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William J. Quirk

Leon E. Wein

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# CORNELL LAW REVIEW

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## HOMEOWNERSHIP FOR THE POOR: TENANT CONDOMINIUMS, THE HOUSING AND URBAN DEVELOPMENT ACT OF 1968, AND THE ROCKEFELLER PROGRAM

*William J. Quirk† and Leon E. Weint†*

Homeownership for low-income families has been increasingly proposed as a means of enabling the inhabitants of central city to solve their own problems. In the year since the tenant condominium was proposed,<sup>1</sup> homeownership for low-income urban families has been advocated by the President,<sup>2</sup> the National Advisory Commission on Civil Disorders,<sup>3</sup> and Congress.<sup>4</sup> National housing policy will un-

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† Member of the Bar of New York. A.B. 1956, Princeton University; LL.B. 1959, University of Virginia. Grateful acknowledgment is expressed to Ira Gomberg, a co-author of a related article who though unable to join in writing this article nevertheless rendered valuable assistance and advice, as well as to Richard Cantor for his kind assistance.

†† Member of the Bar of New York. A.B. 1961, Brooklyn College; LL.B. 1966, New York University; Dip. Law. 1966, Cambridge University.

<sup>1</sup> A program of housing reform by means of tenant condominiums was outlined by the authors in Quirk, Wein & Gomberg, *A Draft Program of Housing Reform—The Tenant Condominium*, 53 CORNELL L. REV. 361 (1968).

<sup>2</sup> President's Message to the Congress, "The Crisis of the Cities," Feb. 22, 1968.

<sup>3</sup> NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 476 (Bantam ed. 1968) [hereinafter cited as RIOT COMM'N REPORT].

<sup>4</sup> Housing and Urban Development Act of 1968, 12 U.S.C.A. § 1715z (1969). The Senate report observed that a new "emphasis" should be placed on providing homeownership for lower-income families. The report stated:

[T]he Committee felt that in order to give American families the widest choice in selecting the type of housing in which they desire to live, as well as achieving a balance in existing programs, emphasis should be placed on developing programs which would give lower-income families a better opportunity of becoming homeowners.

S. REP. NO. 1123, 90th Cong., 2d Sess. 4 (1968).

doubtedly stress homeownership opportunities for all citizens in the next decade.

The reasons for this new direction are not hard to find. Public housing that utilizes the government as landlord has not met our low-income housing need, and housing programs that preserve the private landlord-tenant relationship have failed.<sup>5</sup> Urban renewal has aggravated the crisis by depriving the poor of their homes and destroying their communities.<sup>6</sup> Homeownership, on the other hand, shows promise of succeeding where other programs have failed because it offers the low-income family a stake in society. In many cities the traditional fee simple form of ownership provides an acceptable means for increasing homeownership because slums are often characterized by one- and two-family residential properties.<sup>7</sup> Our very largest cities have a high percentage of families living in multiple dwellings,<sup>8</sup> but homeownership can nevertheless be provided in these cities through cooperatives or condominiums. Condominiums are preferable to cooperatives, since liability for another's default in the cooperative is not an acceptable risk for low-income families.<sup>9</sup> Furthermore, the condominium occu-

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<sup>5</sup> The Riot Commission Report notes:

To date, federal building programs have been able to do comparatively little to provide housing for the disadvantaged. In the 31-year history of subsidized federal housing, only about 800,000 units have been constructed, with recent production averaging about 50,000 units a year. By comparison, over a period only three years longer, FHA insurance guarantees have made possible the construction of over ten million middle- and upper-income units.

RIOT COMM'N REPORT, *supra* note 3, at 473-74.

Most of the middle- and upper-income units assisted by FHA insurance are ownership housing. Representative Widnall has pointed out that there has been a large decline in the percentage of new and existing homes insured by FHA for families earning under \$4,000. For existing homes the percentage fell from 42.8% in 1950 to 1.3% in 1966. For new homes the drop was from 56% in 1950 to 1% in 1966. 114 CONG. REC. 6060 (daily ed. July 8, 1968).

<sup>6</sup> See RIOT COMM'N REPORT, *supra* note 3, at 142.

<sup>7</sup> See *Hearings on Housing and Urban Development Legislation of 1968 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 2d Sess. 382 (1968) [hereinafter cited as *1968 Senate Hearings*] (testimony of Walter Reuther who described Detroit as a city of individual dwellings; Mr. Reuther also noted that there are a large number of vacant houses in Detroit).

<sup>8</sup> In New York City, 73% of the population lives in multiple dwellings. N.Y.C. COMM. ON HOUSING STATISTICS, HOUSING STATISTICS HANDBOOK 2 (1967) [hereinafter cited as HOUSING STATISTICS HANDBOOK]. Fifty-five percent of all rental units are in structures with 20 or more apartments. *Id.* at 14-15.

<sup>9</sup> The Cooperative League of the United States has taken the position that cooperatives are more suitable than condominiums as a vehicle for low-income homeownership. *1968 Senate Hearings*, *supra* note 7, at 118-20; *Hearings on Housing and Urban Development Legislation and Urban Insurance Before the Subcomm. on Housing of House Comm. on Banking and Currency*; 90th Cong., 2d Sess. 454-60 (1968) [hereinafter cited as *1968 House Hearings*]. The following factors were suggested as reasons for the preference: lower transfer costs, more readily enforceable rules, and the power of eviction. *Id.* at 456. In the authors' view it is the freedom from rules and eviction threats that distinguishes ownership

pant's interest is concrete; it is direct real property ownership in contradistinction to ownership of shares of stock in a cooperative.

A critical obstacle to any ownership program is that current cost estimates for new construction and rehabilitation place such housing beyond the means of a large part of our population. It is estimated that it now costs \$17,500 to produce a decent new house either privately or under public housing,<sup>10</sup> while the cost of producing a decent unit by rehabilitation is estimated to approach \$12,000.<sup>11</sup> The cost of low-income housing is further distorted by the upward spiral of mortgage interest rates, which the government is unable to halt or reverse.<sup>12</sup> As

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from rental housing. A commission chaired by Paul H. Douglas appears to endorse the Cooperative League position, noting "greater control" as an advantage of cooperatives over condominiums. NATIONAL COMM'N ON URBAN PROBLEMS, REPORT pt. II, c. 4, at 20 (1969) [hereinafter cited as DOUGLAS REPORT]. (The present text of this Report is subject to revision pending printing of the official edition.) A further advantage noted by the Cooperative League is the "non-speculative" aspect of cooperative housing. *1968 House Hearings, supra* at 455. The League observed that in FHA-insured projects a cooperator is required to sell his unit to the cooperative at a "non-speculative price," presumably cost. *Id.* (The Douglas Report notes that cooperatives under the federal § 213 and § 221(d)(3) programs permit a departing member to receive his equity and a "cost of living payment." DOUGLAS REPORT, *supra*, pt. II, c. 4, at 10.) In turn, the cooperative is required to sell to a new member at the same price that it paid for the unit. *1968 House Hearings, supra* at 455. The prohibition of profit on the resale of a cooperative unit in FHA projects does not appear required by statute. A similar prohibition exists in New York under the Mitchell-Lama program. See note 230 *infra*; Quirk, Wein & Gombert, *supra* note 1, at 366 n.23. While a cooperator is prohibited from making a profit on the sale of his unit, he is not protected from loss under either the FHA or Mitchell-Lama programs. The possibility of loss through foreclosure of government financed cooperatives is not remote. See *City of New York v. Big Six Towers, Inc.* (Sup. Ct. Feb. 17, 1969), in N.Y.L.J., Feb. 18, 1969, at 20, col. 1. In the authors' view, the most significant attribute of ownership housing is the possibility of profit coextensive with the possibility of loss.

<sup>10</sup> *1968 Senate Hearings, supra* note 7, at 761 (testimony of Paul H. Douglas).

<sup>11</sup> Dep't of Housing and Urban Development, *Economic Analyses of Ten-Year Housing Program and Estimated Federal Government Cost of Assisted Programs*, in *1968 Senate Hearings, supra* note 7, at 1320, 1349 [hereinafter cited as HUD Memorandum]. HUD estimates \$11,400 as the total cost of a rehabilitated home under § 235 of the National Housing Act. Sixty percent of this total, or \$6,840, is estimated as the cost of actual rehabilitation. A FHA-assisted rehabilitation project in the Park Slope section of Brooklyn, New York, covering 76 units has experienced a per unit cost of \$18,000. Wall St. J., Jan. 2, 1968, at 12, col. 4. Of the total figure, \$6,000 is said to be attributable to acquisition, legal and financing fees, and \$12,000 to the rehabilitation work. Of the \$12,000 attributable to rehabilitation, \$8,000 is reported as labor cost and \$4,000 as the cost of materials. *Id.* The much-heralded "instant rehabilitation" project is now reported to have cost \$25,000 per apartment after discounting research and development costs. HOUSE & HOME, May 1968, at 9. The per square foot cost of instant rehabilitation is reported as \$45 per square foot compared with \$18 for new construction and \$14 for conventional rehabilitation. N.Y. Times, Oct. 27, 1968, at 51, col. 1.

<sup>12</sup> Secretary Weaver testified as follows:

The main point is, under the present situation, interest rates are moving in a certain direction, and this is occurring regardless of what happens to the ceiling that is put on FHA and VA.

requested by Secretary Weaver, statutory ceilings on FHA and VA insured mortgage interest rates have now been removed.<sup>13</sup>

Even though the government cannot control rising interest rates, however, much can be accomplished within the other components of housing cost.<sup>14</sup> The prohibitive cost of new construction and rehabilitation could be avoided by a program under which existing buildings would be put into operating condition and turned over to the tenants. Acquisition of suitable buildings—buildings that are structurally sound and that have plumbing, electrical and heating systems in good working order—should present no particular problem in view of the current depressed state of the slum real estate market. Code enforce-

Now, we have two choices. We have a choice of saying the interest rates are going to be responsive to the market in order to attract the funds. This is what I am proposing. Or else, we can say that we are going to put a ceiling on the interest rate, and then we are going to have a large number of points. These are the only two choices.

1968 House Hearings, *supra* note 9, at 160-61.

<sup>13</sup> 12 U.S.C.A. § 1709-1 (1969); Walter Reuther has pointed out that a 1% rise in interest from 6% to 7% on a \$20,000 mortgage over a 30 year term would increase total payments by \$4,674, or 17%, over the life of the mortgage. 1968 Senate Hearings, *supra* note 7, at 395.

In Canada, as interest rates have approached 10%, new construction has tended toward \$50,000 homes whose owners can afford large down payments so that high interest rates affect only a portion of the total cost. See N.Y. Times, May 6, 1968, at 72, col. 1. HUD Secretary Romney announced on January 24, 1969, an increase in the permissible rate of FHA and VA insured mortgages to 7½%. *Id.*, Jan. 25, 1969, at 1, col. 7. From the viewpoint of the consumer the rapid increase in the interest rates has been the most striking recent development in the national housing market. It is therefore curious that the recommendations of the President's Committee on Urban Housing did not emphasize this problem. PRESIDENT'S COMM. ON URBAN HOUSING, REPORT: A DECENT HOME § IV, pt. 6, at 131-33 (1968) [hereinafter cited as KAISER REPORT, after the Chairman of the Committee]. This is perhaps explained by the absence of any representative of the housing consumer on the Committee. The Committee was composed of representatives of the construction and home-building industries, banking, government, building material suppliers, labor and civil rights groups. See *id.*, Appendix C, at 225-27. One might have expected that housing producers would be concerned by rising interest rates inasmuch as such rates inevitably price many consumers out of the housing market. Apparently, the housing producers believe that governmental subsidy will permit the exaction of such interest rates.

In contradistinction to the KAISER REPORT, the DOUGLAS REPORT strongly recommended a reduction of interest rates. That Report noted:

Nothing could do more to stimulate housing, reduce the cost of subsidies, and achieve the goal of a decent home and a suitable living environment for every American family than a reduction in the general level of interest rates.

DOUGLAS REPORT, *supra* note 9, pt. II, § 9, at 8.

<sup>14</sup> Edgar Kaiser, Chairman of the President's Committee on Urban Housing, allocated the low-income rental dollar into the following components: 25% to construction cost; 25% to land cost, site improvements, financing and architect's fees; 50% to operating expenses, local real estate taxes, and profit. 1968 Senate Hearings, *supra* note 7, at 265-66. Secretary Weaver estimated somewhat differently, stating "debt service makes up only about 40 percent of the total monthly payment, while operating expenses make up the remainder." *Id.* at 1312 (Letter from Secretary Weaver to Senator Sparkman, Apr. 1, 1968).

ment, the emergency repair program,<sup>15</sup> rent strikes<sup>16</sup> and the power of the city to reduce rents of rent controlled apartments<sup>17</sup> have weakened property values in New York's slum and marginal neighborhoods. Slum properties are similarly declining in value in other ghettos.<sup>18</sup> Local government could acquire these buildings cheaply, either by purchase in the private market or by other methods.<sup>19</sup>

A working building would be turned over to the present tenants as a condominium. Total per unit cost for acquisition and repair work under this approach would range between \$2,000 and \$6,000; buildings that could not be put into operating condition for \$6,000 per unit or less would not be suitable. Although this inexpensive housing might not be the equal of new or rehabilitated housing costing five to ten times as much, it would not be of poor quality, and it would provide a new option to the low-income family. Such a family might well prefer owning an existing apartment at a cost it could afford to renting a costly new or rehabilitated dwelling with the help of a subsidy. A program based on repair of existing buildings also seems more immediately practicable than programs calling for massive new construction or rehabilitation.

The longevity of the buildings that the occupants would own makes the proposed program practical. Of New York's current multiple dwelling inventory, 40,800 buildings were constructed prior to 1901; another 49,600 were constructed between 1901 and 1929.<sup>20</sup> Absent an act of God or man, these buildings give every indication of lasting one hundred years or more.

Total monthly cost to the occupant would be a monthly maintenance and real estate tax expense ranging from \$20 to \$30, and monthly mortgage payments of \$15.51 per month will amortize a \$2,000 mortgage at 7 percent in 20 years; a \$6,000 mortgage on the same terms

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<sup>15</sup> See N.Y. City Dep't of Bldgs., *A Program for Housing Maintenance and Emergency Repair*, 42 ST. JOHN'S L. REV. 165 (1967); Quirk, Wein & Gomberg, *supra* note 1, at 370 n.40.

<sup>16</sup> Rent withholding is authorized in New York. N.Y. REAL PROP. ACTIONS & PROC. LAW § 755 (McKinney 1963); N.Y. MULT. DWELL. LAW § 302 (McKinney 1946).

<sup>17</sup> See, e.g., NEW YORK CITY ADMINISTRATIVE CODE § Y51-5.0(h)(3). The most striking characteristic of a depressed market in New York has been the abandonment of buildings at a rate of 1,000 per month during 1968. N.Y. Times, Jan. 6, 1969, at 77, col. 4.

<sup>18</sup> See, e.g., N.Y. Times, June 28, 1968, at 46, col. 4 (Detroit); *id.*, May 8, 1968, at 73, col. 1 (Watts area of Los Angeles); *id.*, Apr. 28, 1968, at 31, col. 1 (Harlem, Bedford-Stuyvesant and South Bronx areas of New York).

<sup>19</sup> Under New York City's emergency repair program, *see* note 15 *supra*, the city is called upon to make repairs in buildings suitable for tenant condominiums. The expenses incurred in making these repairs give rise to a lien prior to all mortgages. The city could also proceed against buildings in tax arrears. The buildings so acquired could be put into operating condition and sold as condominium units to the former tenants with the city taking back a purchase money mortgage.

<sup>20</sup> HOUSING STATISTICS HANDBOOK, *supra* note 8, at 2, Table I-2.

would require monthly payments of \$46.52. Taking the high figure of \$30 per month for maintenance and taxes<sup>21</sup> and adding \$10 for the occupants' utilities, the total monthly cost to the condominium owner would be between \$55.51 and \$86.52. Under this proposal the occupant would be free of his mortgage burden after twenty years. Of course, the monthly payment could be reduced by extending the mortgage term beyond twenty years.<sup>22</sup> After the occupant became the owner of his condominium unit, he might improve it further as he was able and saw fit.

It is expected that the funds necessary for a condominium program would be made available by banks and other conventional sources notwithstanding the low-income status of the new owners. The mortgages could be FHA insured,<sup>23</sup> would be relatively small (from \$2,000 to \$6,000), and would carry market-rate interest. Another method of financing would involve the sale of units by the city financed through purchase money mortgages. Still other methods of financing a tenant condominium program are possible under the Housing and Urban Development Act of 1968.

Because the capital cost of this housing program is much less than any other, it is possible that new financing mechanisms may be developed to accommodate it. The amounts involved are so small that traditional mortgaging devices may not be required. The program outlined above was presaged by Jacob Riis almost eighty years ago when he observed that "the tenement has come to stay, and must itself be the solution of the problem with which it confronts us."<sup>24</sup>

## I

### THE HOUSING AND URBAN DEVELOPMENT ACT OF 1968

President Johnson described the Housing and Urban Development Act of 1968<sup>25</sup> as "the most far-sighted, most comprehensive, most

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<sup>21</sup> In a condominium program the amount necessary to cover maintenance expenses would depend upon the following factors: (1) condition of the building's basic operating systems (heating, plumbing, and electrical); (2) extent of mechanical equipment (elevators, incinerators, intercom systems—any mechanical equipment requires specialized maintenance and is subject to breakdown); and (3) amount of service to be provided (heat supplied to legal minimum or above, electricity supplied or paid for by occupant, full or part time superintendent, etc.). Clearly, a walk-up apartment providing minimal services is cheaper to run than a high-rise building with elevators and a number of extra services.

<sup>22</sup> Cost will also be reduced since a condominium owner, in contrast to a renter, is permitted to deduct interest and real estate taxes paid on his federal tax return. INT. REV. CODE OF 1954, §§ 163-64.

<sup>23</sup> National Housing Act § 234, 12 U.S.C. § 1715 (1964).

<sup>24</sup> J. RIIS, *HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK* 282 (1919 ed.).

<sup>25</sup> 82 Stat. 476 (codified in scattered sections of 12, 42 U.S.C.A., and amending various

massive housing program in all of American history"—a "Magna Carta to liberate our cities."<sup>26</sup> The Act authorizes \$5.3 billion over the next three years to provide 1.7 million units of new and rehabilitated housing.<sup>27</sup> The cost of subsidizing mortgages authorized by the new Act over the next forty years has been estimated at \$50 billion.<sup>28</sup> The ultimate goal is the production of 26 million new and rehabilitated units of housing over a ten-year period, an amount sufficient to eliminate all substandard housing in the United States (estimated by the President at 6 million units housing more than 20 million Americans<sup>29</sup>).

The new Act provides the first federal recognition of condominiums in a low-income context. About one-third of the units contemplated will be ownership housing. Since an interest subsidy down to one percent is provided for owners of condominiums, a form of homeownership will be possible for many lower income families who have previously been unable to purchase a home. In proposing the Act to Congress, President Johnson noted that heretofore low-income families have been able to receive federal assistance only as renters. Home ownership, a "cherished dream and achievement of most Americans," has remained beyond the means of the low-income family.<sup>30</sup> The new legislation purports to bring the benefits of homeownership within the capability of such families.

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sections of the National Housing Act, the Housing and Urban Development Act of 1965, and the Housing Acts of 1937, 1944, and 1964).

<sup>26</sup> N.Y. Times, Aug. 2, 1968, at 12, col. 4.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1, col. 5.

<sup>29</sup> *Id.*, Feb. 23, 1968, at 14, col. 1. The Douglas Report estimates that there are "at the very least 11 million substandard and overcrowded dwelling units . . ." DOUGLAS REPORT, *supra* note 9, Introduction and Summary at 26. The REPORT notes that this amounts to "16 percent of the total housing inventory." *Id.*

<sup>30</sup> President Johnson elaborated:

Owning a home can increase responsibility and stake out a man's place in his community. The man who owns a home has something to be proud of and good reason to protect and preserve it.

With the exception of the pilot program I began last year, low-income families have been able to get Federal help in securing shelter only as tenants who pay rent.

*Today I propose a program to extend the benefits of home ownership to the nation's needy families.*

Under this program, the broad outline of which has already been set forth in S. 2700, low-income families will be able to buy modest homes financed and built by the private sector. These families will devote what they can reasonably afford—a specified percentage of their income—to mortgage payments, with the Government paying the difference in the form of an interest subsidy. Under this interest subsidy, the Federal Government would pay all but 1 percent of the interest on the mortgage, depending on the income of the homebuyer.

"The Crisis of the Cities," *supra* note 2, at 7.

Over a quarter of a century earlier, President Franklin D. Roosevelt stated that "a nation of home owners, of people who own a real share in their own land, is unconquerable." N.Y. Times, Nov. 17, 1942, at 35, col. 6.



The theory of the Act seems to have evolved from two proposals widely discussed during the first session of the 90th Congress: Senator Percy's bill (S. 1592), which provided for homeownership and interest subsidies, and the late Senator Robert Kennedy's bill (S. 2100), which provided tax incentives for investment in low-income housing.<sup>31</sup>

### A. *The Goal*

Twenty-six million units in ten years is the goal set by President Johnson.<sup>32</sup> Former Senator Douglas, chairman of the National Commission on Urban Problems, testified that this goal "is somewhat excessive and that it probably cannot be fulfilled."<sup>33</sup> It would require construction of 2.6 million units annually while the average rate of new construction over the last six years has been 1,450,000 units. Therefore, the administration's goal would require an eighty percent increase over existing production. Accordingly, Senator Douglas proposed a more modest goal of replacing the substandard units in twenty years at an annual rate of between 2 and 2.2 million units.<sup>34</sup> Secretary Weaver, elaborating on President Johnson's overall goal of 26.2 million units, stated it would include 4 million units of federally-assisted new construction and 2 million federally-assisted rehabili-

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<sup>31</sup> For discussions of Senator Percy's bill see Butler, *An Approach to Law and Moderate Income Home Ownership*, 22 RUTGERS L. REV. 67 (1967); Quirk, Wein & Gomberg, *supra* note 1, at 393-99; Note, *Government Programs to Encourage Private Investment in Low-Income Housing*, 81 HARV. L. REV. 1295, 1319 (1968). Senator Kennedy's bill is discussed in Quirk, Wein & Gomberg, *supra* note 1, at 399-403; Note, *supra* at 1299-1318. Title IX of the 1968 Act, entitled "National Housing Partnerships," provides for tax incentives. Unfortunately, unlike Senator Kennedy's bill, title IX is not limited to low-income housing. Its purposes are stated to be the carrying out of new construction and rehabilitation "primarily for the benefit of families and individuals of low or moderate income." Housing and Urban Development Act of 1968, § 906(a)(1), 42 U.S.C.A. § 3936(a)(1) (Supp. 1969). However, the term "low or moderate" is not defined.

As the housing legislation of 1968 developed from the pioneering efforts of Senators Kennedy and Percy, so too, a change of the primary mode of tenure in the ghetto from rental to homeownership made possible by the new Act will require other programs advocated by the Senators. For example, the Home Management Corporations proposed by Senator Robert Kennedy are likely to prove necessary for a large scale homeownership program. The Home Management Corporation is discussed at 113 CONG. REC. 18825 (daily ed. July 13, 1967) (speech of Senator Kennedy).

<sup>32</sup> "The Crisis of the Cities," *supra* note 2, at 5. The goal of 26 million units in ten years, of which 6 million are for low- and moderate-income families, is statutorily set by § 1601 of the Act. The National Advisory Commission on Civil Disorders recommended a program similar in scope but to be accomplished over 5 years. RIOT COMM'N REPORT, *supra* note 3, at 475. Secretary Weaver considered this "highly improbable." 1968 Senate Hearings, *supra* note 7, at 29.

<sup>33</sup> 1968 Senate Hearings, *supra* note 7, at 748.

<sup>34</sup> *Id.* at 750. A Federal Reserve Board report, accompanying testimony of Chairman William Martin to the Joint Economic Committee, projects 1.5 million housing starts for 1969 with no growth after the first quarter. N.Y. Times, Feb. 27, 1969, at 55, col. 1.

tated units.<sup>35</sup> The magnitude of a 26 million unit, ten-year housing program is illustrated by the fact that the country's total of housing units occupied in 1966 was 57,856,000.<sup>36</sup>

These national housing goals must be evaluated in terms of people's capacity to pay for new and rehabilitated homes.<sup>37</sup> Former Senator Douglas testified that our 231 standard metropolitan statistical areas contain two-thirds of the nation's population, or 130 million people. Sixteen million of these people were members of families earning less than \$3,335 per year, and were characterized by the former Senator as the "poor." The next group, characterized as the "near poor," is composed of 9 million people in families earning \$3,335 to \$4,500. A third group, the "lower economic middle class," is made up of 33 million people in families earning between \$4,500 and \$6,800.<sup>38</sup>

<sup>35</sup> *Id.* at 5. Although both the President and the Secretary referred to a 26 million unit goal, the supporting material submitted by the Department of Housing and Urban Development reported a need of 28.2 million units. The HUD Memorandum stated:

The following table summarizes a projected need for 28.2 million new and rehabilitated housing units to be completed between July 1, 1967 and June 30, 1977:

	<i>Millions of units</i>
1. For net additional household formation .....	13.1
2. To permit an increase in vacant units, including seasonal units .....	4.4
3. To compensate for units abandoned because of population shifts .....	1.0
4. To compensate for demolition, casualty, and other losses of nondilapidated units .....	2.0
5. To permit the removal of all existing dilapidated units .....	2.0
6. To permit the removal of all units becoming dilapidated over the decade .....	2.0
7 (a). Rehabilitation of nondilapidated, substandard units without public assistance .....	1.7
Subtotal: new units and unassisted rehabilitation .....	26.2
7 (b). Rehabilitation of nondilapidated, substandard units with public assistance .....	2.0
The total need including publicly assisted rehabilitation .....	28.2

HUD Memorandum, *supra* note 11, at 1344.

<sup>36</sup> Bureau of Census—Bureau of Labor Statistics, Social and Economic Conditions of Negroes in the United States 55 (Oct. 1967).

<sup>37</sup> HUD estimates the cost of the publicly assisted housing under the new program as \$14,500 for a § 235 "home" (single-family and multi-family); \$14,600 for a § 236 rental multi-family unit; \$15,500 for a public housing unit; and \$11,400 for a § 235 rehabilitated home. HUD Memorandum, *supra* note 11, Appendix B, at 1349, Table B-1. HUD estimates an annual increase in construction cost between 1969 and 1978 of about 3%. *Id.* ENGINEERING NEWS-RECORD, however, projects an increase in the building cost index of 9.2% in 1969. ENGINEERING NEWS-RECORD, March 20, 1969, at 91. HUD's basis for determining the above figures is not clear. They appear curious when compared with its cost estimates for unassisted housing which are based upon actual third-quarter 1967 prices. The unassisted cost figures provided by HUD are \$15,000 for a multi-family unit (FHA or conventionally financed); \$18,000 for a FHA financed one- to four-family unit home; and \$26,500 for a conventionally financed one- to four-family unit home.

<sup>38</sup> 1968 Senate Hearings, *supra* note 7, at 751.

Senator Douglas observed that the poor, near poor, and the lower middle class will require subsidy at present construction and rehabilitation costs.<sup>39</sup> Under the general rule that a family can sustain a home costing two and one-half times its annual income, only a family earning \$7,000 is able to afford a home costing \$17,500; this is approximately how much it costs to produce a new house either privately or under public housing.<sup>40</sup> Almost half of the country's population is in families earning less than \$7,000 per year.<sup>41</sup> The Senator concluded:

We have got to reduce the cost. If we could reduce the cost by \$2,500, we would make it possible for all those Americans in the band of income from \$6,000 to \$7,000 to afford their own housing and to buy it or rent it on the private market.<sup>42</sup>

It is increasingly said that the 1968 Act's goals are incapable of achievement.<sup>43</sup> But it is not helpful to view the goals as a projection of what is likely to be accomplished. These goals are more properly understood as a national commitment to house the poor in our generation.

#### B. *Interest Subsidy and Mortgage Insurance for Homeowners*

Section 235,<sup>44</sup> entitled "Homeownership for Lower Income Families," is the basic homeownership provision of the new Act. The section

<sup>39</sup> *Id.* at 752.

<sup>40</sup> *Id.* at 777. HUD estimates that a multi-person household requires a house, available in 1966 for \$12,000, or a 2 bedroom rental unit available for an average of \$95 per month. According to FHA statistics, a \$12,000 house requires a monthly total expenditure of \$115. HUD concludes that an annual income of about \$5,000 would be necessary to avoid such a family's spending more than 25% of its income for housing. HUD Memorandum, *supra* note 11, Appendix A, at 1348.

<sup>41</sup> 1968 Senate Hearings, *supra* note 7, at 761.

<sup>42</sup> *Id.*

<sup>43</sup> N.Y. Times, March 16, 1969, § 3 (Financial), at 1, col. 7.

<sup>44</sup> National Housing Act § 235, added by 12 U.S.C.A. § 1715z (1969). The congressional floor discussion of this legislation is found in the Congressional Record as follows:

S. 3029 (Administration Bill) *introduced*, 114 CONG. REC. 1654-63 (daily ed. Feb. 26, 1968).

S. 3497 (Comm. Bill) *reported*, 114 CONG. REC. 5619 (daily ed. May 15, 1968); *considered*, 114 CONG. REC. 6386-403, 6407-17 (daily ed. May 24, 1968), 114 CONG. REC. 6447-74 (daily ed. May 27, 1968), 114 CONG. REC. 6489-91, 6513-16, 6518-20, 6520-31, 6531-54 (daily ed. May 28, 1968); *Senate adopted conference report*, 114 CONG. REC. 9398-404 (daily ed. July 25, 1968).

H.R. 15624 (Administration Bill) *introduced*, 114 CONG. REC. 1458 (daily ed. Feb. 27, 1968).

H.R. 17989 (Comm. Bill) *reported*, 114 CONG. REC. 5604 (daily ed. June 25, 1968); *considered*, 114 CONG. REC. 6054-92 (daily ed. July 8, 1968), 114 CONG. REC. 6118-68 (daily ed. July 9, 1968), 114 CONG. REC. 6198-302 (daily ed. July 10, 1968), 114 CONG. REC. 7278-324 (daily ed. July 23, 1968); *House adopted conference report*, 114 CONG. REC. 7657-67 (daily ed. July 26, 1968).

provides for an interest subsidy to be paid to the mortgagee with respect to a market-rate mortgage.<sup>45</sup> It authorizes appropriation of annual interest subsidy payments of \$75 million per year prior to July 1, 1969, increased by \$100 million on July 1, 1969, and by \$125 million on July 1, 1970.<sup>46</sup> Thus, assuming appropriations meet authorizations, an annual interest subsidy rate of \$300 million will be reached by July 1, 1970. Assuming further than a five percent subsidy is required for all the housing involved in this program for the full mortgage term, the \$300 million annual subsidy will finance \$6 billion worth of housing. Total cost to the government will vary with the term of the mortgages: if all mortgages are for a twenty year term the cost will be \$6 billion; if for a thirty year term the cost will be \$9 billion; if for a forty year term the cost will be \$12 billion. Interest subsidy is to be paid pursuant to contracts providing for the Secretary to make "periodic assistance payments" to mortgagees holding mortgages meeting the requirements of section 235.<sup>47</sup> Among other requirements, the mortgagor's income must not exceed specific income limitations. Eighty percent of the interest subsidy authorized must be contracted for with respect to families earning no more than 135 percent of the maximum income limits for initial occupancy of public housing.<sup>48</sup> In New York City the maximum for a family of four is \$5,760;<sup>49</sup> families earning \$7,776 (135 percent of the public-housing maximum) will thus be eligible for section 235 mortgages. The remaining twenty percent of interest subsidy authorized may be contracted for with respect to families whose incomes exceed the 135 percent limit but do not exceed ninety percent of the section 221(d)(3) limitations (below market interest program).<sup>50</sup> In New York City, this limit is \$7,875 for a family

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<sup>45</sup> In a strict sense the new Act does not provide "interest subsidy;" rather, it provides subsidy for monthly mortgage payments. That is, the subsidy is such that it will reduce monthly payments to what they would be for a 1% mortgage (maximum subsidy). For purposes of simplicity, as used in this article, "interest subsidy" will mean subsidy of mortgage payments unless otherwise stated.

<sup>46</sup> National Housing Act § 235(h)(1), added by 12 U.S.C.A. § 1715z(h)(1) (1969). The supplemental appropriations act for the fiscal year ending June 30, 1969, appropriates, for both § 235 and § 236, \$7 million. In addition, the total contract authorization is limited to \$50 million; \$25 million each for § 235 and § 236. Pub. L. No. 90-608, ch. IV, § 401 (Oct. 21, 1968), 82 Stat. 1193. This appropriation is disappointing in view of the massive goal undertaken.

<sup>47</sup> National Housing Act § 235(a), added by 12 U.S.C.A. § 1715z(a) (1969).

<sup>48</sup> *Id.* § 235(h)(2), added by 12 U.S.C.A. § 1715z(h)(a) (1969).

<sup>49</sup> NEW YORK CITY HOUSING AUTHORITY, PROJECT STATISTICS 31 (1967).

<sup>50</sup> National Housing Act § 235(h)(2), added by 12 U.S.C.A. § 1715z(h)(2) (1969).

Senator Tower, during floor discussion, commented as follows with respect to a provision which would have permitted 20% of the families to be eligible at 100% of § 221(d)(3) limits:

of three or four.<sup>51</sup> Interestingly, the term "income," as used in these limitation provisions, is not defined.<sup>52</sup> However, in computing "income" \$300 is deducted for each child living with the family and the earnings of children are not included.<sup>53</sup> On the other hand, regulations under the rent supplement program<sup>54</sup> have defined "income" as "total gross income, before taxes and other deductions, received by all members of the tenant's household."<sup>55</sup> Finally, there is a minimum down-payment of at least \$200 for a family whose income does not exceed 135 percent of the public housing limit and at least three percent of the estimated cost of acquisition for other families (the remaining twenty percent).<sup>56</sup>

The cost of interest subsidy to the government will not be as small as it may appear. An example will demonstrate this. The Department

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I am aware that it seems like nit-picking to object to a mere 20 percent of the funds earmarked or being made available under the program for families that reach full eligibility limits on 221 (d) (3) but, again, it is the case of the camel with his head under the tent. We have striven for years to devise programs that would help the very poor, and in every instance the programs have always gravitated upwards toward the lower-risk income groups. So I think now we need to have a program in which we say 100 percent of all that we earmark for the program is going to help those who are lowest on the socio-economic scale, because they are the people most in need, they are the people suffering the most and the people least able to take care of themselves.

114 CONG. REC. 6455 (daily ed. May 27, 1968). See also 1968 Senate Hearings, *supra* note 7, at 629-32 (colloquy between Senators Tower and Robert Kennedy).

<sup>51</sup> The § 221(d)(3) income limit is \$8,750. *Hearings on Housing Legislation of 1967 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 122 (1967) [hereinafter cited as 1967 Senate Hearings].

<sup>52</sup> S. REP. NO. 1123, *supra* note 4, at 8. Pertinent to maximum income limitations and the subsidy formula is the question whether the interest subsidies under the new statute will be includable in the gross income of the subsidized family for tax purposes. Similar questions might be raised under the rent supplement statute. Gross income would seem to include interest or rent payments made on behalf of a taxpayer. Representative Barrett, however, stated during floor discussion of the bill that these amounts would not be includable. 114 CONG. REC. 6065 (daily ed. July 8, 1968). This is the only reference to the problem in the legislative history and no authority was given. Of course, for the purposes of the new statute, the Secretary may exclude such amounts from his definition of "income." If interest subsidy is includable in gross income the taxpayer would seem entitled to an interest paid deduction. However, this would not seem true in the case of rent supplement. The entire question is in need of clarification. Senator Proxmire, during floor discussion of the meaning of "income" under the new Act, reported that HUD would include gifts and inheritances within "income." 114 CONG. REC. 6451 (daily ed. May 27, 1968). There was no discussion as to whether gifts and inheritances would be "income" solely in the year of receipt or would be spread over a number of years.

<sup>53</sup> National Housing Act § 235(l), added by 12 U.S.C.A. § 1715z(l) (1969).

<sup>54</sup> Housing and Urban Development Act of 1965, § 101, 12 U.S.C. § 1701s (Supp. III 1967).

<sup>55</sup> 24 C.F.R. § 5.20(b) (1968).

<sup>56</sup> National Housing Act § 235(i)(3)(C), added by 12 U.S.C.A. § 1715z(i)(3)(C) (1969). The Secretary may require larger amounts. *Id.*

of Housing and Urban Development has reported \$15,000 as the 1967 average national cost (construction and land) of an apartment unit in a multi-family building.<sup>57</sup> HUD further estimated that, between 1969 and 1978, the cost will increase 2.75 percent per year.<sup>58</sup> Thus for a thirty-five year mortgage with a five percent interest subsidy (reducing a six percent mortgage to one percent), the total interest subsidy will be \$16,879.80, an amount exceeding the acquisition cost of the unit.

Subsidizing private-market-rate mortgages is more expensive than other available options. For example, Senator Robert Kennedy observed that the program would be cheaper if federal credit were utilized as has been done for the section 221(d)(3) below-market-interest program.<sup>59</sup> The apparent motivation of the Act is to avoid at all cost the

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<sup>57</sup> 1968 Senate Hearings, *supra* note 7, Table B-1, at 1349. The HUD figure is based on experience with § 207 and the § 221(d)(3) market rate program.

<sup>58</sup> *Id.*

<sup>59</sup> Senator Kennedy testified as follows:

Title II of S. 3029 adopts an unsound and needlessly expensive procedure for financing the housing units which it seeks to provide. It rejects the approach of the current below market interest rate program whose subsidy reflects only the differences between the government borrowing rate and the interest rate sought to be achieved. In place of this procedure, S. 3029 adopts the more expensive course of allowing the project owners to borrow privately at the market rate and then subsidizing the difference between that rate and the stipulated interest charge—a charge which the bill specifies as 1%.

What the extra cost to the government will be under this proposal is hard to compute. But it is clear that it will be considerable. The going mortgage interest rate in a city like New York is 7 to 7¼%—at least 2% above the federal borrowing rate. This figure, however, is for mortgages on luxury buildings in low-income areas. Moreover, the average term of these mortgages is only about 25 years, not the 40 years which is the minimum term sought in S. 3029. To ask private lending institutions to issue long-term mortgages on risky properties is to invite interest rates far higher than those now prevailing. Inevitably interest rates must spiral upward as private lenders react to a program under which the federal government agrees to meet the going rate.

The argument that FHA guarantees will operate to keep the interest rate at or near the market level for luxury apartment buildings is unsound. It ignores the fact that many mortgagees will expect low- or moderate-income housing projects to experience some financial difficulties. It ignores the fact that when such difficulties arise these projects will pose administrative problems for mortgagees and that repeated postponements in monthly payments are not solved by FHA guarantees. And, it ignores important facts: that mortgagees are only too aware of the problems experienced in foreclosure proceedings; that they know the difficulties involved in finding a buyer for a foreclosed building and of bargaining with FHA over the terms of repayment for the losses suffered.

In short, there is no magic to the FHA guarantee. Granted that it may keep interest rates from soaring, it cannot prevent them from rising to at least 3% above the government borrowing rate. And, even at this price, large amounts of mortgage money may not be made available for poverty area housing.

Moreover, under the bill's terms, the Federal Government will have to pay 75% more interest each year on every dollar of mortgage issued than it would if the mortgage were financed in accordance with the present practice. Translated into the authorization which this bill provides, it means that the same subsidy

appearance of large expenditures in the federal budget. However, Secretary Weaver noted the possibility that the special assistance function of the Government National Mortgage Association, one of the two separate corporations resulting from the partition of the Federal National Mortgage Association (FNMA), may have to be used.<sup>60</sup>

The amount of interest subsidy that a family will receive is determined on a sliding scale depending on both the family's income, which must be recertified to the Secretary at least every two years,<sup>61</sup> and the size of the mortgage. A family is eligible for subsidy if its monthly payment for mortgage amortization, taxes, insurance, and mortgage insurance premium exceeds twenty percent of its income.<sup>62</sup> The sub-

dollars provide only 57% of the housing that they would if mortgages were issued under current procedures.

What benefits will using this more costly approach provide? In my judgment they are negligible. The primary benefit is to include only the interest payments of the below market interest rate program in the budget and thereby avoid showing full government loans as budgetary expenditures. But in truth, government loans are not real expenditures since they will be repaid. The real expense is the interest cost which the government must bear to finance the program. Indeed, the President's Commission on Budget Concepts recently recommended that loans should be carried separately from other expenditures in the budget in recognition of the fact that they are different from non-recoupable outlays.

On the other hand, reliance on private mortgage funds may very well have a negative impact on the purposes of Title II of this bill. For private mortgagees—seeking even greater security for their investments—may be reluctant to provide funds to build new dwelling units in less safe poverty areas. In short, it may very well be that reliance on private borrowing will work against one of the purposes which I believe is basic to this bill—namely the substantial rebuilding of our urban slums.

*1968 Senate Hearings, supra note 7, at 642-43.*

For a similar criticism of the 1968 Act approach see KAISER REPORT, *supra* note 13, § IV, pt. 6, at 132-33. Budget considerations also seem to underlie title VIII of the Housing and Urban Development Act of 1968 which provides for the partition of FNMA and establishment of its secondary market operation as a "private" corporation. *Id.* at 59 (testimony of Secretary Weaver). Apparently, the market placed greater value upon FNMA than does Secretary Weaver. Following passage of the Act, FNMA stock, which for many years had traded at around \$60 per share, rose to \$150 per share. *N.Y. Times*, Sept. 1, 1968, § 3 (Financial), at 1, col. 4.

The new Act also authorizes FNMA and private companies to issue a new federally guaranteed debt instrument to be issued against pools of FHA and VA mortgages. National Housing Act §§ 304(d), 306(g), *as amended*, 12 U.S.C.A. §§ 1719(d), 1721(g) (1969). The provision is intended to attract into the mortgage field the monies of trusts and pension funds which now purchase corporate bonds and other long term debt instruments. See Quirk, Wein & Gomberg, *supra* note 1, at 375 n.57.

<sup>60</sup> *1968 Senate Hearings, supra note 7, at 60-61.* FNMA, prior to amendment, is discussed by Quirk, Wein & Gomberg, *supra* note 1, at 375-79.

<sup>61</sup> National Housing Act §§ 235(c), (f), *added by* 12 U.S.C.A. §§ 1715z(c), (f) (1969).

<sup>62</sup> *Id.* § 235(c)(1), *added by* 12 U.S.C.A. § 1715z(c)(1) (1969). A good deal of testimony suggested reducing the 20% of income requirement for principal, interest, taxes, insurance, and mortgage insurance premium. *1968 House Hearings, supra note 9, at 406, 427-28, 441-42* (testimony of National Housing Conference); *id.* at 451 (testimony of

sidy is designed to make up the difference between that monthly payment and twenty percent of the family's income. However, the amount of subsidy cannot exceed the difference between the payments on a market-rate mortgage (principal, interest, and mortgage insurance premium) and the payment on that mortgage (principal and interest) if the interest rate were one-percent.<sup>63</sup> Assuming a \$15,000 mortgage, which HUD reports as the average total cost in 1967 for a multi-family unit,<sup>64</sup> for a thirty-five year term at 7.25 percent including mortgage insurance premium, a family earning \$3,600 would receive a subsidy of \$57.15 per month, and a family earning \$6,600 would receive \$14.85.<sup>65</sup> As the capital cost increases, the maximum subsidy also increases—the maximum monthly subsidy on a \$20,000 unit is \$76.20, while the maximum on an \$8,000 unit is \$30.48.<sup>66</sup> Although the statute does not expressly provide, it is apparently contemplated that a family will not be eligible if, with maximum subsidy, its total mortgage payments would exceed twenty-five percent of its income.<sup>67</sup> Consequently, a family earning \$3,000 will not be eligible for subsidy if the mortgage is \$14,000. If the mortgage is \$12,000, however, such a family will be eligible for a monthly subsidy of \$45.72.<sup>68</sup> If standard homes can be provided for \$12,000,<sup>69</sup> there seems no good reason to subsidize more expensive housing. But if new homes are not generally available for \$12,000 the \$3,000 family will be obliged to buy a rehabilitated home. HUD estimates an \$11,400 total cost for a section 235 rehabilitation home.<sup>70</sup>

Sensitive to the fact that expensive housing requires deeper per unit subsidy, Congress resisted efforts to raise the limitations on per-

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Dwight Townsend, Vice President and Director of Public Affairs, the Cooperative League of the United States of America); *id.* at 726 (testimony of Walter Reuther). It was observed that FHA statistics for 1966 showed 15.5% of income expended for such mortgage payments as the median figure under the § 203 program. *1968 Senate Hearings, supra* note 7, at 120. It was further reported that the 1966 FHA statistics under § 203 showed that a median of 19.6% of income was spent for total housing expense. *Id.* at 121. Of course the § 203 program deals with higher income groups than the contemplated program. *Id.* at 32 (colloquy between Senator Proxmire and Secretary Weaver).

<sup>63</sup> National Housing Act § 235(c)(2), *added by* 12 U.S.C.A. § 1715z(c)(2) (1969).

<sup>64</sup> *See 1968 Senate Hearings, supra* note 7, Table B-1, at 1349.

<sup>65</sup> S. REP. No. 1123, *supra* note 4, at 9.

<sup>66</sup> *Id.* estimates "that the average subsidy is likely to be in the area of \$50 a month." *1968 House Hearings, supra* note 9, at 172.

<sup>67</sup> S. REP. No. 1123, *supra* note 4, at 9 n.2 to Table.

<sup>68</sup> *Id.* at 9.

<sup>69</sup> HUD reports that in 1966 only 6% of all new homes sold were priced below \$12,000. *1968 Senate Hearings, supra* note 7, at 1348 n.1.

<sup>70</sup> *Id.* at 1349, Table B-1. Of this total cost of \$11,400, 60% (or \$6,840) is reported as the cost of rehabilitation. *Id.*



missible mortgage amounts.<sup>71</sup> Section 235 provides that the mortgage attributable to a dwelling unit with respect to any family with under five persons shall not exceed \$15,000 but that the Secretary may increase this to \$17,500 in high-cost areas.<sup>72</sup> The cost limitations under section 236 (rental and cooperative housing), however, are substantially higher than those permitted under section 235. Section 236 is governed by the cost limitations of section 221(d)(3), which authorize, in the discretion of the Secretary, for elevator buildings, \$13,500 for a one bedroom unit, \$16,000 for a two bedroom unit, \$20,000 for a three bedroom apartment and \$22,750 for a unit with four or more bedrooms.<sup>73</sup> Additionally, the Secretary may increase these limits by forty-five percent in high-cost areas.<sup>74</sup> Thus, under section 236, subsidy can be made available for units costing between \$24,000 and \$30,000. This appears extravagant, and it is hoped that the Secretary will confine his program to less expensive homes where limited subsidy dollars will go further.

The cost of housing and subsidy per unit can be reduced by relying on existing or rehabilitated housing rather than new construction. HUD estimates the total cost of a new home under section 235 will be \$14,500, while the total cost for a rehabilitated home will be \$11,400 of which \$6,840 is allocable to the cost of rehabilitation.<sup>75</sup>

A program of minimal repair of existing housing would be even less expensive than rehabilitation. Although the Housing and Urban Development Act of 1968 is generally restricted to new or substantially rehabilitated housing,<sup>76</sup> exceptions are made in the following cases:

<sup>71</sup> 1968 House Hearings, *supra* note 9, at 503 (testimony of William Rafsky, President, National Association of Housing and Redevelopment Officials).

<sup>72</sup> National Housing Act § 235(b)(2), *added by* 12 U.S.C.A. § 1715z(b)(2) (1969). For a family of 5 or more persons the general limit is \$17,500 and in a high-cost area \$20,000 may be permitted. *Id.*

<sup>73</sup> *Id.* § 221(d)(3)(ii), 12 U.S.C. § 1715l(d)(3)(ii) (Supp. III 1967).

<sup>74</sup> *Id.*

<sup>75</sup> 1968 Senate Hearings, *supra* note 7, at 1349, Table B-1. HUD estimates \$14,600 for new construction and \$11,300 for rehabilitation under the § 236 rental program. *Id.*

<sup>76</sup> See National Housing Act §§ 235(b)(2), (i)(3)(A), *added by* 12 U.S.C.A. §§ 1715z(b)(2), (i)(3)(A) (1969). The Senate report noted:

In order to achieve the substantial increase in the number of dwellings available to lower income families that is sorely needed, assistance under this new program will generally be limited to new or substantially rehabilitated units. The existing supply of good, low-cost housing is entirely inadequate and shows little tendency to improve without the impetus a program such as this can give it.

S. REP. NO. 1123, *supra* note 4, at 10. The House version of the bill, following an amendment proposed by Congressman William B. Widnall, would have permitted subsidy under §§ 235(b)(2) and 235(i)(3)(A) for existing housing meeting standards prescribed by the

(1) a displaced family;<sup>77</sup> (2) a family with five or more minor persons;<sup>78</sup> (3) a family occupying low-rent public housing;<sup>79</sup> and (4) a new cooperative member if he purchases his apartment from an initial cooperative member.<sup>80</sup>

In addition, section 235 contains a provision sponsored by Senator Percy that permits subsidy for existing housing over a three-year period as follows: twenty-five percent of total subsidy as appropriated prior to July 1, 1969; fifteen percent of additional subsidy appropriated prior to July 1, 1970; and ten percent of additional subsidy appropriated prior to July 1, 1971.<sup>81</sup> If appropriations meet authorizations under section 235, this provision would permit an annual subsidy for existing housing of \$42.5 million.<sup>82</sup>

A further exception to the Act's general requirement of new or substantially rehabilitated housing is the program authorized by sec-

Secretary. H.R. 17989, 90th Cong., 2d Sess. (1968). Congressman Widnall explained the purpose of his amendment as follows:

[It] opens the homeownership sections up to utilization of existing housing, as well as housing involving new construction or substantial rehabilitation. A survey made by my office among District of Columbia real estate agencies indicated the availability of houses selling for under \$18,000 and needing little repair, if any. It also uncovered the potential availability of many more renter-occupied houses, which would come on the market if these very same renters had access to mortgage funds. Negro real estate brokers were particularly conscious of this opportunity.

H.R. REP. No. 1585, 90th Cong., 2d Sess. 355-56 (1968). See also *1968 House Hearings*, *supra* note 9, at 138 (colloquy between Congressman Widnall and Secretary Weaver).

The general limitation to new or rehabilitated construction was questioned by Mrs. Cushing N. Dolbeare, Managing Director of the Philadelphia Housing Association:

[W]e are concerned that the new homeownership provisions seem limited largely to new or rehabilitated construction. Yet our stock of existing housing is probably the largest single component of our national wealth. Most of it is in good condition and does not need rehabilitation. We think this kind of insurance should be available for existing housing, not tied to new construction, not tied to rehabilitation. We think for many families just the availability of these terms at market rates of interest would enable them to purchase their own homes.

*1968 House Hearings*, *supra* note 9, at 310-11. For a discussion of a program advocating the use of existing housing with minimal repair see text at pp. 814-16 *supra*.

<sup>77</sup> National Housing Act §§ 235(b)(2), (i)(3)(A), added by 12 U.S.C.A. §§ 1715z(b)(2), (i)(3)(A) (1969).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* A good deal of testimony was received to the effect that the subsidy be freely transferable on all subsidized units if the buyer is eligible. *1968 House Hearings*, *supra* note 9, at 427 (testimony of Nathaniel S. Keith, President, National Housing Conference); *id.* at 451-52 (testimony of Dwight Townsend, Vice President and Director of Public Affairs, the Cooperative League of the United States of America).

<sup>81</sup> National Housing Act § 235(h)(3), added by 12 U.S.C.A. § 1715z(h)(3) (1969).

<sup>82</sup> *Id.* § 235(h)(1), added by 12 U.S.C.A. § 1715z(h)(1) (1969). The Kaiser Committee recommended that the provisions for existing housing be maintained rather than phased out. KAISER REPORT, *supra* note 13, Committee report at 20.

tion 235(j).<sup>83</sup> Section 235(j), derived from the existing section 221(h) program,<sup>84</sup> authorizes the Secretary to insure mortgages of nonprofit organizations or public bodies to finance the purchase of existing housing for subsequent resale to low-income purchasers who are eligible for subsidy. Under this program, the mortgage may also cover the cost of rehabilitation if the housing is deteriorating or substandard.<sup>85</sup> An important change made by section 235(j) in the existing 221(h) program is express authorization for condominium housing in multiple dwellings (containing four or more family units).<sup>86</sup> Single-family and two-family homes are also covered under section 235(j).<sup>87</sup> To be eligible for insurance a mortgage shall (1) not exceed the appraised value plus the estimated cost of any rehabilitation, (2) bear interest at a rate to be determined by the Secretary, (3) provide for the release of the mortgage lien upon the sale of an individual single-family dwelling, and (4) provide for complete amortization over such term as the Secretary may prescribe.<sup>88</sup>

Section 235(j) also authorizes the Secretary to insure individual mortgages to finance the sale of a unit to a "lower income purchaser."<sup>89</sup> In addition to interest subsidy down to one percent for the individual mortgages the Secretary may make such payments on the blanket mortgage on behalf of the nonprofit organization or public body.<sup>90</sup>

An unfortunate provision of section 235(j) requires that the property be located in a neighborhood that is "sufficiently stable . . . to support long term values" or that, after the contemplated purchase or rehabilitation plus the action of other owners and public authorities, gives "reasonable promise that a stable environment will be created in the neighborhood."<sup>91</sup> This provision may or may not be troublesome depending upon how the Secretary interprets it. But in any case it is contrary to the underlying theory of homeownership, that the change of a building's tenure from rental to ownership will result in a stable

<sup>83</sup> 12 U.S.C.A. § 1715z(j) (1969).

<sup>84</sup> 12 U.S.C. § 1715l(h) (Supp. III 1967). The § 221(h) program is discussed by Quirk, Wein & Gomberg, *supra* note 1, at 395 n.136.

<sup>85</sup> National Housing Act §§ 235(j)(1), (j)(2)(B), added by 12 U.S.C.A. §§ 1715z(j)(1), (j)(2)(B) (1969).

<sup>86</sup> *Id.* § 235(j)(2)(A)(ii), added by 12 U.S.C.A. § 1715z(j)(2)(A)(ii) (1969).

<sup>87</sup> *Id.* §§ 235(j)(2)(A)(i), (j)(6), added by 12 U.S.C.A. §§ 1715z(j)(2)(A)(i), (j)(6) (1969). As proposed by the administration, a two-family home with a renter would not have been eligible under §§ 235(i), (j). H.R. 15624, 90th Cong., 2d Sess. (1968).

<sup>88</sup> National Housing Act § 235(j)(2), added by 12 U.S.C.A. § 1715z(j)(2) (1969).

<sup>89</sup> *Id.* § 235(j)(4)(B), added by 12 U.S.C.A. § 1715z(j)(4)(B) (1969).

<sup>90</sup> *Id.* § 235(j)(7), added by 12 U.S.C.A. § 1715z(j)(7) (1969).

<sup>91</sup> *Id.* § 235(j)(3), added by 12 U.S.C.A. § 1715z(j)(3) (1969).

building regardless of the neighborhood. Moreover, if the tenure in a neighborhood is changing to ownership, the eventual result will be a stable neighborhood. Assuming a sympathetic interpretation of the "stable neighborhood" requirement, however, section 235(j) seems to be a most promising provision of the new Act.<sup>92</sup>

A surprising feature of the new Act is the differing treatment of the same type of housing depending upon which authorizing section is used. For example, under section 235(i), the term of a condominium mortgage could not exceed thirty-five years, but under section 235(j) the term of the mortgage is discretionary with the Secretary. Similarly, a cooperative may be insured under either section 235(b)(2) or section 236, but subject to different limitations. Under section 235(b)(2), the mortgage principal may not exceed \$20,000 per unit and the maximum term is forty years; under section 236, the mortgage principal must be \$30,000 per unit and the term may be set by the Secretary.<sup>93</sup>

### C. Interest Subsidy and Mortgage Insurance for Rental and Cooperative Projects

Section 236 of the Act<sup>94</sup> is derived from and was intended to replace existing section 221(d)(3).<sup>95</sup> The section provides for mortgage insurance and interest subsidy for rental and cooperative projects for lower-income families. Income eligibility under section 236 is the same as under section 235: Eighty percent of the funds are allocated to families

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<sup>92</sup> The language "stable neighborhood" is not intended to refer to what is colloquially known as a "good" neighborhood. Clearly, Congress intended to confer the benefits of the program upon deprived neighborhoods such as Watts, Bedford-Stuyvesant, and Harlem. The "stable neighborhood" language appears to be a statutory codification of planning jargon. The DOUGLAS REPORT noted, with respect to the model cities program, that there was a danger that the program would become bogged down in planning jargon "at the expense of action." The REPORT continued:

One hears from model city experts and reads in its literature an abundance of language taken from space jargon which might best be termed modern barbarisms. One hears about "target" neighborhoods, "restructuring the delivery systems," and "launching the planning process." One hears very little about how many houses will be built, how often the garbage will be collected, and what kind of schools, health clinics, and job training classes are planned or when they will be open for use.

DOUGLAS REPORT, *supra* note 9, pt. II, c. 7, at 7.

<sup>93</sup> See Appendix, pp. 867-70 *infra*, for a comparison of the different treatment provided for the same type of housing.

<sup>94</sup> 12 U.S.C.A. § 1715z-1 (1969).

<sup>95</sup> 1968 Senate Hearings, *supra* note 7, at 73. This was the intent of the administration, but as enacted by Congress, § 236 does not replace § 221(d)(3). Section 221(d)(3) provides below market interest rates for families of low or "moderate" income. See 1968 Senate Hearings, *supra* note 7, at 122. The administration version of § 236 would have included moderate income families. S. 3029, 90th Cong., 2d Sess. (1968). However, Congress struck "moderate" income coverage and substituted lower income limits as set in § 235.

whose income does not exceed 135 percent of public housing admissibility and the remaining twenty percent to families whose income does not exceed ninety percent of section 221(d)(3) limits.<sup>96</sup> The interest subsidy under section 236 may not exceed the difference between monthly payments (principal, interest, and mortgage insurance premium) on a market-rate mortgage and monthly payments under a one percent mortgage (principal and interest).<sup>97</sup> Section 236(f) provides that the Secretary shall determine for each dwelling unit (1) a fair market rental based on operating cost and payment on the market-rate mortgage and (2) a "basic rental charge" based on operating cost and payment on a one percent mortgage.<sup>98</sup> The tenant's rental is the "basic rental charge or such greater amount, not exceeding the fair market rental charge, as represents 25 per centum of the tenant's income."<sup>99</sup> The rent supplement statute is amended to authorize rent supplement payments for twenty percent of the dwelling units in a section 236 project.<sup>100</sup> For purposes of determining twenty-five percent of the tenant's income, the Secretary shall adopt procedures to review income at intervals of two years or less.<sup>101</sup> All rentals received by the owner in excess of the "basic rental charge" are required to be paid periodically to the Secretary to be deposited in a revolving fund.<sup>102</sup> This "recapture" provision is intended to accomplish the same result as the sliding-scale interest subsidy of section 235.<sup>103</sup> The revolving fund is to be used for making further interest subsidy payments pursuant to section 236.<sup>104</sup> Payments from the revolving fund, however,

<sup>96</sup> National Housing Act § 236(i)(2), added by 12 U.S.C.A. § 1715z-1(i)(2) (1969).

<sup>97</sup> *Id.* § 236(c), added by 12 U.S.C.A. § 1715z-1(c) (1969).

<sup>98</sup> *Id.* § 236(f), added by 12 U.S.C.A. § 1715z-1(f) (1969).

<sup>99</sup> *Id.* Secretary Weaver testified that the homeowner may pay a little more under the 20% rule of § 235 than a renter under the 25% rule of § 236. 1968 Senate Hearings, *supra* note 7, at 25.

<sup>100</sup> Housing and Urban Development Act of 1965, § 101, 79 Stat. 451, as amended, 12 U.S.C.A. § 1701s (1969). Senator Douglas, however, questioned the effectiveness of rent supplement:

While in 1966 and 1967 a total of slightly over 36,000 units were put under reservation for rent supplements, we have checked the figures twice with the FHA, once just before we left the office to come here this morning and we find that as of December 31, 1967, there were only 921 units completed in 12 rent supplement projects, of which only 365 units were rent supplemented.

1968 Senate Hearings, *supra* note 7, at 753-54. See also DOUGLAS REPORT, *supra* note 9, pt. II, c. 5, at 18-25.

<sup>101</sup> National Housing Act § 236(e), added by 12 U.S.C.A. § 1715z-1(e) (1969).

<sup>102</sup> *Id.* § 236(g), added by 12 U.S.C.A. § 1715z-1(g) (1969).

<sup>103</sup> All § 236 mortgages will involve a subsidy down to 1% since the recapture is computed on a "basic rental charge" of 1%. See *id.* § 236(f), added by 12 U.S.C.A. § 1715z-1(f) (1969).

<sup>104</sup> *Id.* § 236(g), added by 12 U.S.C.A. § 1715z-1(g) (1969).

are "subject to limits approved in appropriation Acts pursuant to" section 236(i)<sup>105</sup> and moneys which are thus recaptured effectively reduce annual appropriations under section 236(i). Consequently, the function of the revolving fund is unclear. The authorized interest subsidy appropriation under section 236 is the same as under section 235—\$300 million annually as of July 1, 1970.<sup>106</sup> To qualify for a section 236 mortgage, the mortgagor must be a private nonprofit corporation or entity, a limited dividend corporation or entity, or a cooperative housing corporation which is financed under an approved state or local law providing aid through loans, loan insurance, or tax abatement.<sup>107</sup>

There are important differences between sections 235 and 236. Section 235 generally requires new construction or "substantial" rehabilitation. Section 236, however, refers to new construction or "repair and rehabilitation."<sup>108</sup> Thus, existing housing which requires only some repair would seem to qualify under section 236. Furthermore, section 236 provides that the Secretary may determine the term of the mortgage,<sup>109</sup> and thus a 75- or 100-year mortgage is possible. The terms of section 235 mortgages, however, are limited.<sup>110</sup> Under section 235(j) the term is set by the Secretary,<sup>111</sup> but only existing housing is there involved and a long-term mortgage would be unlikely. Finally, section 235(i) limits the per unit mortgage principal to \$15,000 (\$17,500 in a high-cost area) or \$17,500 (\$20,000 in a high-cost area) for a family with five or more persons,<sup>112</sup> and section 235(j) limits the mortgage principal to the appraised value plus the estimated cost of rehabilitation.<sup>113</sup> Section 236, however, is governed by the mortgage limitations

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* § 236(i)(1), added by 12 U.S.C.A. § 1715z-1(i)(1) (1969). See note 46 *supra* for the amount of current appropriation.

<sup>107</sup> National Housing Act § 236(b), added by 12 U.S.C.A. § 1715z-1(b) (1969). This subsection was apparently designed to aid New York's Mitchell-Lama cooperatives. Note 230 *infra*. However, the provision is unlikely to be utilized since Mitchell-Lama projects generally require a minimum income of \$10,000 which is well in excess of § 236 income limits. In New York City, new Mitchell-Lama projects will rent at \$50 per room per month. N.Y. Times, Feb. 23, 1969, at 1, col. 4; *id.*, Feb. 16, 1969, at 49, col. 1; *id.*, Feb. 3, 1969, at 52, col. 1. Additionally, unlike § 221(d)(3), public bodies and agencies are not eligible under § 236(b).

<sup>108</sup> National Housing Act § 236(j)(3), added by 12 U.S.C.A. § 1715z-1(j)(3) (1969); *id.* § 221(d)(3)(iii), 12 U.S.C. § 1715l(d)(3)(iii) (1964).

<sup>109</sup> *Id.* § 236(j)(4)(c), added by 12 U.S.C.A. § 1715z-1(j)(4)(c) (1969).

<sup>110</sup> *Id.* § 125(i)(2), added by 12 U.S.C.A. § 1715z(i)(a) (1969); *id.* § 234(c), 12 U.S.C. § 1715y(c) (1964) (35 year limitation); *id.* § 235(b)(2), added by 12 U.S.C.A. § 1715z(b)(2) (1969); *id.* § 213(d), 12 U.S.C. § 1715e(d) (1964) (40 year limitation).

<sup>111</sup> *Id.* § 235(j)(1), added by 12 U.S.C.A. § 1715z(j)(1) (1969).

<sup>112</sup> *Id.* § 235(i)(3)(B), added by 12 U.S.C.A. § 1715z(i)(3)(B) (1969).

<sup>113</sup> *Id.* § 235(j)(2)(B), added by 12 U.S.C.A. § 1715z(j)(2)(B) (1969).

of section 221(d)(3), which provides higher limits; for example, in elevator buildings, \$13,500 for a one bedroom unit, \$16,000 for a two bedroom unit, \$20,000 for a three bedroom unit, and \$22,750 for a four bedroom unit.<sup>114</sup> These amounts can be increased by forty-five percent in high-cost areas.<sup>115</sup>

#### D. Miscellaneous Mortgage Insurance

Section 237 authorizes the Secretary to insure mortgages for families of low- or moderate-income who are unable to meet the Secretary's normal credit standards because of their history, irregular income caused by seasonal employment, or other factors.<sup>116</sup> It is designed to aid those families who, "through the incentive of homeownership and counseling assistance, appear to be able to achieve homeownership."<sup>117</sup> Section 237 does not provide for an interest subsidy, but such assistance is available under section 235.<sup>118</sup> The principal amount of a section 237 mortgage may not exceed \$15,000 per unit (\$17,500 in a high-cost area),<sup>119</sup> and total monthly payments, including real estate tax, may not exceed twenty-five percent of the owner's income.<sup>120</sup> For this purpose,

<sup>114</sup> *Id.* § 236(j)(3), added by 12 U.S.C.A. § 1715z-1(j)(3) (1969); *id.* § 221(d)(3)(ii), 12 U.S.C. § 1715l(d)(3)(ii) (Supp. III 1967), amending 12 U.S.C. § 1715l(d)(3)(ii) (1964).

<sup>115</sup> *Id.* § 221(d)(3)(ii), 12 U.S.C. § 1715l(d)(3)(ii) (1964). A curious provision of the new Act permits the Secretary to subsidize a mortgage to finance the sale of a § 236 rental project to a cooperative or nonprofit corporation. *Id.* § 236(j)(3), added by 12 U.S.C.A. 1715z-1(j)(3) (1969). The mortgage amount may be for the full "appraised value of the property." *Id.* Since appraised value might well be higher than fair market value this provision would permit an owner to "bail out" of the project at an advantageous price. H.R. REP. No. 1585, *supra* note 76, at 23. Senator Robert Kennedy sharply criticized this provision stating that "[t]o require low-income tenants to pay more than a building is worth is surely not a viable approach to the problem of raising an investor's rate of return." 1968 Senate Hearings, *supra* note 7, at 645.

<sup>116</sup> National Housing Act § 237, added by 12 U.S.C.A. § 1715z-2 (1969). Secretary Weaver described the function of § 237 as follows:

The purpose of this section is to provide assistance to families of modest means who aspire to purchase homes but cannot obtain mortgage financing because of flaws in their credit histories or instability in their earning records. The Secretary would be required to search behind these flaws to determine whether delinquent accounts were ultimately paid or involved extenuating circumstances, or whether irregular employment and income patterns were due to such factors as seasonal employment, with income otherwise at levels of eligibility over the previous two years. Consideration would be given to any other factors which would indicate that the families could maintain homeownership.

1968 Senate Hearings, *supra* note 7, at 69.

<sup>117</sup> National Housing Act § 237(a), added by 12 U.S.C.A. § 1715z-2(a) (1969).

<sup>118</sup> *Id.* § 235(b)(1), added by 12 U.S.C.A. § 1715z(b)(1) (1969). A mortgage insured under § 237 would be eligible for a § 235 subsidy if it covered a single-family home, an owner-occupied two-family home, or a condominium.

<sup>119</sup> *Id.* § 237(c)(2), added by 12 U.S.C.A. § 1715z-2(c)(2) (1969).

<sup>120</sup> *Id.* § 237(c)(4), added by 12 U.S.C.A. § 1715z-2(c)(4) (1969).

the owner's income is determined as the higher of (1) his average monthly income during the past year, or (2) his average monthly income over the past three years.<sup>121</sup>

The section 237 program will be relatively small, since the total balance of outstanding mortgages may not exceed \$200 million at any time.<sup>122</sup> The insurance is available only for mortgages meeting the requirements, except as modified by section 237, of sections 203 (one-to four-family homes), 220(d)(3)(A) (rehabilitation in an urban renewal or code enforcement area), 221(d)(2) (one- to four-family homes), 221(h)(5) (single-family homes), 221(i) (condominiums), 234(c) (individual condominium units), and 235(j)(4) (single-family, two-family owner-occupied and/or condominium units).<sup>123</sup>

A special-risk insurance fund for the benefit of mortgages insured under sections 235, 236, and 237 is created by the new section 238.<sup>124</sup> The mortgage premium is to be paid into this reserve fund, which may be funded by further appropriations if necessary.<sup>125</sup> The reserve fund is not intended to be actuarially sound.<sup>126</sup> Rather, the administration desired a special reserve fund for the new socially-oriented programs in order to maintain the integrity of the regular FHA mortgage insurance reserves.<sup>127</sup>

Section 223, as amended by section 103 of the new Act, is also supported by the special-risk insurance fund. Section 223(e) provides that the Secretary may insure a mortgage "under any section of this title [title II, Mortgage Insurance] . . . executed in connection with the repair, rehabilitation, construction, or purchase of property located in an older, declining urban area . . ." <sup>128</sup> Such mortgages may be insured,

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* § 237(f), added by 12 U.S.C.A. § 1715z-2(f) (1969).

<sup>123</sup> *Id.* § 237(c)(1), added by 12 U.S.C.A. § 1715z-2(c)(1) (1969).

<sup>124</sup> *Id.* § 238, added by 12 U.S.C.A. § 1715z-3 (1969). The new Act also authorizes the Secretary, "at the earliest practicable date" to develop a plan for the establishment of an insurance program "to help homeowners in meeting mortgage payments in times of personal economic adversity." Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 109(a) (Aug. 1, 1968). For discussion of equity insurance see Quirk, Wein & Gomberg, *supra* note 1, at 396-97; Butler, *supra* note 31, at 85-87. There has been no public announcement by the Secretary of such a plan. The Act also directs the Secretary to "report to the Congress on his actions under this section" and to recommend appropriate legislation within 6 months following enactment of the Act. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 109(b) (Aug. 1, 1968). Although the 6 month period expired February 1, 1969, there has been no public announcement of such report to Congress.

<sup>125</sup> National Housing Act § 238(b), added by 12 U.S.C.A. § 1715z-3(b) (1969).

<sup>126</sup> S. REP. NO. 1123, *supra* note 4, at 15.

<sup>127</sup> 1968 Senate Hearings, *supra* note 7, at 71 (testimony of Secretary Weaver).

<sup>128</sup> National Housing Act § 223(e), added by 12 U.S.C.A. § 1715n(e) (1969).



despite their failure to meet the eligibility requirements of the section under which insurance is sought, if the Secretary, "giving consideration to the need for providing adequate housing for families of low and moderate income in such area," finds the area to be "reasonably viable" and the property an "acceptable risk."<sup>129</sup> The new section 223(e) thus allows waiver of maximum mortgage amounts,<sup>130</sup> and apparently allows waiver of such eligibility requirements as the maximum mortgage term, requirements for new construction or substantial rehabilitation, and section 234's general requirement that individual condominium mortgages may be insured only if the blanket mortgage is an FHA mortgage. The only expressed exception is that the requirements of section 212, the Davis-Bacon provisions, may not be waived.<sup>131</sup>

Section 234, which provides insurance for condominium mortgages, is amended by section 303 of the new Act to permit individual condominium mortgages in projects involving fewer than twelve units without an FHA blanket mortgage.<sup>132</sup> Additionally, section 221(d)(3), previously restricted to rental and cooperative projects, is expanded by the new Act to give added emphasis to the condominium form of tenure.<sup>133</sup> The amendment provides for the conversion of cooperatives and rental projects to condominium ownership if the mortgage is

<sup>129</sup> *Id.*

<sup>130</sup> Secretary Weaver testified as follows:

This section would permit FHA to waive any other statutory limitation on such items as loan to value, size of dwelling unit, or *maximum mortgage amount*, if such limitation would prevent the insurance of an otherwise acceptable risk to carry out the purpose of this section. In addition to one to four family sales units, financing could be provided for rental or cooperative projects and for individual ownership of apartments in a condominium project.

1968 Senate Hearings, *supra* note 7, at 70 (emphasis added).

<sup>131</sup> National Housing Act § 212, 12 U.S.C.A. § 1715c (1969), *amending* 12 U.S.C. § 1715c (1964). Section 212 concerns minimum wage standards for workers involved in the construction of the building to be mortgaged.

<sup>132</sup> *Id.* § 234(c), 12 U.S.C.A. § 1715y(c) (1969), *amending* 12 U.S.C. § 1715y(c) (1964). The Senate Committee observed:

*Condominium ownership has proven to be a useful and flexible tool in providing homeownership opportunities and in the upgrading of deteriorated housing in older neighborhoods. This amendment would facilitate its usefulness by authorizing insurance for condominium units in small projects without the expense of an unnecessary project mortgage and dual title transfer.*

S. REP. No. 1123, *supra* note 4, at 38 (emphasis added). The new Act also made two additional changes in § 234: (1) increasing the maximum mortgage amount from 75 to 80% of the appraised value of the property in excess of \$20,000 (National Housing Act § 234(c), 12 U.S.C.A. § 1715y(c) (1969), *amending* 12 U.S.C. § 1715y(c) (1964)), and (2) making eligible for a blanket condominium mortgage a project containing 4 units instead of 5 as previously required. *Id.* § 234(f), 12 U.S.C.A. 1715y(f) (1969), *amending* 12 U.S.C. § 1715y(f) (1964).

<sup>133</sup> National Housing Act §§ 221(i), (j), *added by* 12 U.S.C.A. §§ 1715l(i), (j) (1969).

within section 221(d)(3) limits.<sup>134</sup> Thus a condominium may be financed by forty-year mortgages at a three percent interest rate,<sup>135</sup> but the interest rate will increase as the income of the owner rises, and will become a market rate if the apartment is sold to anyone except another low- or moderate-income person or a nonprofit organization approved by the Secretary.<sup>136</sup> A condominium owner under this program must pay a minimum downpayment of three percent of the purchase price.<sup>137</sup> A parallel expansion of section 221(d)(3) permits conversion of rental projects to cooperative ownership.<sup>138</sup>

#### E. Rehabilitation Assistance

Increased aids for repair and rehabilitation have great potential for a condominium program. Section 115 of the Housing Act of 1949 provides outright grants for such rehabilitation,<sup>139</sup> and section 503 of the new Act increases those grants from \$1,500 to \$3,000 for low-income homeowners<sup>140</sup>—those earning \$3,000 or less per year.<sup>141</sup> Higher-income homeowners with monthly expense, including available loans, in excess of twenty-five percent of their income are also eligible.<sup>142</sup> Although the grants were previously restricted to homeowners in urban renewal areas,<sup>143</sup> they can now go to areas certified by the local governing body to contain a substantial number of structures in need of repair and rehabilitation.<sup>144</sup> The structures must be under consideration for rehabilitation or concentrated code enforcement within a reasonable time, and the locality must have an approved workable program in effect.<sup>145</sup>

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<sup>134</sup> *Id.* §§ 221(i)(1), (2)(A)(i), added by 12 U.S.C.A. §§ 1715l(i)(1), (2)(A)(i) (1969). Section 221(i) speaks of a "conversion" to condominium ownership which would apparently require that the project be approved and constructed as a rental or cooperative project. The rationale for the conversion requirement is that, as originally contemplated, § 236 was to replace § 221(d)(3). Note 95 *supra*. Consequently, the conversion provision focused upon providing for existing § 221(d)(3) projects. Now, however, the future of § 221(d)(3) is not clear. As earlier discussed (note 95 *supra*), § 236 as enacted eliminated coverage for "moderate" income families. Therefore, it is not unlikely that § 221(d)(3) will continue to be funded in order to provide for such families.

<sup>135</sup> National Housing Act §§ 221(i)(2)(A)(iii), (iv), added by 12 U.S.C.A. §§ 1715l(i)(2)(A)(iii), (iv) (1969).

<sup>136</sup> *Id.* § 221(i)(4), added by 12 U.S.C.A. § 1715l(i)(4) (1969).

<sup>137</sup> *Id.* § 221(i)(2)(B), added by 12 U.S.C.A. § 1715l(i)(2)(B) (1969).

<sup>138</sup> *Id.* § 221(j), added by 12 U.S.C.A. § 1715l(j) (1969).

<sup>139</sup> Housing Act of 1949, § 115, 42 U.S.C. § 1466 (Supp. III 1967).

<sup>140</sup> *Id.* § 115(c), added by 42 U.S.C.A. § 1466(c) (Supp. 1969).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* § 115(a), 79 Stat. 457 (1965), as amended, 42 U.S.C.A. § 1466(a)(2) (Supp. 1969).

<sup>144</sup> *Id.* § 115(a)(2), added by 42 U.S.C.A. § 1466(a)(2) (Supp. 1969).

<sup>145</sup> *Id.*

Provisions for FHA insurance of home improvement loans are liberalized by section 308 of the new Act.<sup>146</sup> The maximum amount of such loans for single-family homes is increased from \$3,500 to \$5,000, and the maximum maturity from five years and thirty-two days to seven years and thirty-two days.<sup>147</sup> However, the Act does not change the existing provisions for insurance of loans for repair or rehabilitation of buildings with two or more dwelling units. Condominiums would therefore seem to be governed by the existing provisions which set two maximum figures on such loans—with respect to the building the loan cannot exceed \$15,000, and the average loan per apartment unit cannot exceed \$2,500.<sup>148</sup>

Most significantly, the new Act increases the authorization and expands the coverage of section 312 of the Housing Act of 1964.<sup>149</sup> Under section 312, property owners (including condominium owners) are eligible for direct federal rehabilitation loans of up to \$10,000 per dwelling unit at zero to three percent interest<sup>150</sup> and for up to a twenty-year term.<sup>151</sup> Previously section 312 was limited to urban renewal or code enforcement areas,<sup>152</sup> but its coverage has been expanded.<sup>153</sup> A

<sup>146</sup> National Housing Act § 2(b), 12 U.S.C.A. § 1703(b) (1969), *amending* 12 U.S.C. § 1703(b) (1964).

<sup>147</sup> *Id.* The new provision also permits a discount rate of \$5 to \$5.50 per \$100 of face amount under \$2,500.

<sup>148</sup> *Id.* § 2(b), 12 U.S.C. § 1703(b) (1964).

<sup>149</sup> Housing Act of 1964, § 312, 42 U.S.C.A. § 1452b (Supp. 1969), *amending* 42 U.S.C. § 1452b (1964). Section 312 is discussed in Quirk, Wein & Gomberg, *supra* note 1, at 384-85.

<sup>150</sup> Representative Widnall, the author of section 312, observed during a colloquy with Secretary Weaver:

The 312 program. It is referred to as a 3-percent program, but this is a maximum rate. It is flexible with you. As the administrator you can cut it down from 3 percent.

1968 *House Hearings*, *supra* note 9, at 134.

<sup>151</sup> Housing Act of 1964, § 312(c), 42 U.S.C. § 1452b(c) (1964); National Housing Act § 220(h)(2)(i), 12 U.S.C. § 1715k(h)(2)(i) (Supp. III 1967). The \$10,000 limitation may be increased by 45% in a high-cost area.

<sup>152</sup> Housing Act of 1964, § 312(a), 78 Stat. 790 (1964), *as amended*, 42 U.S.C.A. § 1452b(a) (Supp. 1969).

<sup>153</sup> The new Act makes loans eligible in the following areas:

[W]hich the governing body of the locality has determined, and so certifies to the Secretary, contains a substantial number of structures in need of rehabilitation, (ii) there is in effect for the locality a workable program meeting the requirements of [section 1451 (c) of this title], (iii) the property is residential and owner-occupied, (iv) the property is in need of rehabilitation and is in violation of the local minimum housing or similar code, and (v) the area is definitely planned for rehabilitation or concentrated code enforcement within a reasonable time, and the rehabilitation of such property is consistent with the plan for rehabilitation or code enforcement . . . .

Housing Act of 1964, § 312(a)(1)(B), *added by* 42 U.S.C.A. § 1452b(a)(1)(B) (Supp. 1969). The statute does not appear to require approval by the Secretary of the local

further change made in section 312 is the new requirement that a borrower's income cannot exceed section 221(d)(3) limits.<sup>154</sup>

The tenant condominium could make effective use of these improved repair and rehabilitation programs. The availability of such funds is particularly significant since buildings can be acquired in many of our slums at little or no cost. The capital expenses of a tenant condominium program in such areas would therefore be limited to the repair and rehabilitation of buildings. Section 115 provides outright grants of up to \$3,000 for this purpose.<sup>155</sup> This capital subsidy suits the needs of extremely low-income families who could not achieve homeownership even with the benefit of interest subsidy under section 235. Such a family might be able to meet the expense of maintenance and taxes, but could not repay the capital cost.

The FHA insured home improvement loan meets a different need. A family owning a condominium unit under the program of minimal repair outlined earlier might desire to modernize it with funds available under this provision. Because the interest cost is relatively high—about ten percent—such a loan would be suitable for providing a new kitchen or bathroom but would not be appropriate for major rehabilitative work.

Section 312, which provides direct federal loans at zero to three percent, meets a broad spectrum of needs. Since the section is less expensive than interest subsidy programs based upon a market rate of interest paid to lending institutions, it should be a foundation statute for a tenant condominium program. This section could accommodate all families requiring subsidy except those with extremely low incomes who can achieve homeownership only through a capital subsidy such as that provided by section 115.

#### F. Public Housing

The new Act increases the authorization for public housing annual contribution contracts by \$100 million on the date of enactment, by \$150 million on July 1, 1969, and by another \$150 million on July 1, 1970.<sup>156</sup> These increases could provide 375,000 additional units of

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governing body's certification. With the exception of the workable program requirement, the provisions pose no particular difficulty.

<sup>154</sup> *Id.* § 312(a), 42 U.S.C.A. § 1452b(a) (Supp. 1969), amending 42 U.S.C. § 1452b(a) (1964). An exception to the new income limitations is made for existing urban renewal and code enforcement projects.

<sup>155</sup> Housing Act of 1949, § 115(c), added by 42 U.S.C.A. § 1466(c) (Supp. 1969).

<sup>156</sup> Housing Act of 1937, § 10(e), 42 U.S.C.A. § 1410(e) (Supp. 1969), amending 42 U.S.C. § 1410(e) (1964). The administration bill called for increased authorization

public housing over the next three years.<sup>157</sup> The public housing program enacted in 1937 now includes 680,000 units.<sup>158</sup>

The annual contribution contract is a contract between the local public housing authority and the Housing Assistance Administration that provides for subsidy to the local authority. Presently, the subsidy covers only the principal and interest on bonds issued to cover capital costs;<sup>159</sup> the public housing project must pay maintenance and other operating expenses out of rents. As a result, many families are too poor for public housing assistance.<sup>160</sup> However, Edgar F. Kaiser, Chairman of the President's Committee on Urban Housing, has pointed out that an interpretation limiting subsidy to debt service is not required by the language of section 10(b).<sup>161</sup> Section 10(b) provides that the subsidy may be based on "development, acquisition or administration cost, number of dwelling units, number of persons housed, or other appropriate factors;"<sup>162</sup> this language does seem to permit subsidy beyond debt service. The subsidy is limited in that it may not exceed by more than one percent the going rate on federal long-term bonds; but since the local authority's bonds are tax-exempt, subsidy could be substantially increased within the statutory limitation.<sup>163</sup>

The public housing program has become more concerned with providing ownership opportunities for tenants. Section 15(9) of the Housing Act of 1937, added in 1965, provided for the sale to tenants of detached or semi-detached public housing.<sup>164</sup> The new Act expands section 15(9) by amending it to permit tenants to purchase any type of

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for annual contribution contracts of \$100 million on the date of enactment, \$150 million on July 1, 1969 and 1970, and \$200 million on July 1, 1971 and 1972. S. 3029, 90th Cong., 2d Sess. § 203 (1968). Secretary Weaver testified that this 5-year program would provide approximately 775,000 units. 1968 Senate Hearings, *supra* note 7, at 75; 1968 House Hearings, *supra* note 9, at 67.

<sup>157</sup> S. REP. NO. 1123, *supra* note 4, at 28.

<sup>158</sup> *Id.*

<sup>159</sup> 1968 Senate Hearings, *supra* note 7, at 266.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Housing Act of 1937, § 10(b), 42 U.S.C. 1410(b) (1964).

<sup>163</sup> *Id.* Mr. Kaiser observed that the subsidy could be equal to about 2% above the going rate. He further observed:

The Housing Act of 1937 allows the payment of subsidy equal to about 2 percent above the going rate on Federal borrowings. Since local housing authority bonds are tax exempt, the cost of debt service is considerably less than the maximum allowed.

Accordingly, the Federal subsidy to public housing could be increased to permit housing for the very poor, without increasing the subsidies already authorized by the statute.

1968 Senate Hearings, *supra* note 7, at 266.

<sup>164</sup> Housing Act of 1937, § 15(9), added by 42 U.S.C. § 1415(9) (Supp. III 1967).

public housing unit, including condominium units in multi-family buildings.<sup>165</sup> As amended, section 15(9) provides for sale "if the property to be acquired is sufficiently separable from other property retained by the public housing agency to make it suitable for sale and for occupancy."<sup>166</sup> The committee reports make clear that condominium units are to be eligible for purchase.<sup>167</sup> The sales price to the tenant, which is not altered by the amendment, is fixed by the statute as the appraised value or the unamortized debt, whichever is greater.<sup>168</sup> The owner may, by contract, pay the sales price over a forty-year period<sup>169</sup> at an interest rate equal to the rate on bonds outstanding in connection with the project.<sup>170</sup> In addition, the owner must pay his pro rata share of the operating expenses of the project and local real estate tax on his unit.<sup>171</sup> Property so held may not be alienated. If the buyer does not make his contract payments and no member of his family residing in the dwelling assumes the contract, the local authority may acquire his interest at terms disadvantageous to him.<sup>172</sup> Section 15(9), therefore, does not provide for fee simple ownership. Apparently, legal title would pass to the buyer only at the end of his forty-year contract period. Additionally, the use of appraised value in the price formulation seems unnecessary since there is no reason for the local authority to make a profit on the sale to the tenant.<sup>173</sup>

The new Act also amends section 23 of the Housing Act of 1937<sup>174</sup>

<sup>165</sup> *Id.* § 15(9), 42 U.S.C.A. § 1415(9) (Supp. 1969), amending 42 U.S.C. § 1415(9) (Supp. III 1967). The National Association of Housing and Redevelopment Officials proposed an additional amendment to § 15(9) which would have permitted coverage of public housing units built prior to 1965. *1968 House Hearings, supra* note 9, at 482.

<sup>166</sup> Housing Act of 1937, § 15(9), 42 U.S.C.A. § 1415(9) (Supp. 1969), amending 42 U.S.C. § 1415(9) (Supp. III 1967).

<sup>167</sup> This would permit the sale to a public housing tenant of any property owned by a local housing authority so long as the property sold has sufficient individual identity (including cooperative or condominium units) to make it suitable for sale to, and occupancy by, the public housing tenant.

S. REP. NO. 1123, *supra* note 4, at 31-32; H. REP. NO. 1585, *supra* note 76, at 29-30.

<sup>168</sup> Housing Act of 1937, § 15(9)(A)(iii), 42 U.S.C. § 1415(9)(A)(iii) (Supp. III 1967).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* § 15(9)(B), 42 U.S.C. § 1415(9)(B) (Supp. III 1967).

<sup>171</sup> *Id.* §§ 15(9)(A)(i), (ii), 42 U.S.C. §§ 1415(9)(A)(i), (ii) (Supp. III 1967).

<sup>172</sup> *Id.* § 15(9)(D), 42 U.S.C. § 1415(9)(D) (Supp. III 1967).

<sup>173</sup> An amendment sponsored by Senators Tydings and Mondale would have retained the existing price formulation but would have permitted extended terms so that the buyer's total monthly payments would not exceed 20% of his income. S. 2343, 90th Cong., 1st Sess. § 1 (1967). Secretary Weaver objected to this provision. *1968 Senate Hearings, supra* note 7, at 1114. See also testimony of Senator Tydings, *id.* at 647-83.

<sup>174</sup> Housing Act of 1937, § 23, 42 U.S.C.A. § 1421b (Supp. 1969), amending 42 U.S.C. § 1421b (Supp. III 1967). The amendment originated in the House version of the bill. The KAISER REPORT states that although only three years old, the § 23 program "has proved

to authorize purchase by the local authority of a structure containing one or more leased housing units and the resale of such structure to the tenants. The statute does not formulate the resale price, nor does it restrain the local authority from conveying title to the tenant subject to a mortgage.<sup>175</sup> Further, the purchasing tenant or tenants need not be occupants of the leased units,<sup>176</sup> nor need they meet public housing income limitations. In the case of a multi-family structure, the purchasing tenants must represent units aggregating in value at least eighty percent of the structure's total value.<sup>177</sup>

The potential of section 23 as amended by the new Act is large indeed.<sup>178</sup> The local authority is given great flexibility in the purchase and resale of existing structures. It may purchase any structure containing one leased unit and resell the structure to the tenants, as a condominium or cooperative, at such price and on such terms as it sees fit. Particularly in view of the increased public housing authorization, a section 23 purchase and resale program could operate on a mass scale. In a short time such a program could change a city's basic form of tenure from rental to condominium ownership. Section 23's potential could best be realized by financing the resale of the building to the tenants under other provisions of law, such as section 235, thereby freeing the more flexible section 23 funds for use elsewhere.<sup>179</sup>

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the feasibility of subsidized existing standard housing." KAISER REPORT, *supra* note 13, § II, pt. 3, at 78.

<sup>175</sup> The statute provides:

Any such resale shall be made subject to such terms and conditions (including provision for deferment of the required downpayment and for elimination of or adjustments in the required interest payments during a temporary period) as may be necessary to enable the tenants involved to make the purchase without undue financial hardship.

Housing Act of 1937, § 23(g), *added by* 42 U.S.C.A. § 1421b(g) (Supp. 1969).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* Normally, no more than 10% of the units in a structure are to be leased under the § 23 program.

<sup>178</sup> Even prior to amendment the section has proven successful. The section permits a local authority to lease existing standard units in private structures (which need not be rehabilitated). Housing Act of 1937, § 23(d), *as amended*, 42 U.S.C.A. § 1421b(d) (Supp. 1969). *See* H.R. REP. No. 1585, *supra* note 76, at 356 (1968). Section 23 allows local authorities to sublease to families eligible for public housing. The program also is known as the rent certificate program. As of June 1968 the § 23 program had provided shelter for over 16,000 families. *Id.*

The KAISER REPORT recommends that renewal options be permitted under the § 23 program, thereby facilitating new construction. KAISER REPORT, *supra* note 13, Committee Report at 16, § II, pt. 3, at 79. This proposal may require legislation since the statute specifies that the term shall not exceed 5 years "and shall be renewable by such agency and owner at the expiration of such term." Housing Act of 1937, § 23(d), *as amended* 42 U.S.C.A. § 1421b(d) (Supp. 1969).

<sup>179</sup> Discussions of homeownership (including the Indian tribe programs) of public

### G. *Recapture of Interest Subsidy*

It is generally recognized that some form of subsidy will be needed to make the new goal of homeownership a reality to many low- and middle-income families. Edgar F. Kaiser has testified that of the 26 million new or rehabilitated units needed over the next ten years, "6 to 9 million require some form of subsidy to provide decent housing for those who cannot pay the marketplace costs for shelter."<sup>180</sup>

If interest subsidy<sup>181</sup> is to be widely used, the next question is whether past subsidy payments will be recaptured by the government when the owner no longer requires the subsidy.<sup>182</sup> Assume, as is prob-

housing are found in *1967 Senate Hearings, supra* note 51, at 1575-78; Burstein, *New Techniques in Public Housing*, 32 LAW & CONTEMP. PROB. 528 (1967).

<sup>180</sup> *1968 Senate Hearings, supra* note 7, at 279 (testimony of Edgar J. Kaiser). Subsidy could, of course, take the form of capital subsidy. A capital subsidy would operate to reduce the amount of acquisition and/or construction costs to be borne by the owner. Secretary Weaver has reported that his department is experimenting with urban renewal "write-down" (sale at negotiated price, perhaps \$1) to provide homeownership for low-income families. *1967 Senate Hearings, supra* note 51, at 10. The new Act constitutes a clear congressional decision to use an interest subsidy rather than a capital subsidy.

<sup>181</sup> See National Housing Act §§ 235, 236, added by 12 U.S.C.A. §§ 1715z, 1715z-1 (1969).

<sup>182</sup> Current subsidy, of course, will be discontinued when an owner's income rises above the sliding scale standards set by the statute. However, subsidy is not altered by increases in the owner's equity. The owner's equity will increase as the mortgage is amortized even when income remains constant. Additionally, the market value of the home may increase. When the owner can refinance his mortgage at market rate interest and a new term of years for a principal amount which would enable him to retire the subsidized mortgage, he should be required to do so if monthly payments under the new mortgage will be no higher than those under the subsidized mortgage. Such a refinancing requirement has been imposed in the rural housing program. Mr. Howard Bertach of the Farmers Home Administration described the rural housing interest subsidy program as follows:

Our present loans, as you indicated, are extended at 5-percent interest to the borrower. We are now paying about 6½-percent interest to the investor. But we are not locking that 6½ percent in for the life of the loan, but only for the period of redemption.

Ordinarily this is locked in only for 3 to 5 years.

So it is difficult to cost out the premium interest that is now being paid. It is about 1⅓ percent for the period of the insurance endorsement.

It is also significant that in our present statute, when a borrower of the Farmers Home Administration achieves equity in his home, sufficient to enable him to go into the conventional money market and refinance his debt to us, he is required to do it.

The average housing loan borrower, even though his payments are amortized over a 30 year period, retires his loan in about 12 years. So that again, the interest subsidy applies only during the period of time that he is a borrower of ours. *1968 House Hearings, supra* note 9, at 1224.

The rural housing program has experienced 112 foreclosures out of 225,000 loans. *Id.* at 1206. No recapture of interest subsidy is required. *Id.* at 1225. A refinancing requirement would be appropriate under the new Act.



able under the new Act, that an owner receives a six percent interest subsidy (a market-rate mortgage at seven percent subsidized down to one percent) on a \$15,000 mortgage with a thirty-five year term. The owner's annual subsidy is \$641.76. After eight years, and \$5,134.08 of subsidy, the owner must move and is obliged to sell the house. Assume that the market value of the house has risen to \$20,000 and that the owner's mortgage is reduced to \$13,932. If the government recaptures the previously paid subsidy the owner will still realize \$934 from the sale of the house. However, if the market value of the house remains \$15,000, the owner would have a loss of \$4,066 on the sale. Clearly, the result in the second example is improper; any attempt to recapture should be limited to proceeds of the sale above existing mortgage debt.

The question of recapture can also be raised by voluntary transfers, such as transfers by gift, and by involuntary transfers, such as those brought about by condemnations or executions of judgments. The most comprehensive treatment of the recapture question is found in Senator Percy's homeownership legislation. Under the Senator's proposal the Treasury would maintain an "investment account" for each owner showing the amount of subsidy expended for him.<sup>183</sup> If the owner sold his property, a lien would be placed on the property in the amount of the owner's subsidy account or in the amount of the "taxable long term capital gain," whichever is less.<sup>184</sup> Thus, if there were no taxable long-term capital gain there would be no recapture.<sup>185</sup>

Senator Percy's bill also provides for recapture of subsidy if the owner's income rises above specified levels.<sup>186</sup> The effect of this provision is in part to reduce present and future interest subsidy, but past subsidy is also recovered. When the owner's income rises above a specified level, he must make payments to the government; his obligation continues as long as a balance remains in his investment account. The owner's annual obligation is determined by a statutory formula as follows: (1) five percent of income between eighty and ninety percent of section 221(d)(3) limits; (2) ten percent of income over ninety

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<sup>183</sup> S. 1592, 90th Cong., 1st Sess. § 113(b) (1967). Under S. 1592 the interest rate was fixed for the term of the mortgage. The new Act reduces interest subsidy as the owner's income rises.

<sup>184</sup> *Id.* § 115.

<sup>185</sup> The Internal Revenue Code, however, provides that if a taxpayer sells his principal residence and reinvests the proceeds in a new home, the gain will be recognized only to the extent that the proceeds of the sale exceed the cost of the new home. INT. REV. CODE OF 1954, § 1034. The nonrecognized gain reduces the cost basis of the new home. *Id.* § 1034(e). The Percy bill apparently does not contemplate an analogous requirement which would place a lien on the owner's new home.

<sup>186</sup> S. 1592, 90th Cong., 1st Sess. § 114 (1967).

percent of section 221(d)(3) limits; and (3) fifteen percent of income above section 221(d)(3) limits. Consequently, of every \$1,000 of income earned above the 221(d)(3) limits, \$150 will be used to reduce the investment account.<sup>187</sup>

Recapture poses a serious problem. Because the subsidy, and thus the potential liability, will add up so quickly, it is unlikely that the homeowner will make a profit on sale or other disposition. The possibility of such profit is the most significant attribute of homeownership, however. Recapture leads to a situation similar to New York's Mitchell-Lama cooperatives where the tenant-stockholders have no opportunity for gain but do bear the risk of loss.<sup>188</sup>

Existing federal housing subsidy programs handle the recapture problem in various ways. The section 221(d)(3) program, which provides a below-market interest rate for cooperative and rental projects, contains no provision for recapture. The section 221(h) program, which provides for a below-market interest rate for rehabilitation and resale, requires that the mortgage become a market-rate mortgage if the property is sold to an ineligible purchaser,<sup>189</sup> but does not provide for recapture. The rent supplement statute makes an attempt at recapture in the case of sale by a tenant-cooperator. In order to be eligible under the rent supplement program, a cooperative member must be

<sup>187</sup> The Internal Revenue Code permits a taxpayer to deduct "all interest paid" on "indebtedness." INT. REV. CODE OF 1954, § 163. Although it may be arguable, this section appears to allow the deduction of interest subsidy recapture payments.

Mr. Andrew J. Biemiller, Director, Department of Legislation, AFL-CIO, testified against what he considered to be the iniquitous features of the recapture provision of S. 1592:

Perhaps the most iniquitous feature of the bill is what has been termed as "ingenious arrangement" to keep tabs on the amount of subsidy paid to each individual homeowner so he can be subject to a Treasury lien if he ever earns enough income to be covered by the proposal.

1967 *Senate Hearings, supra* note 51, at 530.

Senator Percy defended this aspect of his bill in a dialogue with another opponent of the measure:

SENATOR PERCY. You feel if the homeowner moves and sells his house at a \$4,000 profit, and he has received \$1,000 of subsidy, that he should be allowed to pocket the \$4,000 and not repay the \$1,000 subsidy.

MR. LASHMAN. I think the answer to your question is we don't think this is going to happen.

SENATOR PERCY. That has happened to the housing market since—

MR. LASHMAN. Not with the homes we are talking about here.

SENATOR PERCY. I'll bet 90 percent of the homes sold have appreciated value in them that offset depreciation. Building costs have gone up sufficiently. The scarcity of housing has provided for appreciation in sale of most houses.

*Id.* at 538.

<sup>188</sup> See Quirk, Wein & Gomberg, *supra* note 1, at 366 n.23.

<sup>189</sup> National Housing Act § 221(h)(5)(F), 12 U.S.C. § 1715l(h)(5)(F) (Supp. III 1967).

one "who, upon resale of his membership to the cooperative, will not be reimbursed for any equity increment accumulated through payments under this section."<sup>190</sup> The meaning of this provision is not entirely clear, but in a real sense, all the accumulated equity is attributable to the rent subsidy, since it made possible the cooperator's investment.

Against this background of existing, if inconsistent, precedent and the considerable discussion in connection with Senator Percy's bill,<sup>191</sup> it is curious that the new Act, the accompanying Senate and House reports, and the congressional debate were all silent on the question of recapture. Nevertheless, the congressional silence reflects a decision that there be no recapture under the new Act.<sup>192</sup> The congressional

<sup>190</sup> *Id.* § 101(c), 12 U.S.C. § 1701s(c) (Supp. III 1967). The statute is not elucidated by the Secretary's regulations. 24 C.F.R. §§ 5, 30 (1968).

A type of recapture question is presented by the termination of a rent supplement project. The owner provides 10% of equity if it is a limited dividend corporation as defined by the Secretary. National Housing Act §§ 101(B), 221(d)(3), 12 U.S.C. §§ 1601s(B), 1715l(d)(3) (Supp. III 1967). In addition, the effect of rent supplement is to guarantee as much as 70% of the owner's rent roll. This situation has led a commentator to observe that potential windfall profits may occur:

A housing owner cannot sell or refinance his project without the consent of the FHA Commissioner. Thus a project might continue to receive supplements for the entire term of the mortgage and its concurrent rent supplement contract. Neither the statute nor the FHA pronouncements shed any light on the important question of who gets what when the mortgage has been retired. Under its ordinary regulatory agreements, the mortgagor is freed from FHA's controls at that point, since the FHA is no longer securing his debt. If this is true in the case of rent supplement projects, the project owner receives precisely the windfall that the government withholds from subsidized tenants in co-ops, condominiums, or Tulsa-type projects. Although the building itself may be obsolete, and not worth much more than the cost of wrecking it, the land below should be quite valuable. To obtain this benefit the housing owner had to put up very little capital and, because of the supplements, exposed himself to only a small risk of loss. The availability of a windfall sometime in the twenty-first century is probably unnecessary to attract sponsors today. The other incentives should be sufficient. Consequently FHA ought to limit the housing owner's rights on expiration of the rent supplement contract. For example, FHA could obtain an option to purchase at a reduced price, or an option to renew the contract and its powers of supervision under the Regulatory Agreement. Such measures would reduce the costs of the program to the federal government and prevent empire building by sponsors. Note, *Government Housing Assistance to the Poor*, 76 YALE L.J. 508, 533-34 (1967) (footnote omitted).

<sup>191</sup> Additional discussion in connection with Senator Percy's proposal is found at 1967 Senate Hearings, *supra* note 51, at 1615 (additional material on S. 1592 submitted by Senator Percy); Butler, *supra* note 31, at 89-92.

<sup>192</sup> Senator Percy has pointed out to the authors:

There is no provision in the Housing and Urban Development Act of 1968 for recapture. This was discussed in committee and the Senators decided to reject the recapture provision.

Letter from Senator Charles H. Percy to William J. Quirk, Aug. 12, 1968.

decision to forego recapture may lead to some abuse, but it gives administrative simplicity and immediate ownership housing.<sup>193</sup>

#### H. National Housing Partnership

Title IX of the Housing and Urban Development Act of 1968<sup>194</sup> is an effort to apply the vast resources of large industries to "the provision of housing for our low- and moderate-income families."<sup>195</sup> It offers large businesses sizeable depreciation deductions<sup>196</sup> and the opportunity to

<sup>193</sup> One likely abuse is at the initial sale of a cooperative or the sale of a § 235(j) unit where an eligible purchaser may receive subsidy. It would seem likely in this situation that the seller would realize a premium on the sale of the unit that is attributable to the buyer's future interest subsidy. This would be unconscionable from any point of view.

<sup>194</sup> Housing and Urban Development Act of 1968, § 902(a), 42 U.S.C.A. § 3932(a) (Supp. 1969). The President may cause the creation of additional corporations if he finds it to be in the national interest. *Id.* § 902(b), 42 U.S.C.A. § 3932(b) (Supp. 1969). This title was recommended by the Kaiser Committee. *See 1968 Senate Hearings, supra* note 7, at 12 (testimony of Secretary Weaver); *id.* at 269-71 (testimony of Edgar F. Kaiser); KAISER REPORT, *supra* note 13, Committee Report at 15, 17-19, § II, pt. 3, at 85-87.

<sup>195</sup> *1968 Senate Hearings, supra* note 7, at 12 (testimony of Secretary Weaver); *id.* at 270 (testimony of Edgar F. Kaiser). Secretary Weaver's detailed statement observed:

Although the housing industry is one of the very largest in the country, there is no single existing entity which accounts for more than one-third of 1 percent of the market, and there are few firms that carry on their activities on a national scale.

*Id.* at 103-04.

<sup>196</sup> The availability of large depreciation deductions is a strong incentive to housing production. The recent success of the § 221(d)(3) below-market-interest-rate program is said to be the result of the availability of such deductions under that program. Fifty thousand units were approved in the 18 months ending July 1968 pursuant to the § 221(d)(3) program. HOUSE & HOME, Jan. 1969, at 86. The below-market-interest-rate program contains many elements considered unfavorable by the building industry. Builders' fees are limited to 10% of construction cost (KAISER REPORT, *supra* note 13, § II, pt. 3, at 79-80) and there is a relatively low maximum limit on per unit construction costs (normally \$13,500 for a two bedroom unit; § 221(d)(3) (ii)). Regulatory agreements with FHA limit cash distribution to 6% of equity (KAISER REPORT, *supra* note 13, § II, pt. 3, at 82) and management fees to approximately 4½% of gross rent. HOUSE & HOME, Jan. 1969, at 86. The KAISER REPORT, *supra* note 13, § II, pt. 3, at 81-82, reports that such fees usually run from 3% to 6% of gross rental. Except for very advantageous financing, there is little besides the availability of large depreciation deductions to account for the success of the below-market-interest-rate program. This very favorable financing gives § 221(d)(3) housing a strong advantage over conventionally financed housing. These projects generally are 100% occupied inasmuch as a unit which rented for \$155 per month with conventional financing would rent at only \$115 per month with § 221(d)(3) financing. HOUSE & HOME, Jan. 1969, at 86. As fees are figured on the basis of a 7% vacancy ratio, there is an accumulation of substantial additional revenue in projects which are 100% occupied. *Id.* Further, a large § 221(d)(3) project can be financed with little or no cash. *See* financing discussion in KAISER REPORT, *supra* note 13, § II, pt. 3, at 81. Section 221(d)(3) enjoys such popularity with builders that there is opposition within the industry to its being phased out and replaced with new § 236; a program aimed at lower-income families. These lower-income families are thought by the industry to be more destructive than the middle-income families at which the § 221(d)(3) program is aimed. Accordingly, the industry

spread risk over a number of projects.<sup>197</sup> The Act authorizes the creation of a privately funded corporation to be controlled by a fifteen-man board of directors, three to be appointed by the President of the United States and twelve to be elected by the stockholders.<sup>198</sup> The corporation is empowered to form a limited partnership under the District of Columbia Uniform Limited Partnership Act<sup>199</sup> with itself as general partner.<sup>200</sup> The statute ensures that deductions for depreciation on partnership property can be passed through to the limited partners by providing that notwithstanding any inconsistency with the District of Columbia Uniform Limited Partnership Act, the "partnership organized pursuant to this section shall be deemed to have the legal status of a limited partnership."<sup>201</sup> The Internal Revenue Service is thus foreclosed from maintaining that the "partnership" created is in fact a corporation under the Internal Revenue Code.<sup>202</sup> Were the entity treated as a corporation the depreciation deduction would not be passed through to the limited partners to offset other income but would be taken on the corporation's tax return.<sup>203</sup>

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fears higher management expenses which would in turn make the § 236 program less attractive to investors notwithstanding the continued availability of large depreciation deductions. *See generally* HOUSE & HOME, Jan. 1969, at 88. However, at least one builder has expressed the view that the § 236 program will be a "gravy train." NATIONAL REAL EST. NEWSL., Jan. 1969, at 59.

<sup>197</sup> 1968 Senate Hearings, *supra* note 7, at 12, 104, 270. Secretary Weaver noted that "[h]ousing is often a risky business on an individual project basis." *Id.* at 12.

<sup>198</sup> Housing and Urban Development Act of 1968, § 904, 42 U.S.C.A. § 3934 (Supp. 1969).

<sup>199</sup> *Id.* § 907(a), 42 U.S.C.A. § 3937(a) (Supp. 1969). The initial stock offering may require that buyers also purchase interests in the national housing partnership. *Id.* § 903(c), 42 U.S.C.A. § 3933(c) (Supp. 1969).

<sup>200</sup> *Id.* § 907(d), 42 U.S.C.A. § 3937(d) (Supp. 1969).

<sup>201</sup> *Id.* § 907(b), 42 U.S.C.A. § 3937(b) (Supp. 1969).

<sup>202</sup> INT. REV. CODE OF 1954, § 7701; Treas. Reg. § 301.7701 (1965).

<sup>203</sup> Unquestionably the Service would have successfully maintained that the limited partnership does not qualify for partnership treatment. The Internal Revenue Service regulations provide that the partnership characteristic of unlimited liability may be found if a corporation is the general partner of a limited partnership provided the corporation has substantial assets in addition to its partnership interest. Treas. Reg. § 301.7701-2(d)(2) (1965). The title IX corporation would have no purpose in holding other substantial assets. Housing and Urban Development Act of 1968, § 906, 42 U.S.C.A. § 3936 (Supp. 1969). Further, even if the partnership characteristics of unlimited liability were found, the national housing partnership would probably still be treated as a corporation under the regulations, since it would possess the corporate characteristics of continuity of life and centralized management. Treas. Reg. § 301.7701-1-15 (1965). Thus, the proponents of the national housing partnership were less than candid when they repeatedly asserted that they were not requesting anything to which they were not entitled under existing law. *See 1968 Senate Hearings, supra* note 7, at 270, 274, 284 (testimony of Edgar F. Kaiser);

The benefits of partnership status are quickly evident from the following hypothetical. Assume that ten limited partners each contribute \$10 million to the partnership. If the average equity required for partnership projects is five percent, the partnership, when its funds are fully invested, will own projects worth \$2 billion. Subtracting eight percent of the value as attributable to nondepreciable land,<sup>204</sup> the depreciable base will be \$1.84 billion. If the double declining balance method is used in conjunction with a forty-year useful life, the partners will take \$92 million in depreciation deductions for the first year. Over the first ten years the available deductions will amount to over \$738 million. If all the limited partners are corporations in the fifty percent tax bracket, the depreciation deduction will result in tax savings of over \$369 million; if the limited partners are all individuals in the seventy percent bracket, tax savings of over \$516 million will result. Thus, the return on investment is in the form of tax deductions, and the partnership would probably be satisfied to break even in the operation of its projects. Rentals would be expected to meet, but not necessarily exceed, all operating expenses and amortization of debt.

All of the housing constructed by the national housing partnership is likely to be rental rather than ownership housing, because the depreciation deduction will be lost if the partnership does not own the housing.<sup>205</sup> Apartments and garden apartments will probably be built

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*id.* at 104 (testimony of Secretary Weaver); KAISER REPORT, *supra* note 13, Committee Report at 18.

It is of interest that title IX was not submitted to the congressional committees with jurisdiction over the Internal Revenue Code; namely, the Senate Finance Committee and the House Ways and Means Committee. Although title IX does not amend the Internal Revenue Code, its only purpose is to alter the tax position of the partnership and the partners. In contrast, when Senator Kennedy's bill was proposed (S. 2100, 90th Cong., 1st Sess. (1967)), which in essence accomplished the same result, the hearings were held by the Senate Finance Committee. 1968 Senate Hearings, *supra* note 7, at 617. Additionally, the views of the Treasury Department were apparently not solicited with respect to title IX or other provisions of the new Act.

<sup>204</sup> The Department of Housing and Urban Development reports a land value-total value ratio of 8% for multi-family dwellings. 1968 Senate Hearings, *supra* note 7, at 1350.

<sup>205</sup> Tax incentives based upon the depreciation deduction result in rental rather than ownership housing since the builder must retain ownership in order to take the deduction. If tax incentives are to be utilized, the authors would prefer an investment credit approach. Such an approach could be designed so that the tax benefits could be retained by the builder after sale of his building to a condominium. Consequently, tax incentives need not discriminate against ownership housing. The Kaiser Committee has recommended a 3% credit for low- or moderate-income projects identical to the existing investment credit for machinery. KAISER REPORT, *supra* note 13, Committee Report at 17. The idea of an investment credit for low-income projects was first suggested by Senator Robert Kennedy in 1967. S. 2100, 90th Cong., 1st Sess. § 301(a) (1967).

rather than single-family housing. But since the partnership will not be concerned with an operating profit, the single-family home-builders in the neighborhood may be faced with hard competition.<sup>206</sup>

The statute provides that the limited partnership may engage in the planning and execution of new construction and rehabilitation "for the benefit of families and individuals of low or moderate income."<sup>207</sup> The expression "low or moderate income" is not defined, and there is no cross reference to section 221(d)(3) or the regulations thereunder which define the expression in terms of specific income limitations. Apparently the partnership will have a good deal of discretion in determining the income groups for whom it builds. Public criticism and the threat of legislative amendment, however, should prevent the partnership from building luxury housing. Furthermore, it is not necessary for the partnership to move into high-income groups because it is not concerned with an operating profit. On the other hand the desire for a secure investment will also tend to keep the partnership out of the ghettos.<sup>208</sup> The likely target of the partnership are families earning \$7,500 to \$10,000 since it will desire a secure investment.

Since the sale of a project is not restricted by the statute, the partnership is likely to contemplate a sale of its projects after the early heavy depreciation deductions have been taken—after about ten years. Some thought might be given to requiring that the tenants be offered the project at a bargain price. The incentives given to the partnership seem more than sufficient without a potential capital gain profit on the sale of projects,<sup>209</sup> and sale to the tenants in this manner fulfills the

<sup>206</sup> Local interests may participate in projects with the partnership. The statute provides that the partnership shall not subscribe to more than 25% of a project's equity with the remainder to be provided by local interests. Housing and Urban Development Act of 1968, § 907(e), 42 U.S.C.A. § 3937(e) (Supp. 1969). However, the partnership may disregard the 25% limitation if it is decided that the balance of the required equity is "not readily obtainable" from responsible local investors. *Id.*

<sup>207</sup> *Id.* §§ 906(a)(1), 907(a), 42 U.S.C.A. §§ 3936(a)(1), 3937(a) (Supp. 1969).

<sup>208</sup> This likelihood makes especially pertinent Senator Robert Kennedy's testimony that the bill should require at least 75% of the new units to be constructed in the central city. He testified:

In my judgment, it is an absolute necessity for the Congress to require that at least 75 percent of the new units . . . be built in the center of our cities. Otherwise, we will merely repeat the mistakes of our past, mistakes which during the last several decades caused too little attention to be given to our major cities; mistakes which produced housing which was not accessible to those who needed it; and mistakes which resulted in yearly increases rather than decreases in the number of non-whites living in substandard housing units.

1968 Senate Hearings, *supra* note 7, at 619.

<sup>209</sup> The Douglas Report comments generally that the tax incentive approach to housing "would be inefficient and ineffective." DOUGLAS REPORT, *supra* note 9, Introduction

expressed overall goal of homeownership. A reasonable price to the tenants might be the amount of outstanding mortgage and any initial equity put in by the partnership.<sup>210</sup> However, the partnership's initial equity would be reduced by depreciation, and, in the usual case, the project would therefore be offered to tenants for the amount of outstanding mortgages.

## II

### THE ROCKEFELLER PROGRAM

The past year has witnessed a surge in housing legislation on the state as well as the federal level. Perhaps the most ambitious and controversial of the state housing schemes is the one recently enacted in New York. Unlike the 1968 federal legislation, the New York program places little emphasis on expanding homeownership opportunities. Both the New York and the federal legislation, however, stress the importance of involving private enterprise in the rebuilding of our cities and make use of tax incentives to encourage such involvement.<sup>211</sup>

#### A. *Attracting Private Participation*

The New York legislation creates the New York State Urban Development Corporation (UDC), which is designated a "corporate

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and Summary at 90. Existing provisions of the tax law provide substantial incentives for ownership housing in the form of interest and property tax deductions and for rental housing in the form of excess depreciation. The Treasury reports the cost of existing provisions to the government in 1968 as follows: interest on mortgages—\$1.9 billion; property taxes—\$1.8 billion; and depreciation of rental housing (in excess of straight-line depreciation)—\$250 million. *Hearings on The 1969 Economic Report of The President Before The Joint Economic Committee*, 91st Cong., 1st Sess. 38 (1969). Since high-bracket taxpayers receive more benefit from these deductions than low-bracket taxpayers, the existing provisions can be viewed as having an effect opposite to the policy goals of the 1968 Act. For an excellent discussion of the use of tax laws for non-revenue purposes see Caplin, *Federal Tax Policy—The Need for Reform*, 56 GEO. L.J. 880, 889-90 (1968).

<sup>210</sup> This formulation is similar to that projected by Senator Kennedy under his bill. See discussion of Senator Robert Kennedy's Aug. 4, 1967, amendments in Quirk, Wein & Gomberg, *supra* note 1, at 403 n.178. The Senator's formulation was the outstanding mortgage plus the owner's initial equity as reduced by investment credit taken.

<sup>211</sup> Governor Rockefeller described the proposal in his Budget Message of January 16, 1968 as follows:

I am recommending the establishment of a New York State Urban Development Corporation to transform the state from passive lender to active partner of private enterprise in carrying out urban development projects. While the corporation could act as redeveloper itself, it would rely mainly on incentives to insure the participation of private developers in various projects. The corporation will be able to operate a finished project which a private contractor has



governmental agency of the state constituting a political subdivision<sup>212</sup> and public benefit corporation."<sup>213</sup> The corporation has nine directors,

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developed with Urban Development Corporation assistance under a leaseback arrangement.

N. Y. Times, Jan. 17, 1968, at 34, col. 2-3.

<sup>212</sup> The language "political subdivision" is intended to confer federal tax exemption on the interest of UDC's bonds. See INT. REV. CODE OF 1954, § 103. A recent amendment to § 103 denies tax exemption on the interest of "Industrial Development Bonds." *Id.* § 103(c). The Rockefeller bonds would fall into this category but for an exemption for "residential real property for family units." *Id.* § 103(c)(4)(A).

A glut in the tax exempt bond market has been predicted by former Assistant Secretary to the Treasury Stanley Surrey. N.Y. Times, Sept. 28, 1968, at 45, col. 7. Mr. Surrey observed that new net borrowing by state and local governments is currently between \$9 and \$10 billion a year. *Id.*, Sept. 28, 1968, at 51, col. 1. Mr. Surrey further observed that the result of the flood of tax exempt bonds will be a steep rise in the interest on such bonds causing increased cost to the issuer, increased tax benefits to high-income purchasers and increased cost to the Federal Treasury. *Id.*, Sept. 28, 1968, at 45, col. 7. The Treasury reports that tax exempt bonds in 1968 cost the federal government \$1.8 billion. *Hearings on The 1969 Economic Report of The President Before the Joint Economic Committee*, 91st Cong., 1st Sess. 43 (1969).

<sup>213</sup> N.Y. UNCONSOL. LAWS § 6254(1) (McKinney Supp. 1969). Companion legislation to the N.Y. State Urban Development Corporation Act creating a non-profit private "New York State Urban Development and Research Corporation" was enacted by Chapter 173 of the Laws of 1968. *Id.* §§ 6301-25. The Chairman and Board of Directors of this corporation are the same persons who serve in those capacities for the State Urban Development Corporation. *Id.* § 6254(2). Indeed, the powers of the Corporation for Urban Development and Research of New York are quite similar to those granted the State Urban Development Corporation. The former corporation is empowered to acquire, construct, reconstruct, rehabilitate, and improve housing accommodations as well as industrial, commercial, and recreational structures and facilities. *Id.* §§ 6257(b), 6253(c). The corporation or its subsidiary may acquire real property by condemnation. *Id.* § 6310(2).

Although § 8 of the statute requires the corporation to give "primary consideration" to local needs and desires, by a two-thirds vote of its Board of Directors it may override local disapproval of any of its activities. *Id.* § 6308(2). Accordingly, it is given discretion to avoid compliance with local laws, codes, ordinances, or charters. *Id.* § 6308(3). In any such case it must comply with requirements of the State Building Construction Code. *Id.*

The corporation is given power to act through subsidiary corporations organized pursuant to the Business Corporation Law, the Membership Corporation Law and articles II, IV, V, or XI of the Private Housing Finance Law. N.Y. UNCONSOL. LAWS § 6309(1) (McKinney Supp. 1969). Unlike the Urban Development Corporation, the Urban Development and Research Corporation is empowered to give grants, make loans, and provide advisory services to individuals to achieve its corporate purposes. *Id.* § 6307(a). Thus Governor Rockefeller stated:

This second corporation will provide considerable latitude in urban development by its ability to carry out projects which UDC could not undertake. For example, this corporation could make rehabilitation loans to individual home owners or actually carry out the rehabilitation.

Special Message to the Legislature, Feb. 27, 1968, at 2.

The activities of the Urban Development and Research Corporation are financed through the issuance of its bonds and notes to investors, the sale of membership certificates, and the collection of annual dues from its membership. It is also intended that it receive grants and loans from private sources and participate in federal, state, and local programs.

The essential difference between the State Urban Development Corporation and the

five of whom are appointed by the Governor with the advice and consent of the Senate. The other four are designated by office; they are the Commissioner of Commerce, the Superintendent of Banks, the Superintendent of Insurance, and the Director of the Office of Planning Coordination.<sup>214</sup> From among the directors, the Governor appoints a Chairman, who is to be the UDC's chief executive officer.<sup>215</sup> The UDC is authorized to issue bonds in an aggregate principal amount not to exceed \$1 billion.<sup>216</sup>

The UDC may undertake condemnation and construction of projects itself,<sup>217</sup> or it may exercise its powers and functions through

Urban Development and Research Corporation is that the former is a public corporation and receives certain state appropriations; on the other hand the Urban Development and Research Corporation is private and may therefore make gifts and loans to private individuals to carry out its corporate purposes. The State constitution prohibits the State Urban Development Corporation from making such gifts and loans. N.Y. CONST. art VII, § 8.

There is some question, however, whether this method of avoiding the gift and loan provisions of the constitution achieves that purpose. The draftsmen of this legislation take the position that a public corporation is not able to make gifts and loans and therefore believe it necessary to create the Urban Development and Research Corporation as a private corporation. Although it is clear that a private corporation is not subject to the gift and loans restrictions of the State constitution, it is doubtful that a "private" corporation may be given power to override local laws, codes, and regulations. Certainly if the power to override local laws were given to only one private construction company, this would be constitutionally objectionable. Thus, to justify the exercise of the powers and rights accorded the Urban Development and Research Corporation, one would have to find that the Urban Development and Research Corporation was a public rather than a private instrumentality and therefore unable to make gifts and loans to private individuals.

Another piece of companion legislation established the Urban Development Guarantee Fund of New York. N.Y. UNCONSOL. LAWS §§ 6341-60 (McKinney Supp. 1969). The Chairman and Board of Directors of this Fund are the same persons who serve in those capacities for the State Urban Development Corporation. *Id.* §§ 6304(2), (3). The Urban Development Guarantee Fund would guarantee loans to homeowners and small businessmen in an amount not exceeding five times the amount of its capital. *Id.* § 6308. The capital of the Fund would derive from private gifts, grants, sale of debentures, and loan insurance premiums to be paid by borrowers. *Id.* §§ 6305(b), (h), 6310. The Fund is authorized to guarantee loans for the purchase and "substantial improvement" of an existing building. *Id.* § 6303(4). Apparently, condominium loans are eligible for such a guaranty.

<sup>214</sup> N.Y. UNCONSOL. LAWS § 6254(1) (McKinney Supp. 1969).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* §§ 6267-68.

<sup>217</sup> As a precondition to UDC's power to "undertake the acquisition, construction, reconstruction, rehabilitation or improvement of a [residential] project," the UDC must find (1) that there exists in the area "a need for safe and sanitary housing accommodations for persons or families of low income, which the operations of private enterprise cannot provide," *id.* § 6260(a)(1), and (2) "[t]hat the project has been approved as a project of a housing company pursuant to the provisions of the private housing finance law." *Id.* § 6260(a)(2). This finding appears to be more a matter of form than substance since it could be accurately made for any area in New York City.

“subsidiary” corporations formed pursuant to the Business Corporation Law, the Membership Corporation Law, or the Private Housing Finance Law, article two (limited profit), article four (limited dividend), or article eleven (non-profit).<sup>218</sup> The Governor has stated that housing projects will be executed by subsidiaries formed under the Private Housing Finance Law.<sup>219</sup> Redevelopment companies (article five of the Private Housing Finance Law) are excluded<sup>220</sup> as permissible

<sup>218</sup> *Id.* § 6262(1).

<sup>219</sup> Special Message to the Legislature of Feb. 27, 1968, at 3.

<sup>220</sup> The inclusion of limited dividend housing companies and the exclusion of redevelopment companies (N.Y. PRIV. HOUS. FIN. LAW §§ 100-25 (McKinney 1962), *as amended*, (McKinney Supp. 1969)) is otherwise puzzling. Limited dividend companies and redevelopment companies may be organized as partnerships or trusts, (*id.* § 71(1), *as amended*, § 101 (McKinney Supp. 1969)) and are eligible to purchase a residential project from the Urban Development Corporation or its subsidiaries. N.Y. UNCONSOL. LAWS §§ 6257(1), 6253(4) (McKinney Supp. 1969). In theory, the limited dividend housing company and the redevelopment company are similar in that they assume that the availability of the condemnation power (for assembling parcels), the permission to clear sites, and the existence of a tax exemption are sufficient incentives to encourage the construction of reasonably priced housing. Historically, the redevelopment company statute was designed to meet the wishes of the Metropolitan Life Insurance Company whose Stuyvesant Town was the first redevelopment company project. Metropolitan insisted that it be free, despite tax exemption, to rent to tenants without regard to their income. This would not have been permissible under the limited dividend company statute which expressly imposes income restrictions on eligible occupants. *See* C. ABRAMS, *THE CITY IS THE FRONTIER* 95-98 (1965).

Incorporation of a limited dividend housing company requires the consent of the State Commissioner of Housing (N.Y. PRIV. HOUS. FIN. LAW § 73 (McKinney Supp. 1969)) and involves supervision by him. *Id.* § 84. The municipal supervising agency must consent to the incorporation of a redevelopment company (*id.* §§ 104, 102(2)) and must supervise it. *Id.* §§ 118, 120. Again, there are fixed statutory income limitations for tenants or cooperators in a limited dividend project. The income for a family of three or more may not exceed seven times the rental or carrying charges in a project completed or acquired on or after July 1, 1955. *Id.* § 85-a(2)(a). But for redevelopment companies there are only such restrictions as might be provided for in its contract with the municipality. *Id.* § 114(2) (McKinney 1962). Limited dividend company rentals are fixed by the State Commissioner of Housing, (*id.* § 85 (McKinney Supp. 1969)); redevelopment company rentals are controlled by a contract negotiated with the municipality. *Id.* § 114(2) (McKinney 1962). Rent can be increased only with governmental consent. *Id.* §§ 85, 87 (McKinney Supp. 1969) (limited dividend companies); *id.* § 114(2) (McKinney 1962) (redevelopment companies).

The two statutes are quite similar in operation. Municipalities are authorized to condemn property on behalf of the companies (limited dividend companies, *id.* §§ 500, 501 (McKinney 1962); redevelopment companies, *id.* § 119 (McKinney Supp. 1969)) and are reimbursed by the company for all sums expended in such condemnation. *Id.* § 501 (McKinney 1962) (limited dividend companies); *id.* § 119 (McKinney Supp. 1969) (redevelopment companies). Thus, neither company receives a “write-down” (sale below cost) on the acquired land. Both companies are authorized to “take over and dispose of existing improvements” after receiving title from the municipality. *Id.* § 501(1) (McKinney 1962) (limited dividend companies); *id.* § 119 (McKinney Supp. 1969) (redevelopment companies). Neither company has any responsibility for relocating displaced tenants or businesses.

subsidiaries, apparently to avoid overriding the local supervision required under that law.

Both companies are eligible for municipal real estate tax exemption. Limited dividend companies may be exempted for a 50-year period on the increased value of the property after development over the assessed valuation (including land and improvements) prior to development. *Id.* § 93(5) (McKinney 1962). Redevelopment companies may be exempted for a 25-year period on this increased value. *Id.* § 125 (McKinney Supp. 1969).

Sale of the projects of either type of company is restricted during the period of tax exemption. The project of a limited dividend company may not be sold for a profit as long as it is owned by the limited dividend company. *Id.* § 82(2). However, the statute permits a voluntary dissolution of a company organized after April 1, 1962, without consent of the Commissioner after 20 years of occupancy of the project. *Id.* § 96(1). There is apparently no provision requiring repayment to the municipality for the 20-year period of tax exemption. Redevelopment companies may not sell their projects without consent of the local legislative body "[u]ntil the termination of the tax exemption." *Id.* § 112(1) (McKinney 1962). They may voluntarily dissolve after termination of the tax exemption period, or before that time provided that the redevelopment company pays to the municipality all taxes from which it was exempted plus 5% interest. *Id.* § 123 (McKinney Supp. 1969) (This provision appears to present speculative possibilities since an immediate appreciation of land value would be normal following the assemblage of parcels and site clearance). Following a voluntary dissolution, the project of either type of company apparently can be sold for a profit with no provision for recapture of the municipality's tax exemption.

Both companies are authorized to issue bonds secured by a mortgage on the project. *Id.* § 81 (limited dividend company); *id.* § 111 (redevelopment company). The interest on such bonds would not be exempt from federal taxation. The Internal Revenue Service has ruled that a limited dividend company is not a "political subdivision" of the state and consequently the interest on its indebtedness is not exempt. I.T. 3411, 1940-2 CUM. BULL. 103. Further, although a limited dividend company may receive mortgage funds from the municipality (N.Y. PUB. HOUS. LAW § 93 (McKinney 1955)), neither company receives state mortgage funds as do limited profit housing companies. N.Y. PRIV. HOUS. FIN. LAW §§ 12(2), 22, 23 (McKinney Supp. 1969).

The authority to carry out rehabilitation seems doubtful under either statute. *Id.* §§ 102(1), 103(2), *as amended*, (McKinney Supp. 1969) (redevelopment company); *id.* §§ 71(2), 72(2), *as amended*, (McKinney Supp. 1969) (limited dividend company). Both companies, however, are authorized to "maintain" and "operate" buildings which would permit a low-cost program directed at putting the building into operating condition. *Id.*

Both statutes require that stockholders (or income debenture holders) pay in a minimum contribution in cash or property. Limited dividend companies—20% of actual project cost, *id.* § 79 (McKinney Supp. 1969); redevelopment companies—10% of actual project cost, *id.* § 109. The minimum contribution requirements for both companies are "inapplicable" if federal funds or FHA insured mortgages "are used in financing the project in whole or in part." *Id.* § 79 (limited dividend companies); *id.* § 109 (redevelopment companies).

The return on the stock (or income debentures) may not exceed 6% per annum. *Id.* § 76 (limited dividend companies); *id.* § 107 (redevelopment companies). These companies may thus be said to approach a "non-profit" status. Since the permitted annual return is minimal, much of the housing built under these statutes has been cooperative.

In practice, the redevelopment companies have proven to be more popular, accounting for 21,200 housing units in the City of New York as opposed to 11,300 housing units built as limited dividend companies. HOUSING STATISTICS HANDBOOK, *supra* note 8, at 3.

The overall pattern of the two statutes therefore is similar in that although annual return will not exceed 6% on invested capital, substantial profits seem possible, and

The "subsidiary" status of a corporation formed by the UDC continues for as long as (1) more than half of its voting shares are held by the UDC or (2) a majority of the subsidiary's directors are designated by the UDC.<sup>221</sup> Thus, if the UDC retains the power to designate directors, the corporation, even though completely privately owned, enjoys the special status as a "subsidiary." Advantages of this status include (1) exemption from municipal regulation, including maintenance inspections,<sup>222</sup> (2) eligibility to receive money and donations from the UDC,<sup>223</sup> and (3) complete exemption from local tax including exemption from the pre-improvement taxes which a successor in interest would be required to pay.<sup>224</sup>

The statute apparently contemplates that acquisition and construction of a project will be carried out by a UDC controlled "subsidiary" rather than by private enterprise, since only the UDC or its subsidiary can take advantage of the statute's most unique provision: the power to override local zoning, building, and other laws.<sup>225</sup> Following construction, however, private interests may acquire the project and retain all exemptions existing at the time of transfer without obtaining any approval, permit, or certificate of occupancy.<sup>226</sup> Thus it would appear that all work done prior to transfer is exempt, but that any work subsequent to transfer must comply with local law. Work done by the UDC after a contract of sale has been entered into, however, is exempt from this general requirement.<sup>227</sup>

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indeed likely, following voluntary dissolution of either type of company after a 20- or 25-year period. The possibility of long term profit does not, however, seem sufficient to attract private enterprise in view of the small annual return and substantial investment required (10% or 20% of the actual project cost). Additionally, the private investor would have the responsibility of managing a housing project. Directed toward this last point is the provision of the Rockefeller law which provides that the UDC will manage the project as a lessee of the owning company. N.Y. UNCONSOL. LAWS § 6255(14) (McKinney Supp. 1969). The investor in this situation would have a passive investment with some annual return and the possibility of substantial profits at the end of a 20- or 25-year period. Although this may induce some amount of equity investments in the housing market, it raises the question whether the public is paying too high a price. A condominium program under which the benefits of land appreciation would go to the occupant-owner clearly seems preferable.

<sup>221</sup> N.Y. UNCONSOL. LAWS § 6262(1) (McKinney Supp. 1969).

<sup>222</sup> *Id.* §§ 6262(2), 6266(3).

<sup>223</sup> *Id.* §§ 6262(2), 6255(16).

<sup>224</sup> *Id.* § 6272.

<sup>225</sup> *Id.* § 6266(3). After taking certain procedural steps, the UDC may override the locality whenever "compliance is not feasible or practicable." *Id.* This determination is made by the UDC. *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* § 6257(1).

Claims that the legislation provides incentives to enlist the active involvement of the private sector are somewhat misleading, because the legislation requires that government not only promote development of projects but also involve itself in their construction. Unlike any other local, state, or federal program, except public housing,<sup>228</sup> the Rockefeller plan contemplates that government will sponsor, develop, construct, and possibly manage the housing project. The actual construction work will be done by private firms as contractors to the corporation or its subsidiary, but it is government which is to rebuild the slums. This is hardly a true partnership between government and private enterprise. It would seem that incentives to enlist the active involvement of the private sector<sup>229</sup> are not directly related to the task of rebuilding the slums, except insofar as they enable private enterprise to participate in the profits which will accrue.

Whether private enterprise will invest in the finished project is doubtful. Return on investment will be limited to six percent, since

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<sup>228</sup> The Kaiser Committee has observed that the traditional public housing program limits the role of private enterprise to that of contractor. KAISER REPORT, *supra* note 13, § II, pt. 3, at 75. The Committee notes that the program affords private enterprise no opportunity to be a "developer" (purchasing land, supervising design, constructing the building, selling or leasing the completed project), or to be a "builder" (supervising the design and constructing the building). *Id.*

<sup>229</sup> See Special Message to the Legislature, Feb. 27, 1968, at 1.

<sup>230</sup> In 1955 the legislature passed the limited profit housing company law generally known as the Mitchell-Lama law. N.Y.L. 1955, ch. 407, *as amended*, N.Y. PRIV. HOUS. FIN. LAW, article II (McKinney 1962). In addition to the benefits conferred upon limited dividend and redevelopment companies (availability of condemnation power for site assemblage and authority of municipality to exempt projects from real estate tax), Mitchell-Lama companies are authorized to receive governmental capital loans at below-market interest rates. Either the state or a municipality may loan a Mitchell-Lama company up to 95% of total project cost for a cooperative project and up to 90% for a rental project. *Id.* §§ 22, 23 (McKinney Supp. 1968). A state loan may not exceed a 50-year term for a new project (35 years for a rehabilitation project), and the interest rate is the "same rate of interest paid or to be paid by the state for the definitive housing bonds issued on account of such loan." *Id.* § 26 (2). A municipal loan is not statutorily limited as to permissible term or interest rate. In practice, however, New York City has followed the state's procedure in loaning money for no more than 50 years at an interest rate equivalent to the city's borrowing rate. The minimum equity to be provided in cash or property to the Mitchell-Lama company was 10% for a rental and 5% for a cooperative project. *Id.* § 21 (McKinney 1962), *as amended*, (McKinney Supp. 1968). The minimum contribution for rental projects was effectively reduced to 5% by a 1968 amendment creating an "urban rental company" which is defined as a company whose project is "in or adjacent to a municipality." *Id.* §§ 12(2-a), 21 (McKinney Supp. 1968).

Real estate tax exemption, prior to a recent amendment, was authorized up to "fifty per centum of the value of the property included in the completed project" for a period not to exceed 30 years. N.Y.L. 1961, ch. 803, N.Y. PRIV. HOUS. FIN. LAW § 33(1) (McKinney 1962), *as amended*, (McKinney Supp. 1968). Presently, real estate tax exemption is authorized up to 100% of the increased value of the property for a 30-year term, provided

a residential project may be sold only to a housing company (limited-profit,<sup>230</sup> limited dividend, redevelopment, or non-profit).<sup>231</sup> By way

that taxes paid shall not be less than 10% of the annual shelter rent or carrying charges." *Id.* § 33(1)(a) (McKinney Supp. 1968). Shelter rent is defined as the "total rents received from the occupants of a project less the cost of providing to the occupants electricity, gas heat and other utilities." *Id.*

Mitchell-Lama dwelling units are limited to "families of low income" whose probable income does not exceed 6 times (7 times if the family has 3 or more dependents) the rental of the unit. *Id.* § 31(2)(a). If a family's income exceeds the prescribed maximum income by 25%, the family is subject to removal. *Id.* § 31(3). However, where it is found that hardship would result, the family may remain until its income exceeds the prescribed maximum by 50%. *Id.* Surcharge payments are required when the family's income exceeds the prescribed maximum (*id.*), and increases in rent or carrying charges may be made only with the approval of the Commissioner or supervising agency. *Id.* § 31(1)(a).

Annual return on invested capital (the stock or income debentures making up the 5% minimum contribution) may not exceed 6% per year. *Id.* § 28 (McKinney 1962). Long term profit upon sale following dissolution is effectively foreclosed with one possible exception. A company aided by a state or municipal loan advanced prior to May 1, 1959, may voluntarily dissolve, with the consent of the Commissioner or supervising agency, after 35 years of occupancy. *Id.* § 35(1). The remaining balance of the mortgage must be paid and the municipality reimbursed for "a sum equal to the total of all accrued taxes for which tax exemption was granted." *Id.* A company aided by a state or municipal loan made after May 1, 1959, may voluntarily dissolve, without consent, 20 years after occupancy in which case the remaining balance of the mortgage must be paid. *Id.* § 35(2). Upon dissolution (of a company aided by a loan made before or after May 1, 1959), title to the project may be conveyed to the owners of the capital stock provided payment is made of all current operating expenses, taxes, indebtedness, and the par value and accrued dividends on outstanding stock prior to dissolution. *Id.* § 35(3). Any surplus is paid to the municipality except in projects aided by a state loan made after May 1, 1959. *Id.* It should be noted that a project aided by a state loan made after May 1, 1959, is not expressly obligated to pay the municipality a sum equal to real estate taxes for which exemption was granted. *Id.* § 35(2). It is thus possible that such a project may give rise to long term profit (after 20 years) to the owners.

Prior to dissolution, and during the first 35 years of occupancy for a company aided by a pre-1959 loan or the first 20 years of occupancy by a company aided by a post-1959 loan, the project can be sold only to another company organized pursuant to article II. *Id.* § 36(1). The successor company acquires the project subject to existing mortgage obligations and is entitled to the benefit of tax exemptions held by the selling company. *Id.* Following such sale the selling company may be dissolved with the consent of the Commissioner or the supervising agency (*id.*); however, the stockholders "shall in no event receive more than the par value of their stock with accrued and unpaid dividends." *Id.* § 36(2).

In view of the limited annual return and the limited possibilities of long term return, it may be asked what incentives the Mitchell-Lama law offers private enterprise. The answer seems to lie in the allowable builders' fees and overhead allowance which is divided between builders and sponsors, although there is no statutory or regulatory provision for compensating sponsors. 1967 N.Y. TEMP. COMM'N OF INVESTIGATION ANN. REP., 1967 N.Y. Leg. Doc. No. 96, *An Investigation Concerning the Limited-Profit Housing Program* 59, 69 [hereinafter cited as STATE INVESTIGATION COMMISSION REPORT]. The STATE INVESTIGATION COMMISSION REPORT observed, for example, that on one project (total cost of \$26,290,000), the allowable builder's fee and overhead allowance was \$2,059,000. *Id.* at 71. Of this amount \$1,559,000 was received by the sponsor and \$500,000 by the builder. *Id.*

The STATE INVESTIGATION COMMISSION REPORT also discusses the following: methods by

of contrast, the interest rate on United States government securities has recently approached 6.5 percent.<sup>232</sup> A housing company investment

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which minimum equity contributions (5% of the project cost) are met by paper transactions rather than cash, *id.* at 65-68; favoritism and political interference in the selection of sponsors and grants of tax exemption, *id.* at 73-78; undisclosed relationships between the general contractor and his subcontractors, *id.* at 95-96; methods of estimation and verification of construction costs, *id.* at 96-98; and a legal fee of \$520,000 in connection with land acquisition for one project, *id.* at 149-57.

The original intent of the Mitchell-Lama law was to provide housing for families in the income range of \$5,000 to \$10,000 per year. Thus, the Joint Legislative Committee on Housing and Multiple Dwellings observed that the proposed Mitchell-Lama law will make possible construction and development of rental housing at prices as low as \$19 a room per month or a bit higher in the larger metropolitan centers. N.Y. PRIV. HOUS. FIN. LAW § 10 (McKinney 1962) (Historical Note).

In view of the income eligibility requirements (6 or 7 times the rent), housing priced at about \$20 per room would be available for families earning between \$5,000 and \$10,000. This price range is plausible in view of the constitutional and statutory mandates that state-assisted housing be provided only for "families of low income." N.Y. CONST., art. XVIII; N.Y. PRIV. HOUS. FIN. LAW §§ 12 (9), 31(2)(a) (McKinney Supp. 1968). However, a recently announced 1,100-unit Mitchell-Lama project to be built on the Ruppert Brewery site was reported as planning rentals of \$25-\$32 per room for 220 units, \$35-\$45 per room for 130 units, an average of \$54 per room for 620 units, and \$55-\$70 per room for 130 units. City of New York, Housing and Development Administration, News Release, May 22, 1968, No. 32-68. *See also* N.Y. Times, June 21, 1968, at 82, col. 1. The rent per room prior to "skewing" (*see* note 241 *infra*) is between \$46 and \$50. A family of 4 with an income of \$41,160 would thus be eligible for a seven room apartment in that project. In fact, Congressman William F. Ryan (Dem. N.Y.) testified that the Mitchell-Lama program requires a minimum income of \$10,000 per year. 1968 House Hearings, *supra* note 9, at 1268.

In 1962, the state enacted the so-called "HOPE Loan" provisions for Mitchell-Lama cooperatives. N.Y. PRIV. HOUS. FIN. LAW § 19 (McKinney 1962). These provisions are generally misstated as making available equity downpayment loans to low-income persons desiring to purchase apartments. *See* 1966 N.Y. STATE HOUSING FINANCE AGENCY ANNUAL REPORT 20.

In fact, the "HOPE Loan" provisions do not authorize loans to those who wish to purchase cooperative apartments. As a general rule, a Mitchell-Lama company may issue its stock only for money or property received. N.Y. PRIV. HOUS. FIN. LAW § 19 (McKinney 1962). The HOPE provisions create an exception to this rule by authorizing the company to issue stock for promissory notes if the note is endorsed by the State Commissioner of Housing and a \$200 cash payment is made. *Id.* The HOPE provisions also authorize the State Housing Finance Agency to loan funds to a housing company in the face amount of such promissory notes. *Id.* § 44(18). Such loans are to be repaid within 10 years and are in no way dependent upon the status of the promissory note. Thus, if a purchaser defaults on his obligation to the housing company, it remains liable to the State Housing Finance Agency.

Since the "HOPE Loan" provisions place the risk of loss upon the housing company, they have not been used in economically sound projects. Over half of all HOPE loan funds have been made to one chronically troublesome project. Out of a total amount of \$4,562,460.04 of HOPE loans, \$2,393,878.40 of these loans have been made to the Lindsay Park project (Brooklyn). 1966 N.Y. STATE HOUSING FINANCE AGENCY ANNUAL REPORT 25.

<sup>231</sup> N.Y. Urban Development Corporation Act § 3(4), N.Y. UNCONSOL. LAWS § 6257(1) (McKinney Supp. 1968).

<sup>232</sup> On January 29, 1969, the Treasury offered a 15-month note yielding 6.42% and a 7-year note yielding 6.29%. N.Y. Times, Jan. 30, 1969, at 43, col. 4.



does have long-term capital gain potential, but such gain is not likely to be realized until near the end of the period during which dissolution is prohibited.<sup>233</sup> Apparently, the main incentive relied upon in the Rockefeller plan is the supposed pass-through of the depreciation tax deduction to the individual investor accomplished by chapters 516 and 517 of the Laws of 1968, which authorize the organization of limited dividend and redevelopment companies as general or limited partnerships.<sup>234</sup> This incentive is similar to that previously discussed in relation to the national housing partnership and unquestionably is attractive to individual and corporate investors. But even if the New York provisions are upheld under the state constitution, it is questionable whether they can withstand attack by the United States Treasury. Unlike the national housing partnership program, the New York plan is not protected by federal statute.

An example shows how the New York plan operates. Assume that the UDC establishes a limited dividend company to undertake a particular project. The project cost is \$10 million, financed by \$500,000 of UDC funds and a \$9.5 million federally-insured mortgage. After completion, the project's assets or the limited dividend company's shares are sold at cost to a limited dividend partnership, with the partnership assuming the mortgage and paying \$500,000 in notes. The partnership then leases the project back to the UDC for management, as the legislation expressly provides; the terms of the lease might provide that the partnership is to receive no annual return. Assuming that \$1 million of the project cost is attributable to land and other non-depreciable items, the partnership owns a depreciable asset worth \$9

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<sup>233</sup> Although the stock of a housing company may be sold at any time, it would command limited market value since the purchaser would be restricted to a 6% return as long as the housing company exists. However, as the period during which dissolution is prohibited expires, the stock would appreciate to reflect the fact that market rentals may be changed following dissolution.

<sup>234</sup> Curiously, most authorities had considered this impossible to accomplish without a constitutional amendment:

This [permitting partnerships to be housing companies] would avoid the present onerous tax consequences resulting from the "double" taxation of corporations and would allow the depreciation advantages to be taken by the individual sponsor as well as the corporations. *Unfortunately, it would seem impossible to accomplish this without a constitutional amendment* which would broaden the provisions of Article XVIII to include individuals and partnerships in the *provision presently limited to corporations.*

Morris, *The Development of New Middle Income Housing in New York*, 10 N.Y.L.F. 492, 515 (1964) (emphasis added). Another recent amendment, N.Y.L. 1968, ch. 518, permits a limited profit housing company to become a member of a general or limited partnership.

The Douglas Report concluded that the tax incentives approach would be both "inefficient and ineffective." DOUGLAS REPORT, *supra* note 9, Introduction and Summary at 90.

million to be written off over forty years. If the double declining balance method of depreciation is elected, the partners can report \$2,036,021 in depreciation deductions on their federal tax returns over a five-year period. If the partnership is composed of three individuals whose marginal federal tax rates are seventy-eight percent, their tax savings are \$1,588,096.<sup>235</sup> This is accomplished without any initial cash investment and without any responsibility for the operation of the project.

### B. *Funding of the State Urban Development Corporation*

The State Urban Development Corporation is authorized to issue bonds in an aggregate principal amount not to exceed \$1 billion.<sup>236</sup> Although the bonds may be secured by a pledge of corporate revenues and by a mortgage covering all or part of a project,<sup>237</sup> bondholder security remains an acute problem. The statute permits the UDC to sell projects and grant mortgages on such terms as it determines to be "necessary or desirable;"<sup>238</sup> the UDC thus has the power to dispose of projects below fair market value—to "write-down"—and to provide subsidized interest for the mortgages it grants.<sup>239</sup> The UDC could for instance sell a project costing \$10 million to the government at a \$5 million loss.

It seems clear that without substantial write-downs or interest subsidy the Rockefeller program will be unable to provide housing for families earning below \$10,000 per year. If write-downs or interest subsidies are not used, the program will only provide additional Mitchell-Lama type financing together with extraordinary powers to override local governments. Particularly in view of the Mitchell-Lama experience,<sup>240</sup> the utility of this approach is doubtful—a program which provides housing for persons earning \$41,160 per year is not relevant to our urban problems.<sup>241</sup> But if subsidy approaches are used, it is

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<sup>235</sup> It is assumed that depreciation deductions will be passed through to the owners; this will not be the case if the United States Treasury treats the partnership as a corporation.

<sup>236</sup> N.Y. UNCONSOL. LAWS §§ 6267, 6268 (McKinney Supp. 1968).

<sup>237</sup> *Id.* § 6268 (1).

<sup>238</sup> N.Y.L. 1968, ch. 174, §§ 5(17), 7.

<sup>239</sup> The Mitchell-Lama program (note 230 *supra*) does not permit "write-down." But pursuant to N.Y.L. 1968, ch. 1089, the city Mitchell-Lama program is now authorized to write down and to grant interest subsidy.

<sup>240</sup> Rapidly rising costs under the Mitchell-Lama program appear to have already priced its housing out of the range of families earning \$5,000 to \$10,000 per year, the families for which the program was intended.

<sup>241</sup> See note 230 *supra*. In 1964, the legislature added to the Private Housing Finance Law § 44-a which has been variously described as creating a state "rent supplement" or

difficult to see how the bonds will be "self-liquidating"<sup>242</sup> or marketable in the first instance.<sup>243</sup>

Section 20 of the Urban Development Act is an attempt to remedy the otherwise deficient bondholders' security by giving the Chairman of the UDC in effect a "blank check" on the state Treasury. It provides for a debt-service reserve fund to be used for payment of the principal

"capital grant" program. N.Y.L. 1964, c. 272, § 2 (codified as N.Y. PRIV. HOUS. FIN. LAW § 44-a (McKinney Supp. 1968)). Section 44-a authorizes the State Housing Finance Agency (HFA), subject to the provisions of any contract with bondholders, to lease up to 20% of the units in a new or existing Mitchell-Lama rental project, or 50% if "unusually difficult housing conditions exist," as found by the Commissioner. *Id.* § 44-a(1). The rent to be paid by the HFA is the otherwise established rent less an appropriate deduction for additional tax exemption granted. *Id.* The HFA may sublet the apartment at a rent equal to 20% of the occupant's probable income. *Id.* § 44-a(2). However, such rent must not be less than \$15 per room and an apartment may not be rented to a family whose probable income exceeds 5 times the otherwise established rental on the apartment. *Id.* § 44-2(2). This last requirement appears to be the only limitation on occupant eligibility; *i.e.*, beneficiaries of this program need not meet public housing eligibility standards.

The cost of the subsidy involved (the difference between the otherwise established rental and the amount received from the occupant) is borne by the State (through appropriations) and the municipality (through real estate tax exemptions). The subsidy borne by the municipality arises from an amendment made to the tax exemption provisions of § 33 creating a statutory tax exemption for HFA leased apartments operable without the consent of the municipality. *Id.* § 33(2). Section 44-a clearly has the potential for use as a "bail out" for projects with marketability problems.

Further, the HFA may purchase shares of a cooperative and sublease such units. It may not, however, purchase more than 20% of such stock. *Id.* §§ 12(2-b), 44(20). The 20% limitation apparently reflects the fact that cooperators are not permitted to deduct interest and taxes paid by the cooperative corporation unless 80% or more of the corporation's gross income "is derived from tenant-stockholders." INT. REV. CODE OF 1954, § 216(b)(1)(D).

Another attempt at economic integration in Mitchell-Lama housing is New York City's so called "skewed rent" program which is not expressly authorized by the legislature. Under this program the rents or carrying charges of certain apartments are raised and the additional revenue resulting thereby is used to lower the rents or carrying charges of other apartments in the project. Assume the established rent or carrying charge to be \$50 a room per month but that it was deemed desirable to occupy 20% of the building with families able to pay only \$30 a room per month. Under the skewed rent program, the 20% lower-income families would pay \$30 a room and the remaining 80% would pay \$55. This program makes it possible to rent some apartments in a project to persons of low income. Since maximum income eligibility is determined as a multiple of rent, the program also has the effect of allowing persons of high income, who would not otherwise be eligible, to occupy the apartments for which the rentals or carrying charges were raised. This program may be constitutionally objectionable since it provides housing for persons earning \$41,160. *See* note 230 *supra*.

<sup>242</sup> *See* note 230 *supra*.

<sup>243</sup> Special Message to the Legislature, Feb. 27, 1968, at 4. Of course, the legislature could appropriate money to be used for write-down subsidy. However, this appears unlikely since the Governor has already assured the legislature that "this program [Urban Development Corporation] could be carried out without any increase in State or municipal debt or cost to the taxpayer." *Id.*

and interest of bonds of the corporation.<sup>244</sup> An amount equal to the maximum amount of principal and interest which is to fall due in any succeeding calendar year must be maintained in the debt-service fund.<sup>245</sup> Should the reserves in the fund be insufficient in any given year, the Chairman of the UDC shall certify to the Governor and the State Director of the Budget the amount required to restore the debt-service reserve fund.<sup>246</sup> Following presentation of the certificate, the specified funds "shall be apportioned and paid to the corporation during the then current fiscal year."<sup>247</sup> Neither the Governor nor the Budget Director is authorized by the statute to perform any review function with respect to the Chairman's certification.

Section 20 poses serious state constitutional difficulties. Its "blank check" provision constitutes a guarantee of UDC bonds by the state. But article VII, section 8 of the New York state constitution expressly forbids such guarantee by providing that the "credit of the state" shall not "be given or loaned to or in aid of any individual, or *public or private corporation or association* . . ."<sup>248</sup> The guarantee of a public corporation's bonds clearly constitutes a gift of the state's credit to a public corporation within the meaning of the constitutional prohibition. Nor does the "blank check" provision meet the requirements of article XVIII of the constitution, which creates certain exceptions to article VII. Article XVIII authorizes the legislature to provide "for low rent housing for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes . . ."<sup>249</sup> Section 2 of article XVIII provides that "in aid of such purposes" the legislature may act in ten specified areas.<sup>250</sup> The only area which might be considered relevant to the Urban Development Corporation Act authorizes state loans to "corporations regulated by law as to rents, profits, dividends and disposition of their property . . ."<sup>251</sup> The UDC is not such a corporation, however, since it is not so regulated. If the "blank check" provision is an appropriation rather than a guarantee, it then violates the constitution's appropriation bill requirements. Article VII, section 7 of the New York constitution provides that "no money shall

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<sup>244</sup> N. Y. UNCONSOL. LAWS § 6270(1) (McKinney Supp. 1968).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* § 6270(3).

<sup>248</sup> N.Y. CONST. art. VII, § 8 (emphasis added).

<sup>249</sup> *Id.* art. XVIII, § 1.

<sup>250</sup> *Id.* art. XVIII, § 2.

<sup>251</sup> *Id.*

ever be paid out of the state treasury . . . except in pursuance of an appropriation by law; nor unless such payment be made within two years next after [its] passage . . . and every such law . . . shall distinctly specify the sum appropriated . . . ."<sup>252</sup> The "blank check" provision cannot be considered a valid appropriation law under the constitution, since it neither "distinctly specifies" any sum nor ensures that all payments will be made within two years of the Act. If the provision is considered neither a guarantee nor an appropriation but, as some suggest, a "legislative undertaking," its status is unclear. However, there is no known constitutional authority for an "undertaking" by the legislature.<sup>253</sup>

### C. *Discrimination in Government-Aided Construction*

The purposes of the UDC are to be accomplished by encouraging maximum participation of the private sector of the economy.<sup>254</sup> Minority-group workers unable to get jobs or the security of union membership are certainly a resource of this sector. An effective mechanism to provide employment opportunities to minority-group workers and to prevent discrimination in their employment is conspicuously lacking in the UDC's broad grant of jurisdiction, however.<sup>255</sup> Notwithstanding the great mass of federal,<sup>256</sup> state,<sup>257</sup> and local<sup>258</sup> legislation seeking to prohibit discrimination in employment, there is a special need to assure that this housing legislation will not itself serve as an instrument of discrimination against persons whose housing opportunities it seeks to expand.

Discrimination remains a serious problem despite corrective legislation. Since 1935 construction contracts in the state of New York for or on behalf of the state or a municipality have contained provisions which prohibit discrimination in employment,<sup>259</sup> yet such discrimination continues. Since 1940, labor unions in the state of New York have been forbidden to discriminate,<sup>260</sup> yet such discrimination has not abated. In 1962 most of the international unions affiliated with the building and construction trades department of the AFL-CIO signed

<sup>252</sup> *Id.* art. VII, § 7.

<sup>253</sup> As of the first anniversary date of the Rockefeller law, April 10, 1969, no UDC bonds have been issued.

<sup>254</sup> See pp. 849-59 *supra*.

<sup>255</sup> For a discussion of discrimination in the building trades see generally O'Hanlon, *The Unchecked Power of the Building Trades*, FORTUNE, Dec. 1968, at 102.

<sup>256</sup> *E.g.*, title VIII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964).

<sup>257</sup> *E.g.*, N.Y. LABOR LAW § 220-e (McKinney 1965); N.Y. EXEC. LAW § 296 (McKinney Supp. 1968); N.Y. CIV. RIGHTS LAW § 43 (McKinney 1948).

<sup>258</sup> *E.g.*, NEW YORK CITY, ADMINISTRATIVE CODE § 343-8.0.

<sup>259</sup> N.Y. LABOR LAW § 220-e (McKinney 1965).

<sup>260</sup> N.Y. CIV. RIGHTS LAW § 43 (McKinney 1948).

a program for fair practices with what was then the President's Committee on Equal Employment Opportunity; yet discrimination in the construction industry persists.<sup>261</sup> The Equal Employment Opportunity Commission set up by title VII of the Civil Rights Act of 1964 now has a backlog of 1,900 uninvestigated complaints that causes an eleven-month wait for processing through the conciliation stage.<sup>262</sup>

Against this background, the Urban Development Corporation is required to "take affirmative action . . . to the end that residents of areas in which projects are to be located shall be afforded priority in the construction work . . ." <sup>263</sup> Regrettably, this section does not set forth the form such "affirmative action" is to take, nor does it grant to the corporation new powers to make such "affirmative action" effective. The corporation is under no obligation to build its projects in areas with substantial numbers of minority residents. Indeed, in light of the problems of relocation and racial unrest, it is unlikely to do so.<sup>264</sup>

If the UDC is to have sufficient power to provide not only housing but job opportunities, something more is needed. It is suggested that the corporation be placed under a statutory duty of certifying each year that every contractor and union which undertakes construction or supplies labor for the construction of its projects does not discriminate against minority workers. The determination resulting in certification or decertification should arise out of a public hearing. In any case where a contractor or union is found to discriminate, it should be the duty of the corporation not to allow the contractor to continue his contract nor the union to continue to supply labor.

This scheme may not guarantee the cessation of discrimination in employment; but if it failed to do so, it would be clear where responsibility lay.

#### D. *Exemption from Local Real Estate Taxation*

The real estate tax is widely criticized as regressive and uneconomic,<sup>265</sup> but until tax reform is effected the cities must continue to

<sup>261</sup> See generally *Hearings on Federal Role in Urban Affairs Before the Subcomm. on Executive Reorganization of the Senate Comm. on Government Operations*, 90th Cong., 1st Sess. 3114-27 (1967).

<sup>262</sup> ENGINEERING NEWS-RECORD, July 18, 1968, at 89.

<sup>263</sup> N.Y. UNCONSOL. LAWS § 6254(11) (McKinney Supp. 1968), amending N.Y.L. 1968, ch. 174, § 4 (11). The amendment changed the word "participation" to "priority."

<sup>264</sup> The chief executive officer of the UDC recently stated that ". . . New York City is going to be able to count on the services of the state development corporation in rehousing some of its low-income families in Scarsdale." Address by E.J. Logue, 25 J. HOUSING 459, 461 (Oct. 1968). The UDC has not yet, however, announced the acquisition of a site for low-income families in Scarsdale.

<sup>265</sup> The property tax can be viewed as a "consumption" tax similar to a sales tax.

rely upon the property tax to provide services for their citizens. New York City's largest single source of income is the real estate tax, which provides thirty-five percent of the city's total revenue.<sup>266</sup> On a national basis, property taxes account for forty-five percent of total local government general revenue.<sup>267</sup>

This tax base is eroded by the Rockefeller law in two ways. First, property owned by the UDC or its subsidiaries is tax-exempt.<sup>268</sup> Second, the Act extends its grant of exemption from local tax to successors in interest solely by act of the UDC.<sup>269</sup> Before passage of the Act, Governor Rockefeller stated:

UDC's housing program would be carried on through subsidiary corporations organized under the Private Housing Finance Law. *These subsidiary housing corporations would be entitled to receive exemption from local taxes to the extent presently permitted under State law.* It is anticipated that the housing would eventually come under private ownership through the sale of the stock in these subsidiaries to private investors.<sup>270</sup>

On the date of the Governor's message, state law required action by the local government concerned before the grant of any tax exemption.<sup>271</sup> The local government could determine the term and extent of

*See* REPORT TO NATIONAL COMMISSION ON URBAN PROBLEMS, IMPACT OF THE PROPERTY TAX, Table 2 at 9, 18, 22 (1968). The burden of such a tax falls upon the consumer, either an owner-occupant or a tenant to whom the landlord passes the tax in the form of increased rentals. Considered as a sales tax the substantial nature of the property tax becomes clear. For example, in New York City in 1960, 541,000 renter families paid real estate taxes (included in their rent) amounting to 33.3% or more of their rents; 568,000 paid between 24% and 33.3%; and 293,000 paid between 20% and 25%. *Id.* Table 10 at 24. Of course, this burden falls most heavily upon the poor. Real estate tax as a percent of income is as follows: under \$2,000—8.6%; \$2-3,000—5.6%; \$3-4,000—4.1%; \$4-5,000—3.4%; \$5-7,000—2.8%; \$7-10,000—2.4%; \$10-15,000—2.2%; and over \$15,000—2.7%. *Id.* Table 11 at 26. The REPORT observes that, as a very high consumption tax, the real estate tax deters investment and consumption of housing. As a result, it adversely affects the housing stock. *Id.* at 29, 39, 47.

<sup>266</sup> Out of total revenues of \$4,497,098,111.21, \$1,573,316,545.14 was derived from the real estate tax levy. ANNUAL REPORT OF THE COMPTROLLER OF THE CITY OF NEW YORK FOR THE FISCAL YEAR 1966-67, 12.

<sup>267</sup> REPORT TO THE NATIONAL COMMISSION ON URBAN PROBLEMS, IMPACT OF THE PROPERTY TAX, Table 2 at 9 (1968). Fifty percent of property taxes collected are estimated to be attributable to housing. *Id.* Table 7 at 19. In 1962, \$34.9 billion was spent for housing by owner-occupants and tenants in standard metropolitan statistical areas. *Id.* at 18. Of this amount, 19% was attributable to property taxes. *Id.*

<sup>268</sup> N.Y. UNCONSOL. LAWS §§ 6262(2), 6265(3), 6272 (McKinney Supp. 1968).

<sup>269</sup> *Id.* § 6262(2).

<sup>270</sup> Special Message to the Legislature, Feb. 27, 1968, at 3 (emphasis added).

<sup>271</sup> Prior to amendment, the Mitchell-Lama law, N.Y. PRIV. HOUS. FIN. LAW § 33 (McKinney Supp. 1968) required "consent of the local legislative body." Section 125(1)(a) permits the "local legislative body . . . by contract [to] agree with any redevelopment

the tax exemption to be granted. For example, although authorized under the Limited Profit Housing Companies Law to grant one hundred percent exemption on the total project value for a thirty-year term, a municipality might grant a lesser exemption, a shorter term, or both where it deemed such limited exemption appropriate.

As amended by Governor Rockefeller's legislation, no local government approval is required. An amendment to the Limited Profit Housing Companies Law provides that the real property of a UDC project "shall be exempt from all local and municipal taxes" for a thirty-year period.<sup>272</sup> The exemption applies to a successor company if the project is sold to another limited profit housing company with the consent of the Commissioner.<sup>273</sup> The amount of exemption parallels the normal Mitchell-Lama provision exempting from taxation the increase of value in the property after development over the assessed valuation of the property including land and improvements at the time of acquisition, provided that taxes paid shall be no less than ten percent of shelter rent.<sup>274</sup> Similarly, the Rockefeller legislation amends the Limited Dividend Housing Companies Law to provide an exemption on increased valuation<sup>275</sup> to successors of UDC subsidiaries for a forty-year period. Limited dividend housing companies may well become more attractive since they may be both exempted from local tax by UDC action and organized as a partnership to attempt to take advantage of large depreciation deductions for federal income tax purposes. The Redevelopment Company Housing Law, however, is not amended by the Rockefeller legislation and will therefore continue to require municipal action for property tax exemption.<sup>276</sup>

At a time when ever-increasing demands for services are being made of the city, eroding the city's tax base seems a questionable state policy. Due to the relatively small scale of New York's existing middle-income housing programs, the selective use of tax exemptions by municipalities has had but a small effect on the city's tax base. The

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company to exempt from local and municipal taxes . . ." Section 93(4) provides that for projects constructed subsequent to January 1, 1939, any municipality is authorized, through its local legislature, to exempt them from local and municipal taxes. The Rockefeller law permits tax exemption for Mitchell-Lama and limited dividend companies by state action alone.

<sup>272</sup> Private Housing Finance Law § 33, *added by* N.Y. PRIV. HOUS. FIN. LAW § 33(1)(c) (McKinney Supp. 1968).

<sup>273</sup> N.Y. PRIV. HOUS. FIN. LAW § 36 (McKinney Supp. 1968). If the project were transferred by a stock sale, the consent of the Commissioner would apparently not be necessary.

<sup>274</sup> *Id.* § 33.

<sup>275</sup> Private Housing Finance Law § 93(6), *added by* N.Y. PRIV. HOUS. FIN. LAW § 93(6) (McKinney Supp. 1968).

<sup>276</sup> N.Y. PRIV. HOUS. FIN. LAW § 125 (McKinney Supp. 1968).



massive scale of the Rockefeller legislation, however, threatens to shift the tax burden to older taxable properties occupied by low-income families who can ill afford to subsidize the new housing.<sup>277</sup>

#### CONCLUSION

A new national housing policy has been determined. It is that poor families shall be given the opportunity to use their limited funds, otherwise allocated for rent, to obtain quality housing and the dignity of homeownership. Housing reform is not only possible; it is mandated. Housing reform will require administration of the law in accordance with congressional intent. Administered aggressively, housing reforms could have been accomplished without the landmark legislation of 1968. Without sympathetic administration no amount of legislation will effect the necessary reform. It is now within our reach to reduce the hopelessness which pervades our ghettos; it is immoral not to do so. The policy has been decided upon, the legislation enacted; only the execution of the law is needed.

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<sup>277</sup> Compare the analysis of Dick Netzer in REPORT TO THE NATIONAL COMMISSION ON URBAN PROBLEMS, IMPACT OF THE PROPERTY TAX 61-62 (1968).

APPENDIX

Type of Housing	Authorizing Section	New Construction, Rehabilitation or Existing Housing	Per Housing Unit	Maximum Term	Maximum Interest
			Maximum Mortgage Amount		
1. Condominium (4 or more units) <sup>a</sup>	§ 235 (i) <sup>b</sup>	New construction or substantial rehabilitation; existing housing is eligible under specific exceptions <sup>c</sup>	\$15,000 (\$17,500 in high-cost areas); if family with 5 or more members limit is \$17,500 (and \$20,000 in high-cost areas) <sup>d</sup>	35 years <sup>e</sup>	Discretionary with the Secretary <sup>f</sup>
2. Condominium units <sup>g</sup>	§ 235 (j) <sup>h</sup>	Existing housing; rehabilitation if housing is deteriorating or substandard <sup>i</sup>	Not to exceed appraised value and the estimated cost of any rehabilitation <sup>j</sup>	Discretionary with the Secretary <sup>k</sup>	Discretionary with the Secretary <sup>l</sup>
3. Cooperatives	§ 235 (b) <sup>m</sup>	New construction or substantial rehabilitation; existing housing is eligible under specific exceptions <sup>n</sup>	\$15,000 (\$17,500 in high-cost areas); if family with 5 or more members the limit is \$17,500 (\$20,000 in high-cost areas) <sup>o</sup>	40 years <sup>p</sup>	Discretionary with the Secretary <sup>q</sup>
4. Cooperatives or rental multi-family	§ 236	New construction or "repair and rehabilitation" <sup>r</sup>	(1) In a non-elevator building—\$8,000 without bedroom; \$11,250 with 1 bedroom; \$13,500 with 2 bedrooms; \$17,000 with 3 bedrooms; \$19,250 with 4 or more bedrooms; (2) in an elevator building—\$9,500 without bedroom; \$13,500 with 1 bedroom; \$16,000 with 2 bedrooms; \$20,000 with 3 bedrooms; \$22,750 with 4 or more bedrooms; <sup>s</sup> (3) in a high-cost area the Secretary may increase any of the foregoing figures by 45% <sup>t</sup>	Discretionary with the Secretary <sup>u</sup>	Discretionary with the Secretary <sup>v</sup>

APPENDIX (continued)

Type of Housing	Authorizing Section	New Construction, Rehabilitation or Existing Housing	Per Housing Unit Maximum Mortgage Amount	Maximum Term	Maximum Interest
5. Single-family	§ 235 (l) <sup>w</sup>	New construction or "repair and re-habilitation" <sup>x</sup>	\$15,000 (\$17,500 in high-cost areas); if 5 or more persons in family—\$17,500 (\$20,000 in high-cost areas) <sup>y</sup>	(1) 40 years for a displaced family; (2) 35 years for any other family if mortgage is approved for insurance prior to construction; (3) 30 years if mortgage not approved for insurance prior to construction <sup>z</sup>	Discretionary with the Secretary <sup>aa</sup>
6. Single-family (detached, semi-detached or row house)	§ 235 (j)	Existing housing; rehabilitation if housing is deteriorating or substandard <sup>bb</sup>	Not to exceed appraised value and the estimated cost of any rehabilitation <sup>cc</sup>	Discretionary with the Secretary <sup>dd</sup>	Discretionary with the Secretary <sup>ee</sup>
7. Two-family (with one unit owner-occupied)	§ 235 (i)	New construction or "repair and re-habilitation" <sup>tt</sup>	\$20,000 (\$25,000 in a high-cost area) <sup>gg</sup>	(1) 40 years for a displaced family; (2) 35 years for any other family if mortgage is approved for insurance prior to construction <sup>hh</sup>	Discretionary with the Secretary <sup>ii</sup>
8. Two-family (with one unit owner-occupied)	§ 235 (j) <sup>jj</sup>	Existing housing or rehabilitation if housing is deteriorating or substandard <sup>kk</sup>	Not to exceed appraised value and the estimated cost of any rehabilitation <sup>ll</sup>	Discretionary with the Secretary <sup>mm</sup>	Discretionary with the Secretary <sup>nn</sup>

- <sup>a</sup> National Housing Act § 234(f), 12 U.S.C.A. § 1715y(f) (1969).
- <sup>b</sup> Mortgages meeting the requirements of § 234(c), 12 U.S.C. § 1715y(c) (Supp. III 1967) (condominiums), are eligible for subsidy under §§ 235(i)(1)-(2), 12 U.S.C.A. §§ 1715z(i)(1)-(2) (1969).
- <sup>c</sup> National Housing Act § 235(i)(3)(A), 12 U.S.C.A. § 1715z(i)(3)(A) (1969). The specific exceptions permitting the use of existing housing are discussed at p. 827 *supra*.
- <sup>d</sup> *Id.* § 235(i)(3)(B), 12 U.S.C.A. § 1715z(i)(3)(B) (1969).
- <sup>e</sup> *Id.* § 234(c)(3)(B), 12 U.S.C. § 1715y(c)(3)(B) (1964).
- <sup>f</sup> Pub. L. 90-301 (signed May 7, 1968) authorizes the Secretary to establish maximum interest rates on §§ 234 and 213 insured mortgages at such rate "as he finds necessary to meet the mortgage market." 12 U.S.C.A. § 1709-1 (1969). The Secretary's discretionary authority terminates October 1, 1969. *Id.* Unless such authority is extended, the maximum rate of §§ 234 and 213 mortgages will then be 6%. National Housing Act §§ 213(d), 234(f), 12 U.S.C.A. §§ 1715e(d), 1715y(f) (1969). The New act amends Pub. L. 90-301 to include §§ 235 and 236 mortgages with the Secretary's discretionary authority. Housing and Urban Development Act of 1968, § 315, 82 Stat. 512, *amending* 12 U.S.C.A. § 1709-1 (1969).
- <sup>g</sup> National Housing Act § 235(j)(2)(A)(ii), 12 U.S.C.A. § 1715z(j)(2)(A)(ii) (1969).
- <sup>h</sup> *Id.*
- <sup>i</sup> *Id.* § 235(j)(1), 12 U.S.C.A. § 1715z(j)(1) (1969).
- <sup>j</sup> *Id.* § 235(j)(2)(B), 12 U.S.C.A. § 1715a(j)(2)(B) (1969).
- <sup>k</sup> *Id.* § 235(j)(2)(D), 12 U.S.C.A. § 1715z(j)(2)(D) (1969).
- <sup>l</sup> *Id.* § 235(j)(2)(C), 12 U.S.C.A. § 1715z(j)(2)(C) (1969); Housing and Urban Development Act of 1968, § 315, 12 U.S.C.A. § 1709-1 (1969). *See* note *f supra*.
- <sup>m</sup> Mortgages meeting the requirements of § 213 (cooperatives) are eligible for subsidy under § 235(b)(2), 12 U.S.C.A. § 1715z(b)(2) (1969).
- <sup>n</sup> National Housing Act § 235(b)(2), 12 U.S.C.A. § 1715z(b)(2) (1969). The specific exception permitting the use of existing housing is discussed at p. 827 *supra*.
- <sup>o</sup> National Housing Act § 235(b)(2), 12 U.S.C.A. § 1715z(b)(2) (1969).
- <sup>p</sup> *Id.* § 213(d), 12 U.S.C. § 1715e(d) (Supp. III 1967).
- <sup>q</sup> *Id.* § 213(d), 12 U.S.C.A. § 1715e(d) (1969). *See* note *f supra*.
- <sup>r</sup> Section 236(j)(3) provides that the mortgage shall meet the requirements of §§ 221(d)(1) and (3). 12 U.S.C.A. § 1715z-1(j)(3) (1969). Section 221(d)(3)(iii) refers to "repair and rehabilitation." 12 U.S.C. § 1715l(d)(3)(iii) (Supp. III 1967).
- <sup>s</sup> National Housing Act § 221(d)(3)(ii), 12 U.S.C. § 1715l(d)(3)(ii) (Supp. III 1967).
- <sup>t</sup> *Id.*
- <sup>u</sup> *Id.* § 236(j)(4)(c), 12 U.S.C.A. § 1715z-1(j)(4)(c) (1969).
- <sup>v</sup> *Id.* § 236(j)(4)(B), 12 U.S.C.A. § 1715z-1(j)(4)(B) (1969); Housing and Urban Development Act of 1968, § 315, 82 Stat. 512, *amending* 12 U.S.C.A. § 1709-1 (1969). *See* note *f supra*.
- <sup>w</sup> Section 235(i)(2) provides that, except as otherwise modified, mortgages meeting the requirements of § 221(d)(2) will be eligible for subsidy. 12 U.S.C.A. § 1715z(i)(2) (1969). Section 235(i)(3) prohibits eligibility for 3- and 4-family homes although these are permitted under § 221(d)(2). 12 U.S.C.A. § 1715z(i)(3) (1969).
- <sup>x</sup> National Housing Act § 221(d)(2), 12 U.S.C. § 1715l(d)(2) (Supp. III 1967).
- <sup>y</sup> *Id.* § 221(d)(2)(A), 12 U.S.C.A. § 1715l(d)(2)(A) (1969).
- <sup>z</sup> *Id.* §§ 221(d)(2), (6), 12 U.S.C. §§ 1715l(d)(2), (6) (Supp. III 1967).
- <sup>aa</sup> *Id.* § 221(d)(5), 12 U.S.C.A. § 1715l(d)(5) (1969).
- <sup>bb</sup> *Id.* § 235(j)(1), 12 U.S.C.A. § 1715z(j)(1) (1969).
- <sup>cc</sup> *Id.* § 235(j)(2)(B), 12 U.S.C.A. § 1715z(j)(2)(B) (1969).
- <sup>dd</sup> *Id.* § 235(j)(2)(D), 12 U.S.C.A. § 1715z(j)(2)(D) (1969).
- <sup>ee</sup> *Id.* § 235(j)(2)(C), 12 U.S.C.A. § 1715z(j)(2)(C) (1969).
- <sup>ff</sup> *Id.* § 221(d)(2), 12 U.S.C. § 1715l(d)(2) (Supp. III 1967). *See* note *f supra*.
- <sup>gg</sup> *Id.* § 221(d)(2)(A), 12 U.S.C. § 1715l(d)(2)(A) (Supp. III 1967).
- <sup>hh</sup> *Id.* §§ 221(d)(2), (6), 12 U.S.C. §§ 1715l(d)(2), (6) (Supp. III 1967).

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<sup>ii</sup> *Id.* § 221(d)(5), 12 U.S.C.A. § 1715l(d)(5) (1969).

<sup>jj</sup> *Id.* §§ 235(j)(2)(A), (6), 12 U.S.C.A. §§ 1715z(j)(2)(A), (6) (1969).

<sup>kk</sup> *Id.* § 235 (j)(1), 12 U.S.C.A. § 1715z(j)(1) (1969).

<sup>ll</sup> *Id.* § 235(j)(2)(B), 12 U.S.C.A. § 1715z(j)(2)(B) (1969).

<sup>mm</sup> *Id.* § 235(j)(2)(D), 12 U.S.C.A. § 1715z(j)(2)(D) (1969).

<sup>nn</sup> *Id.* § 235(j)(2)(C), 12 U.S.C.A. § 1715z(j)(2)(C) (1969); Housing and Urban Development Act of 1968, § 315, 82 Stat. 512, *amending* 12 U.S.C.A. § 1709-1(1969). *See note f supra.*