CONCLUSION

Assuming that Congress enacts the proposed bill, including those amendments offered by Senators Brooke and Mondale, the effect of enactment will probably be less dramatic than hoped. Consolidation and simplification are necessary, but they alone cannot alleviate either the shortage of housing for low-income families or the national housing shortage.

Underproduction is also a function of issues which do not originate in the statutes establishing assistance programs. The level of funding which Congress supplies is a determinative factor. Given the current level of subsidy funding, relatively few people with large needs can be assisted. If production is the goal of the system, limited funding means shallow assistance to those whose needs are not as great as others. As long as there are no long-term commitments of federal funds, developers will be wary of specializing in one or another federal program. The proposed measure would presumably also have little effect on the flow of mortgage funds, a direct factor in production of housing through private sources.

Nor does the proposal directly attack local restraints on the development of housing for low-income families. Exclusionary

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<sup>166</sup> *Id.* at 21158.

<sup>167</sup> *Id.* at 21158, 21170-71.

<sup>168</sup> *Id.* at 21158, 21171.



zoning patterns,<sup>169</sup> subdivision regulations which add unnecessary expense to site improvement costs, and complicated or irregular building codes may all be used to keep subsidized housing from being built in a particular locality. The difficulty that such practices pose cannot be overstated. Yet omission of these considerations from a sweeping revision of current housing statutes is, at the least, a lost opportunity.

The proposed bill leaves intact a basic premise of the federal housing assistance effort: it is the unit and not the family housed within it which is the object of the subsidy. Thus, whether a family receives assistance is a function of the eligibility of the unit in which it lives to be part of a subsidy program, and not of the needs of the family.

Nevertheless, Congress should enact the proposed Housing Consolidation and Simplification Act of 1971, as modified by the Housing Reform Amendments Act. In so doing, Congress should not expect dramatic gains in production. The assisted housing market is in the nature of a closed system: when pressure is relieved in one place, it is reasserted in another. Simplification of statutes places heavier responsibilities on both federal and local housing officials. These administrators must be alert to detect the formation or continuation of eligibility gaps and sensitive to the needs and incentives of the private sector.

Simplification will also reveal the basic assumptions underlying the assortment of federal housing programs. During the forty year period in which these provisions have accumulated, there has been surprisingly little critical evaluation in the chambers of Congress. Once the essential premises are made clear, performance of these programs will be easier to appraise. Congress will then be able to attack the recurrent problems with more suitable tools. At present the issues are obfuscated by needlessly detailed legislation.

— *William A. Newman*

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<sup>169</sup> Some recent cases suggest that courts are increasingly aware of the inhibitory effects of exclusionary zoning practices upon housing production. *See e.g.*, Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) (failure of township's zoning ordinances to provide for apartment buildings held unconstitutional on the ground that this omission excluded potential residents and hence was an unreasonable exercise of the police power); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970) (zoning ordinance requiring minimum lot sizes of two and three acres was unconstitutional as an unreasonable exercise of police power).