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## A DRAFT PROGRAM OF HOUSING REFORM— THE TENANT CONDOMINIUM

*William J. Quirk,† Leon E. Wein,‡ and Ira Gomberg\**

Few dispute that the two central problems of America's cities are the pervasive hopelessness of the slums and the flight of the middle class to the suburbs. The resulting cities lack balance and diversity.<sup>1</sup> Only the very rich and the very poor remain, each in their separate sectors. The tax base is distorted, and in order to provide sufficient revenue the more regressive forms of taxation are used.<sup>2</sup> If our cities are to be saved, vast reforms must be effected, particularly in the area of housing.

The primary mode of housing in the larger cities is tenancy in a multiple dwelling.<sup>3</sup> In the slums, where the need for housing reform is greatest, the renting of apartments is almost universal. Thus, the raw material of any housing reform is the landlord-tenant relationship. The past twenty-five years have witnessed major improvements in our hous-

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<sup>1</sup> New York City has experienced a population upheaval recently. Between 1950 and 1960, Negro population increased by more than 47.7% (360,566), and Puerto Rican population by 148.7% (366,268). Meanwhile, the white population made a mass exodus (1,238,738). N.Y. CITY DEP'T OF COMMERCE & INDUS. DEV., 1964 STATISTICAL GUIDE FOR NEW YORK CITY 16.

<sup>2</sup> *E.g.*, real estate and sales taxes. See note 14 *infra*.

<sup>3</sup> In New York City, about 78% of all living units, or 2,078,000 units, are renter-occupied. N.Y. CITY COMMITTEE ON HOUSING STATISTICS, HOUSING STATISTICS HANDBOOK 12-13 (1966) [hereinafter cited as HOUSING STATISTICS HANDBOOK]. Several other cities have comparable rates of renter occupation. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CENSUS OF HOUSING: 1960, FINAL REPORT HC(1)-1, UNITED STATES SUMMARY, table 18, pp. 1-127 to 1-153 [hereinafter cited as 1960 CENSUS OF HOUSING, UNITED STATES SUMMARY].

ing standards. Legal machinery has developed to force landlords to keep their buildings in repair.<sup>4</sup> We are increasingly told, however, that rigorous enforcement of housing codes will cause owners to abandon their buildings and that the city will be obliged to become the landlord of a "great mass of uneconomical, deteriorated buildings."<sup>5</sup>

But there is some basis for optimism. First, housing reform need not presuppose continuance of the landlord-tenant relationship. Indeed, a housing reform program that encourages tenants to become the *owners* of their apartments will tend to eliminate many of the sources of the social blight that plagues our cities. Second, and most surprising, the transformation of low- and middle-income tenants<sup>6</sup> into owners of rehabilitated or new apartments is presently practicable and requires *no new legislation*. The housing program herein proposed has the following features:

- (1) gradual obsolescence of landlords, both private and public;
- (2) creation of real property interests in former tenants;
- (3) monthly payments within the reach of low- and middle-income families;
- (4) radical rehabilitation and new construction;
- (5) maintenance of the individual character of existing neighborhoods;
- (6) absence of governmental intervention;
- (7) avoidance of governmental subsidies, except for very low income families; and
- (8) maintenance, and perhaps improvement, of the tax base.

The proposed program will be within the cost range of the existing rent structure. In 1960 the median monthly rent in New York City

<sup>4</sup> For a history of New York City's building and housing laws from 1647 to the present, see 1966 N.Y. CITY DEP'T OF BLDGS. ANN. REP. 5-9.

<sup>5</sup> Grad & Gribetz, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1290 (1966).

<sup>6</sup> For the purposes of this article the term "low income" is used to mean income between poverty levels and \$7,000 per year. The term "middle income" is used to mean income between \$7,000 and \$20,000 per year. The government defines poverty levels on a sliding scale taking into account family size, number of children, and farm-nonfarm residence. For 1966 incomes the poverty level for nonfarm residents ranges between \$1,560 (for a woman 65 years or older living alone) and \$5,440 (for a family of 7 or more persons). For a nonfarm family of 4 the poverty level is defined as \$3,300. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, & BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SOCIAL AND ECONOMIC CONDITIONS OF NEGROES IN THE UNITED STATES 22 (BLS Rep. No. 332, Current Population Rep., ser. P-23, No. 24, Oct. 1967); see *Hearings on Housing Legislation of 1967 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 534 (1967) (remarks of Senator Percy); N.Y. Times, Aug. 15, 1967, at 20, col. 3.

would be \$73.00.<sup>7</sup> Based on a high estimate of \$12,000 per unit for the costs of acquisition and rehabilitation,<sup>8</sup> monthly amortization payments by the unit owner would be \$62.49.<sup>9</sup> His total monthly payments, including maintenance,<sup>10</sup> insurance, and taxes, would be \$87.49. Based on a more reasonable estimate of \$7,500 per unit, monthly amortization payments would be \$39.06, yielding a total monthly payment of \$64.06.

These figures do not include any governmental subsidy. For persons at poverty levels—about fifteen to twenty percent of the population<sup>11</sup>—some subsidy will be necessary; for other groups it may be desirable. As will be discussed, an interest subsidy is the most flexible and cheapest type of governmental aid.<sup>12</sup> Where there is no subsidy, of course, income restrictions upon eligible occupants are unnecessary.

## I

### THE HOMEOWNERSHIP PRINCIPLE

Our tenements, once a haven for immigrant Jews, Italians, and Irish, now house the impoverished internal migrants, mostly Negroes, and the failures of earlier immigrations. In past generations immigrants were able to assimilate themselves into this country's opportunity systems; but the volatile slums of today are characterized neither by opportunities nor by a culture of aspiration. Bringing quality housing within the means of slum dwellers is a prerequisite to any solution to the problem of urban unrest.

Our tenements contain both very large families that are not eligible for public housing and families that have been evicted from publicly

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<sup>7</sup> N.Y. CITY COMMUNITY RENEWAL PROGRAM, NEW YORK CITY'S RENEWAL STRATEGY/1965, at 18 (based on the 1960 CENSUS OF HOUSING). As of 1960, the number of units in different rent ranges was as follows (rental figure includes utilities paid for by renter):

Rooms in Unit	\$0-49	\$50-79	\$60-119	\$120 or more
1	61,000	67,000	32,000	15,000
2-3	125,000	390,000	237,000	103,000
4-5	126,000	434,000	246,000	127,000
6 or more	11,000	67,000	53,000	39,000

1960 CENSUS OF HOUSING, UNITED STATES SUMMARY, *supra* note 3, at XLII.

<sup>8</sup> Per-unit figures are on the basis of a two-bedroom apartment.

<sup>9</sup> See p. 384 *infra* for monthly mortgage and amortization tables.

<sup>10</sup> See pp. 387-89 *infra* for an analysis of maintenance costs.

<sup>11</sup> Recent Census Bureau statistics report a poverty population of 15% or 29.7 million people. N.Y. Times, Aug. 15, 1967, at 20, col. 3. Michael Harrington's analysis of past government statistics indicates a tendency to underestimate the amount of actual poverty. M. HARRINGTON, *THE OTHER AMERICA*, app. (1962).

<sup>12</sup> See p. 396 *infra*.

assisted housing for antisocial behavior. Many slum dwellers, recently arrived in the city, have not yet adapted to the demands of urban living; others, despite prolonged residence in the slum, are unable or unwilling to do so. Slum tenants have no sense of pride in their homes, no sense of belonging to the community. Antagonism towards landlords, public or private, is one of the roots of urban unrest.

Many tenement landlords mulct their buildings and abandon them. Slum tenants frequently remove copper pipe, bathroom fixtures, or anything else of value. Indiscriminate vandalism makes maintenance and repair difficult. Thus, landlords seek profits in an atmosphere that does not promise increased return from improvements; and vandals, having no substantial interest in their community, often seek gain through pillage.

Homeownership, on the other hand, offers opportunities for personal dignity, self-reliance, and stability. It gives the owner a long-term interest both in the building and in the community. Ownership by residents would help discourage the social disintegration that marks our slums, and the resulting sense of responsibility and aspiration could replace the pervasive hopelessness.

Housing reform must deal with the needs of people, not just the construction of pleasant buildings. In his world-wide study of housing, Charles Abrams observed:

To the poorer family, homeownership is a prime hope, representing not only shelter but lifelong security. The emotions underlying the homeownership structure may or may not be based on reality, but they are powerful enough to win respect.<sup>13</sup>

In the United States the statement seems true of middle-income families as well. In light of the general desire to own a home and the social interests stimulated by resident ownership, truly significant housing reform must be based on the homeownership principle.

Besides offering improved housing at realistic prices, the proposed program offers a stake in society to the low-income family. It also provides middle-income groups with a permanent stake in the city, and improved living conditions throughout the city may eventually make the flight to the suburbs unnecessary.<sup>14</sup> For both groups the advantages offered are the pride of ownership, the building up of equity, tax benefits

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<sup>13</sup> C. ABRAMS, *MAN'S STRUGGLE FOR SHELTER IN AN URBANIZING WORLD* 221 (1964).

<sup>14</sup> The city receives economic benefits if the middle-income group stays, since that group is the most significant source of tax revenues. This is particularly important now, when cities, having extended regressive taxes such as real estate and sales about as far as is practicable, seem on the verge of bankruptcy. An official of the New York City Housing

accruing from ownership treatment,<sup>15</sup> and the availability of a choice not now offered.

Most significantly, the program will place a check on the increasing power of the government. The creation of a property interest in the individual will act as a buffer against the state.<sup>16</sup> No new government machinery need be created, and even slum dwellers will be able to have a permanent property interest of their own.

## II

### VEHICLE OF TENANT OWNERSHIP

A unique characteristic of New York City is the high percentage of people living in multiple dwellings. Presently about seventy-three percent of the population lives in dwellings containing three or more units.<sup>17</sup> Fifty-five percent of all rental units are in structures with twenty or more apartments.<sup>18</sup> This accounts for almost half of the nation's total housing inventory in such structures.<sup>19</sup> Because of land shortage, other urban areas are likely to develop similar high-rise apartment living in the future.<sup>20</sup> The two basic formulas for homeownership

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and Redevelopment Board has recently stated, "[i]t's nothing new but there doesn't appear to be much hope for the middle class in Manhattan." N.Y. Times, July 31, 1967, at 36, col. 8. The authors disagree.

For a thorough investigation of this and other urban problems, see *Hearings on Federal Role in Urban Affairs Before the Subcomm. on Executive Reorganization of the Senate Comm. on Gov't Operations*, 89th Cong., 2d Sess. (1966), and 90th Cong., 1st Sess. (1967) [hereinafter cited as *Executive Reorganization Hearings*]. On January 23, 1967, Senator Ribicoff, chairman of the subcommittee, discussed the 1966 hearings in a comprehensive speech on the Senate floor. 113 CONG. REC. S709-22 (daily ed. Jan. 23, 1967). The Senator observed that the "truly overlooked individual in our housing market is the \$5,000 to \$8,000 wage earner." *Id.* at S714. He recommended homeownership legislation designed to offer this group "an important choice . . . either to rent or to own in decency and dignity." *Id.*

<sup>15</sup> A unit owner is permitted to deduct real estate taxes (INT. REV. CODE of 1954, § 164) and interest (*id.* § 163). Additional benefits are nonrecognition of gain on sale or exchange of principal residence (*id.* § 1034) and exclusion from gross income of gain from sale or exchange of principal residence of individual who has attained age 65 (*id.* § 121).

<sup>16</sup> Taper, *Profiles*, THE NEW YORKER, Feb. 4, 1967, at 89 (interview with Charles Abrams). On October 28, 1785, Thomas Jefferson wrote to the Rev. James Madison:

[I]t is not too soon to provide by every possible means that as few as possible shall be without a little portion of land. The small landholders are the most precious part of the state.

THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 390 (Koch & Peden eds. 1944).

<sup>17</sup> HOUSING STATISTICS HANDBOOK, *supra* note 3, at 2.

<sup>18</sup> *Id.* at 14-15.

<sup>19</sup> *Id.* at 14.

<sup>20</sup> The F. W. Dodge Co., a construction information service of McGraw-Hill, Inc., has projected that apartment construction will comprise 40% of all housing built in 1975. ENGINEERING NEWS-RECORD, Nov. 9, 1967, at 74.

in multiple dwellings are: (1) the stock cooperative and (2) the condominium.

The stock cooperative is a corporation that holds title to the land and building. Each tenant-shareholder owns stock in the corporation and has a "proprietary" lease covering his apartment. The corporation is the mortgagor of the premises and is directly responsible for paying real property taxes assessed against it. Each tenant-shareholder makes monthly payments to the corporation according to the provisions of his proprietary lease. These payments cover maintenance costs, management expenses, and other miscellaneous expenses, in addition to the mortgage and tax obligations.

Since foreclosure of the mortgage would result in loss of the shareholders' investment, the tenant-shareholders are highly dependent on their mutual solvency and good faith. The volatility of the stock cooperative is illustrated by comparing its seventy-five percent foreclosure rate to the twenty percent home mortgage foreclosure rate during the depression.<sup>21</sup> The financial interdependence of the shareholders results in restrictions on the sale of stock. Typically, a sale is prohibited unless the board of directors consents following an inquiry into the credit standing of the prospective purchaser. Because of such restrictions, the shareholder's stock is uninteresting security to a lending institution.<sup>22</sup> As a result, private cooperatives traditionally have required shareholders to make substantial cash down payments and to have sufficient financial resources to allow the money to be tied up.<sup>23</sup>

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<sup>21</sup> Walbran, *Condominium: Its Economic Functions*, 30 Mo. L. Rev. 531, 532-33 (1965).

<sup>22</sup> H. VOGEL, *THE CO-OP APARTMENT* 58 (1960).

<sup>23</sup> A peculiar form of cooperative has grown up in New York under the auspices of the Mitchell-Lama Act, N.Y. PRIV. HOUS. FIN. LAW §§ 10-37 (McKinney 1962, Supp. 1967). Contrary to the sales literature, a Mitchell-Lama cooperative is more properly categorized as rental rather than ownership housing. This type of "moderate income" cooperative contains most of the risks of ownership but none of the usual attributes. Substantial down payments are required. Masaryk Towers, for example, requires a \$2,700 down payment for a 2-bedroom apartment. Monthly carrying charges may be increased without the approval of the cooperators, upon the consent of the supervising governmental agency. If a cooperator's income rises above permitted levels he must leave the building. N.Y. PRIV. HOUS. FIN. LAW § 31(3) (McKinney 1962). Significantly, there is no protection against the risk of foreclosure. Since the mortgagee is a state agency, foreclosure may be unlikely; but it is certainly possible. A cooperator's return on a sale of his stock may not exceed the face amount of his original equity. N.Y. City Housing & Redev. Bd. Rules & Regulations, art. XII, § 1; N.Y. State Division of Housing & Community Renewal, Form of By-Laws, at 8. His return is similarly limited on the dissolution of the corporation. N.Y. PRIV. HOUS. FIN. LAW §§ 35, 36 (McKinney 1962, Supp. 1967). These sections do not describe the result of the dissolution of a project aided by a state loan made after May 1, 1959. It is possible, therefore, that a cooperator's return could exceed his equity in this situation. But in view of the general pattern of the law this is unlikely.

Unlike a cooperative, where each individual is dependent upon the solvency of the entire project, a condominium unit owner is responsible only for his own payments. This factor appears to have motivated passage of the New York Condominium Act in 1964. At that time the legislators observed:

In a cooperative, if one tenant defaults on charges made to him for mortgage payments, the other tenants, if they wish to keep their apartments, must make good the default since the mortgage and the taxes apply to the building as a whole. In a condominium, where each unit has its own mortgage and is separately taxed, this liability for another's default is eliminated.<sup>24</sup>

Liability for another's default is not an acceptable risk for the low- or middle-income groups with which the program herein proposed is concerned. In a condominium, the individual tenant owns, in fee simple, his apartment and an undivided common interest in the common parts of the building. He thus owns a mortgageable asset.

A condominium comes into being when a "declaration,"<sup>25</sup> with by-laws annexed, is recorded where conveyances are recorded. The declaration contains both a statement of intention on the part of the owner to submit to the Condominium Act, and a description of the land and building. The bylaws set forth the rules governing operation of the property,<sup>26</sup> and are, in effect, a constitution for the building. The bylaws must provide for a board of managers, at least one-third of whom are to be elected annually by the unit owners. In addition, the bylaws establish such matters as how the property will be operated and how common expenses will be allocated.<sup>27</sup> Amendment to the bylaws requires approval of at least two-thirds of the unit owners. If a unit owner fails to comply with the bylaws or other rules and regulations of

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Mitchell-Lama projects are exempted from the full disclosure requirements of the New York securities registration statutes. N.Y. GEN. BUS. LAW § 352-e(1)(a) (McKinney Supp. 1967).

Since Congress intended to treat tenants of cooperatives on a par with homeowners, the peculiar nature of the Mitchell-Lama cooperative raises doubts concerning the applicability of INT. REV. CODE of 1954, § 216, which permits a tenant-shareholder to deduct his proportionate share of real estate taxes and interest paid by the corporation. Similar questions are raised concerning the availability of a § 1034(f) (nonrecognition of gain on sale or exchange of principal residence) and § 121(d)(3) (exclusion from gross income of gain from sale or exchange of principal residence of individual who has attained age 65).

<sup>24</sup> *Memorandum of the Joint Legislative Comm. on Housing and Urban Dev.*, MCKINNEY'S SESSION LAWS 1839 (1964).

<sup>25</sup> N.Y. REAL PROP. LAW § 339-n (McKinney Supp. 1967).

<sup>26</sup> *Id.* § 339-u.

<sup>27</sup> *Id.* § 339-v.



the condominium, the board of managers may bring an action against him for injunctive relief.<sup>28</sup>

Illinois has enacted legislation which also permits the board of managers or the unit owners to delegate powers to a nonprofit corporation.<sup>29</sup> This provision was not thought essential, but was passed to remove any possible question concerning the delegation of statutory duties.<sup>30</sup> Formation of a nonprofit corporation achieves a degree of limited liability and may simplify relations with such organizations as the FHA and the proposed National Home Ownership Foundation.<sup>31</sup>

For purposes of low- and middle-income housing reform, the condominium is clearly preferable.<sup>32</sup> First, the condominium unit owner's interest in the premises is concrete; *i.e.*, it is direct real property owner-

<sup>28</sup> *Id.* § 339-j.

<sup>29</sup> ILL. ANN. STAT. ch. 30, § 318.1 (Smith-Hurd Supp. 1966).

<sup>30</sup> Ramsey, *Condominium—And the Illinois Condominium Property Act*, CHICAGO TITLE & TRUST CO. LAWYERS' SUPP., July 1963, addendum.

<sup>31</sup> See pp. 391-98 & notes 124-52 *infra*.

<sup>32</sup> For a history of the concept of the condominium, see Cribbet, *Condominium—Home Ownership for the Megalopolis*, 61 MICH. L. REV. 1207, 1210-14 (1963); Note, *The FHA Condominium: A Basic Comparison with the FHA Cooperative*, 31 GEO. WASH. L. REV. 1014, 1015 (1963). For a detailed comparison of cooperatives and condominiums, see Comment, *Community Apartments: Condominium or Stock Cooperative?*, 50 CALIF. L. REV. 299 (1962).

See generally COMMITTEE ON REAL PROPERTY LAW, N.Y. CITY BAR ASS'N, SYMPOSIUM ON THE PRACTICAL PROBLEMS OF CONDOMINIUM (1964); Symposium, *The Condominium*, 14 HASTINGS L.J. 189 (1963); Berger, *Condominium Primer for Fiduciaries*, 104 TRUSTS & ESTATES 21 (1965); Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987 (1963); Boyer & Spiegel, *Land Use Control: Preemptions, Perpetuities and Similar Restraints*, 20 U. MIAMI L. REV. 148 (1965); Kenin, *Condominium: A Survey of Legal Problems and Proposed Legislation*, 17 U. MIAMI L. REV. 145 (1962); Kert, *Condominium—Statutory Implementation*, 38 ST. JOHN'S L. REV. 1 (1963); McCaughan, *The Florida Condominium Act Applied*, 17 U. FLA. L. REV. 1 (1964); Moller, *The Condominium Confronts the Rule Against Perpetuities*, 10 N.Y.L.F. 377 (1964); Rohan, *Condominium Housing: A Purchaser's Perspective*, 17 STAN. L. REV. 842 (1965); Rohan, *Disruption of the Condominium Venture: The Problems of Casualty Loss and Insurance*, 64 COLUM. L. REV. 1045 (1964); Rohan, *Drafting Condominium Instruments: Provisions for Destruction, Obsolescence and Eminent Domain*, 65 COLUM. L. REV. 593 (1965); Ross, *Condominium in California—The Verge of an Era*, 36 S. CAL. L. REV. 351 (1963); Schwartz, *Condominium: A Hybrid Castle in the Sky*, 44 B.U.L. REV. 137 (1964); Welfeld, *The Condominium and Median-Income Housing*, 31 FORDHAM L. REV. 457 (1963); Wisner, *Financing the Condominium in New York: The Conventional Mortgage*, 31 ALBANY L.J. 32 (1967); Note, *Condominium—A Comparative Analysis of Condominium Statutes*, 13 DEPAUL L. REV. 111 (1963); 77 HARV. L. REV. 777 (1964).

For a discussion of the tax aspects of condominiums, see Anderson, *Tax Aspects of Cooperatives and Condominium Housing*, N.Y.U. 25th INST. ON FED. TAX. 79 (1967); Armstrong & Collins, *Condominium—The Magic in a Word*, U. SO. CAL. 1964 TAX INST. 667; Note, *The FHA Condominium: A Basic Comparison with the FHA Cooperative*, 31 GEO. WASH. L. REV. 1014 (1962); Note, *Condominium—Tax Aspects of Ownership*, 18 VAND. L. REV. 1832 (1965).

ship, as opposed to ownership of shares in a cooperative. Second, when rehabilitation is complete, the unit owner receives his own individual mortgage rather than a share of stock in a corporation holding a large mortgage. Consequently, the defaults of other unit owners, either on a mortgage debt or on taxes, will not result in foreclosure on the entire building and loss of equity by all involved. Third, the involvement of government can be minimized in the case of the condominium.

### III

#### ACQUISITION

The number of vacant buildings in New York City has been increasing at an accelerating rate.<sup>33</sup> As of October 30, 1967, there were 3,151 reported vacant multiple dwellings,<sup>34</sup> distributed as follows: Manhattan—499; Brooklyn—1,831; Queens—266; Bronx—315; Richmond—240. Based on a low average figure of twelve apartments per building, accommodating three persons each, these vacant multiple dwellings could house more than 110,000 persons, the entire population of many medium-size cities.<sup>35</sup>

As might be expected, most of the vacant buildings are located in the poorer sections of the five boroughs. Areas such as Harlem (both East and West), the Lower East Side of Manhattan, the East Bronx, and Bedford-Stuyvesant in Brooklyn are infested with vacant apartments<sup>36</sup> that could be used in the beginning stages of the program.<sup>37</sup>

<sup>33</sup> N.Y. City Dep't of Bldgs., Report on Vacant Buildings, Sept. 1966, at 1.

<sup>34</sup> N.Y. City Dep't of Bldgs., Weekly Report of the Unsafe Buildings Division, Oct. 30, 1967.

<sup>35</sup> This large number of vacant apartments has given rise to a substantial squatter problems. For a discussion of the squatter problem in Pakistan, the Philippines, Venezuela, and Jamaica, see C. ABRAMS, *supra* note 13, at 14-21.

<sup>36</sup> Many of these buildings adjoin one another. In fact, in a study of the 3 boroughs of Manhattan, Bronx, and Brooklyn, 340 such sites were found to exist. In Manhattan alone, 40 of these sites include 3 or more adjoining vacant buildings. N.Y. City Dep't of Bldgs., Report on Vacant Buildings, Sept. 1966, at 14-15.

<sup>37</sup> In testimony before a committee of the United States Senate in 1966, Buildings Commissioner Charles G. Moerdier suggested a solution to the abandoned buildings problem:

Now, the threat has been made time and again when everyone ever talks in this area, that landlords are going to walk away from buildings. I suggest to you those who walk away from buildings, the public is well rid of them. I suggest to you further that when that occurs an easy answer is available and it is an answer which we in New York are only just now beginning to explore and it is the so-called tenant cooperative.

Now, here once the repair is affected by Government it can sue the landlord for the cost of the repair, foreclose on its lien, or, where appropriate, sell the building to the tenants on a cooperative basis so that they can thereafter manage the building and keep it in good repair. This latter concept of returning other-

Three inexpensive methods exist by which title may be taken to both abandoned buildings and many other properties, free and clear of all encumbrances. The first method is to have the city foreclose its tax lien on the property desired.<sup>38</sup> Although in rem tax proceedings may commence only after a four-year default in payment, at any given time many buildings are in such default and the city may proceed against them.<sup>39</sup>

A second method is to have the city foreclose its emergency repair priority lien.<sup>40</sup> Under the new emergency repair program, the city

wise unclaimable buildings to the tenants not only has the advantage of providing for some means of recompense for government, but more importantly it provides some measure of assurance the building will thereafter be kept in a good state of repair, the tenants will have a stake in the building and that stake will certainly be preserved and protected.

I should also add that the proposal for tenant cooperatives will also have ever-increasing attraction as a solution to problems in those areas where unscrupulous or inept landlords finally are forced to abandon their parasitic existence, leaving a legacy of ravaged and abused but otherwise structurally sound buildings.

This approach will provide a vehicle for the redemption of such structures.

*Hearings on Housing in the District of Columbia Before the Subcomm. on Commerce and Industry of the Senate Comm. on the District of Columbia, 89th Cong., 2d Sess. 340 (1966).*

<sup>38</sup> Figures are not available from the Department of Finance concerning the number of buildings in tax arrears. A rigorous enforcement effort would probably result in the availability of a large pool of buildings.

<sup>39</sup> NEW YORK, N.Y., ADMINISTRATIVE CODE §§ D17-1.0 *et seq.* (1963) provide for in rem foreclosure of the city's tax liens that have been due and unpaid for a period of 4 years. The Director of Finance from time to time files with the County Clerk a list of all parcels on which taxes have not been paid for 4 years or longer. Upon this filing and other required filings, the Director of Finance publishes in statutory form a notice to all persons claiming an interest in the parcels, and states that a certified list of delinquent taxes is open to public inspection to a date certain (the last date for redemption) and that any person claiming an interest must file an answer not later than 20 days after the last date for redemption. Notice by mail is required only for persons who are of record in the office of the Director of Finance. Mortgagees and other lienors receive mail notice only if they have filed with the Director. The supreme court is given power to direct a sale at public auction held by the Director of Finance. *Id.* § D17-12.0(a). Where no answer is interposed, the "court shall make a final judgment awarding to the city the possession" of the parcel. *Id.* § D17-12.0(d). In such case, however, the city can petition the court to direct a sale at public auction. Following the sale, the purchaser would be given a deed conveying title in fee simple absolute, free and clear of any encumbrances. *Id.* Such a deed is presumptive evidence that all proceedings leading to it are proper. This presumption becomes conclusive 2 years after recording. *Id.* § D17-12.0(e).

<sup>40</sup> Traditional enforcement of housing violations has been premised upon the use of criminal sanctions imposed by courts. During 1966, the housing division of the Buildings Department brought 26,046 new criminal cases to court resulting in an average fine of \$14.58 per case. 1966 N.Y. CTRY DEP'T OF BLDGS. ANN. REP. 245. Since a typical case involves between 20 and 50 violations, the average per-violation fine is well under \$1.00. Quite obviously, it is cheaper for a landlord to pay the fine than make the repair; the fine is viewed simply as an additional cost of doing business.

In an effort to avoid this situation, the draftsmen of the Multiple Dwelling Law con-

is often called upon to make various repairs in both old and new buildings. A lien is taken prior to all mortgages for the expenses incurred in making these repairs. A large number of buildings would probably be available as potential condominiums under this program.

Finally, receivership proceedings under the Multiple Dwelling Law create a forecloseable lien,<sup>41</sup> which the city can foreclose for the cost of its expenses.

Upon foreclosure of any of these liens, a buyer in many cases probably could purchase title for a nominal amount above the city's liens. For purposes of this program, the buyer would be a nonprofit corpora-

ferred upon the city the power to perform repairs directly and recoup its expenses. N.Y. MULT. DWELL. LAW § 309 (McKinney 1946, Supp. 1967). The problem and its solution were described as follows:

In connection with departmental authority, however, the Commission has been forced to observe the virtual breakdown in the enforcement by city magistrates of the Tenement House Law. The practice of frequently adjourning cases involving violations, freely discharging or suspending sentence, and of imposing negligible fines in the trifling number of cases in which any penalty whatever is imposed was noted in the earlier report of this Commission and continued down to the December hearings where vigorous public protest was made. In an effort to relieve the magistrates' courts as far as possible of a responsibility with which they have been unsympathetic, the Commission in the proposed law gives the enforcing department (primarily the tenement house department in the City of New York) power . . . to make the required repairs at the expense of the owner or his property.

TEMPORARY COMM'N TO EXAMINE & REVISE THE TENEMENT HOUSE LAW, REPORT TO THE LEGISLATURE, 1929 Leg. Doc. No. 54, at 5.

In accord with the intent of the draftsmen, the Multiple Dwelling Law provides for an emergency repair program largely self-sustaining and independent of the judiciary. A revolving fund to finance the program is authorized, to replenish itself out of civil and criminal penalties recovered. N.Y. MULT. DWELL. LAW § 304(5) (McKinney Supp. 1967). The department is given the power to repair dangerous and nondangerous violations with or without a previous order to the owner. *Id.* § 309(1). Recovery of the cost of repair may be had by civil suit against the owner, *id.* § 309(3), by establishing a lien on the rents without any court proceedings (the tenants making rental payments directly to the department), *id.* § 309(7)(a)-(b), and by filing, without prior judgment, a lien against the building and land, which lien is prior to existing mortgages. *Id.* § 309(4)(a).

In December 1966, the Department of Buildings instituted an emergency program based, in part, on the provisions of the Multiple Dwelling Law. During the 9-month period ending August 31, 1967, repairs had been made in 13,898 buildings. N.Y. City Dep't of Bldgs., Analysis and Recommendations: Rehabilitation, Assistance and Code Enforcement Programs of the Housing and Development Administration, Oct. 24, 1967, at 69.

For an extensive treatment of the emergency repair powers, see N.Y. City Dep't of Bldgs., *A Program for Housing Maintenance and Emergency Repair*, 42 ST. JOHN'S L. REV. 165 (1967). The emergency repair powers have recently been enhanced by the "WMCA" law, ch. 619, McKinney's N.Y. Session Laws 756 (1966), which imposes personal liability on certain shareholders of a corporation whose building has been declared a public nuisance. The law derives its name from WMCA Call for Action, a nonprofit civic group that sought its passage.

<sup>41</sup> N.Y. MULT. DWELL. LAW § 309 (McKinney 1946, Supp. 1967).

tion<sup>42</sup> created specifically for: (1) taking title;<sup>43</sup> (2) securing FHA insurance for the tenant condominium and giving general financial advice to it; (3) hiring and supervising rehabilitation contractors in the exercise of its general business expertise; and (4) perhaps negotiating acquisitions with the private building owners. Immediately after acquisition, the nonprofit corporation would offer a condominium in the rehabilitated building to any existing tenants.

It might be argued that only rarely will a building be sold for \$5,000 or \$10,000 worth of liens, since mortgagees will protect their interest by bidding in to buy off the city's liens. But this would not be true for the many buildings that are not profitable in their present condition. They require complete rehabilitation, and there is little new money presently available from private sources. The lien foreclosure would force the present interest holders to invest an additional \$5,000 or \$10,000 to cover the liens, and afterwards they would still be left with the same unprofitable building. Many interest holders will forego this privilege.

Private negotiation between the nonprofit corporation and private owners is another feasible method of acquisition. Many buildings probably could be obtained for approximately \$1,500 to \$2,000 per apartment unit.<sup>44</sup> In the middle-income phase of this program, however, the purchase price, as well as the real estate taxes, will doubtless be much higher. But rehabilitation costs will be low, if not nonexistent.<sup>45</sup>

<sup>42</sup> See pp. 390-93 *infra* concerning the creation of such a corporation.

<sup>43</sup> If the city itself takes title, there are severe charter problems relating to the sale of city property. See NEW YORK, N.Y., CITY CHARTER §§ 39(16), 384 (1963). An additional benefit of the proposal is that the lien will be paid and the city will be saved the expense of taking title and caring for the property.

<sup>44</sup> Mr. Howard Auerbach of Wm. A. White & Sons, real estate brokers, commented on this problem:

We can usually make it clear to the landlord that his particular structure is not absolutely necessary to the success of the project. If a group of landlords hold out for inflated prices, we can always seek out an altogether different area for rehabilitation. Today, practically every block in Harlem is a prime candidate for rehabilitation, and there are hundreds more throughout the city . . .

Real Estate Weekly, Aug. 18, 1966, at 11, col. 3.

There seems to be general agreement that the slum real estate market is currently depressed. In a letter to the Mayor, Mr. Sidney Freidberg, an attorney, has written that "in terms of the destruction of property values" the Buildings Department has "wreaked more havoc than the Chicago fire, the San Francisco earthquake and the sack of Rome by Attila the Hun. This department is inefficient to the point of idiocy, unjust, confiscatory and cynically sadistic." The letter continued: "Buildings which sold for five or six times the annual rental before your inauguration are now going begging at less than half the price." N.Y. World Journal Tribune, Feb. 27, 1967, at 6, col. 4.

<sup>45</sup> In some cases the acquisition cost may be zero. For example, assume that the Emer-

## IV

## FHA MORTGAGE INSURANCE

The National Housing Act was amended by the Housing Act of 1961 to include a new section entitled "Mortgage Insurance for Individually Owned Units in Multifamily Structures."<sup>46</sup> This legislation was designed to stimulate the construction and rehabilitation of buildings under the condominium form of tenure.<sup>47</sup> It authorizes the FHA to insure individual mortgages in multifamily structures.<sup>48</sup> By amendment in 1964, the FHA has been allowed to insure a blanket mortgage to cover the cost of acquisition and of construction or rehabilitation.<sup>49</sup>

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gency Repair Program is forced to install a new boiler and receives a priority lien in the amount of \$5,000. At the foreclosure sale, the nonprofit corporation will purchase title to the property including the new boiler. As a result, the projected rehabilitation cost for the building would be reduced by \$5,000.

<sup>46</sup> National Housing Act § 234, 75 Stat. 160 (1961), 12 U.S.C. § 1715y (1964). The legislative history of § 234 is found in S. REP. NO. 281, 87th Cong., 1st Sess. 16-17 (1961); H.R. REP. NO. 602, 87th Cong., 1st Sess. (1961); *Hearings on Housing Legislation of 1961 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 87th Cong., 1st Sess. 327-28, 434-35, 479-82 (1961); *Hearings on Housing Act of 1961 Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 87th Cong., 1st Sess. 8-9, 109-10, 235-36, 247-53, 793 (1961); *Hearings on Housing Legislation of 1960 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 86th Cong., 2d Sess. 484-608, 980-83 (1960) [hereinafter cited as *1960 Senate Hearings*]; *Hearings on General Housing Legislation Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 86th Cong., 2d Sess. 246-74 (1960) [hereinafter cited as *1960 House Hearings*].

The impetus for § 234 came from a Puerto Rican delegation headed by the Resident Commissioner, Dr. A. Fernos-Isern. *1960 House Hearings, supra* at 246-74; *1960 Senate Hearings, supra* at 585-608. The delegation observed that the condominium was a popular form of tenure in Puerto Rico and that its financing for middle- and low-income families would be assisted by the availability of FHA insurance. The 1960 legislation died in committee, presumably because of FHA opposition. See *1960 Senate Hearings, supra* at 980-82 (testimony of FHA Commissioner Zimmerman).

In transmitting the Housing Act of 1961 to Congress, President Kennedy stated: "We must resume with full vigor the forward movement toward a better life for all Americans. Essential to such a better life is housing available to all at a cost all can afford." PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, JOHN F. KENNEDY 1961, at 244 (1962).

<sup>47</sup> See HARRISON, *The FHA Condominium: Use as a Means of Meeting the Need for Moderate Income Housing*, 11 N.Y.L.F. 458, 459 (1965). For general discussions of condominiums in a low-income context, see *A Chance for Low-Income Families To Own a Home*, Boston Sunday Globe, Oct. 15, 1967, at B-45, col. 1, and Krasnowiecki, *Professor Suggests Use of Condominium Concept*, VA. L. WEEKLY, March 3, 1966, at 1, reprinted at request of Senator Percy in 113 CONG. REC. S6642-44 (daily ed. May 10, 1967).

<sup>48</sup> National Housing Act § 234(c), 12 U.S.C. § 1715y(c) (1964).

<sup>49</sup> *Id.* § 234(d), 12 U.S.C. § 1715y(d) (1964, Supp. 1, 1965). The committee reports on the 1964 amendments are found at S. REP. NO. 1265, 88th Cong., 2d Sess. 44-46 (1964); H.R. REP. NO. 1828, 88th Cong., 2d Sess. 44-46 (1964); H.R. REP. NO. 1703, 88th Cong., 2d Sess. 5-6, 37-38, 80-84 (1964). This amendment also extended the maximum term of an individual mortgage from 30 to 35 years.

When rehabilitation is complete, the blanket mortgage is released and separate mortgages substituted.<sup>50</sup>

The limitations on mortgage insurance may be summarized as follows:

- (1) The term of the individual mortgage cannot exceed thirty-five years or three-quarters of the remaining estimated life of the building, whichever is less.
- (2) The interest rate cannot exceed five and one-quarter percent. The FHA charges an insurance premium of one-half of one percent, which apparently can be administratively waived.<sup>51</sup>
- (3) The project must contain five or more living units. This requirement can be met by connected buildings that are part of the same project.
- (4) The principal of an individual (as opposed to a blanket) mortgage cannot exceed \$30,000.<sup>52</sup> Also, the mortgage cannot exceed ninety-seven percent of the first \$15,000, ninety percent of the next \$5,000, and seventy-five percent of the remainder.<sup>53</sup>
- (5) The blanket mortgage covering the cost of construction cannot exceed \$20,000,000.

To prevent speculation on the apartment mortgages, the statute provides that a mortgagor must own and occupy one apartment, and in no event may he own more than four.<sup>54</sup> As of December 31, 1965, the FHA had experienced no defaults in mortgages on insured apartments.<sup>55</sup>

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<sup>50</sup> National Housing Act § 234(f), 12 U.S.C. § 1715y(f) (1964).

<sup>51</sup> Such waiver is possible with § 221(d)(3) insurance. National Housing Act § 221(f), 12 U.S.C. § 1715l(f) (Supp. II, 1965-66).

<sup>52</sup> Other limitations exist on a per-apartment basis. Thus a mortgage cannot exceed: on a 1-bedroom apartment, \$12,500, and \$15,000 in an elevator building; on a 2-bedroom apartment, \$15,000, and \$18,000 in an elevator building; on a 3-bedroom apartment, \$18,500, and \$22,500 in an elevator building; on a 4-or-more-bedroom apartment, \$21,000, and \$25,500 in an elevator building. These limitations, however, may, in the Commissioner's discretion, be increased by 45% in high-cost areas. National Housing Act § 234(e)(3), 12 U.S.C. § 1715y(e)(3) (Supp. II, 1965-66).

<sup>53</sup> The Administration has recommended increasing the maximum mortgage limits from 75% to 80% of the value in excess of \$20,000. *Hearings on Housing Legislation of 1967 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 88 (1967) [hereinafter cited as *1967 Senate Hearings*] (testimony of Robert C. Weaver). This recommendation has been incorporated in the omnibus housing bill reported by the Senate Committee on Banking and Currency. S. 2700, 90th Cong., 1st Sess. § 205 (1967); S. REP. No. 809, 90th Cong., 1st Sess. (1967).

<sup>54</sup> National Housing Act § 234(c), 12 U.S.C. § 1715y(c) (1964); 24 C.F.R. § 234.26(e) (1967). The House version prohibited any ownership other than by an occupant. The existing provision permitting ownership of 3 additional units was added by the Senate.

<sup>55</sup> 1965 U.S. DEP'T OF HOUSING & URBAN DEV. ANN. REP. 75 table 26 [hereinafter cited as 1965 HUD ANN. REP.] (showing 807 insured mortgages in force). The 1965 *Annual Report* is the most recent available.

## V

## SOURCE OF MONEY

With FHA insurance available, private sources such as banks, insurance companies, and foundations will probably provide the needed money. In the past, large institutional investors have not actively participated in the urban housing field. Their lack of interest is probably attributable to an aversion to government regulation and involvement, as well as to the practical difficulties in operating and managing large real estate holdings.<sup>56</sup> Instead, the institutions have preferred to invest in stocks, bonds, and commercial mortgages. The proposed program would provide institutional investors with insured long-term investments that would involve neither day-to-day management of real estate nor government regulation. Institutional investors, therefore, should be more willing to venture into a condominium-based program than into other forms of urban investment.<sup>57</sup>

The Federal National Mortgage Association (FNMA) is authorized to provide special assistance in the financing of FHA and Veterans Administration mortgages by making advance commitments to purchase certain mortgages.<sup>58</sup> Condominiums financed under Section 234 of the

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<sup>56</sup> See generally C. ABRAMS, *THE CITY IS THE FRONTIER* 92-100 (1965).

<sup>57</sup> Another method of attracting hesitant private capital is through the sale of federally guaranteed debentures, the proceeds of which would be used for mortgage investment. This method should draw capital from custodians of trusts and pension funds who presently avoid the mortgage market because of servicing problems and lack of liquidity. A system of federally guaranteed debentures for this purpose has been proposed by Senator Percy. See p. 394 *infra*; *1967 Senate Hearings, supra* note 53, at 465-66 (colloquy between Senator Percy and Mr. Frank Carr, President of John Nuveen & Co., appearing on behalf of the Investment Bankers Ass'n of America); *id.* at 1534-38 (statement of Senator Percy). See also Heimann, *The Necessary Revolution in Housing Finance*, in *1966 Executive Reorganization Hearings, supra* note 14, at 2274, 2279; *Hearings on Mortgage Credit Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 5, 12-13 (1967) [hereinafter cited as *1967 Mortgage Credit Hearings*] (testimony of Secretary Weaver); *id.* at 179-83 (statement of John Heimann).

The omnibus housing bill reported by the Senate Committee on Banking and Currency would authorize the Federal National Mortgage Association (*see pp. 375-79 infra*), in its secondary market operation, to subject part or all of its mortgages to a trust. S. 2700, 90th Cong., 1st Sess. § 229 (1967). FNMA would then issue and sell trust certificates representing the beneficial interests in mortgages held in trust. *Id.*; S. REP. NO. 809, 90th Cong., 1st Sess. 44-45 (1967). Mr. Raymond Lapin of FNMA has stated that the proposed trust certificate would be "a realistic means of providing the mortgage market with a security instrument that it needs to compete in the nation's capital markets." Address by Mr. Lapin, 23d Annual Conference of Senior Executives in Mortgage Banking, New York University, Jan. 12, 1968.

<sup>58</sup> FNMA Charter Act of 1954, 12 U.S.C. §§ 1716-23 (1964, Supp. I, 1965, Supp. II, 1965-66).



National Housing Act presently come within these special assistance provisions.<sup>59</sup> The FNMA also provides financing assistance for condominiums under its regular program of secondary market operations.<sup>60</sup>

The FNMA was incorporated on February 10, 1938, as an instrumentality of the United States. Presently, it is under the jurisdiction of the Department of Housing and Urban Development.<sup>61</sup> Its business consists primarily of the purchase and sale both of mortgages insured by the FHA and, since 1948, of mortgages guaranteed by the VA. It is empowered to perform three functions:<sup>62</sup> (1) *Secondary market operations*—the purchase and sale of home mortgages to provide liquidity for mortgage investment; (2) *Special assistance functions*—the purchase of mortgages, as authorized by the President or Congress, to assist in financing home mortgages where established financing facilities are inadequate; (3) *Management and liquidating functions*—the management and liquidation of certain mortgages in its portfolio. The Federal National Mortgage Association Charter Act of 1954<sup>63</sup> provided for separate accountability with respect to these operations, each having its own assets, liabilities, and separate borrowing authority.<sup>64</sup>

The central nonprofit corporation proposed in this program should be able to qualify with the FNMA as an "eligible seller" of

<sup>59</sup> National Housing Act § 305(g), 12 U.S.C. § 1720(g) (Supp. II, 1965-66), authorizes the FNMA to make commitments to purchase "any mortgages which are insured under Title II of this Act." Title II, "Mortgage Insurance," includes § 234, under which condominiums would be financed.

<sup>60</sup> See 1965 HUD ANN. REP. 145 table 89.

<sup>61</sup> For a general discussion of the FNMA, see L. Vidger, FNMA (unpublished dissertation, University of Washington, 1960, available at the New York City Public Library).

<sup>62</sup> The division of functions was created by the FNMA Charter Act of 1954, 12 U.S.C. §§ 1716-23 (1964, Supp. I, 1965, Supp. II, 1965-66). This legislation was the result of PRESIDENT'S ADVISORY COMMITTEE ON GOV'T HOUSING POLICIES AND PROGRAMS, RECOMMENDATION (1953).

<sup>63</sup> 12 U.S.C. §§ 1716-23 (1964, Supp. I, 1965, Supp. II, 1965-66). Below is a table indicating the 1965 activities of FNMA by type of operation (dollars in millions):

Function or operation	Purchases	Sales	Repayments	Other credits	Year-end portfolio	Contracts outstanding
Secondary market operations	756.9	46.5	125.6	62.2	2,519.5	461.5
Special assistance functions	135.6	102.0	52.9	37.7	1,340.3	331.9
Management and liquidating functions	20.3	54.2	113.2	14.0	952.6	—
Total	\$912.8	\$202.7	\$291.7	\$113.9	\$4,812.4	\$793.4

1965 HUD ANN. REP. 142 table 78.

<sup>64</sup> 12 U.S.C. § 1722 (1964).

mortgages.<sup>65</sup> If the tenant condominium mortgages qualify under the FNMA special assistance program, the FNMA, in effect, would be the mortgagee. Formally, the approved lending institution would be the mortgagee, but it would issue the mortgage only when it had received a commitment from the FNMA; shortly after issuance, the mortgage would be sold to the FNMA.

For the purposes of the condominium program, two of the FNMA's functions are of special interest. The first of these is the secondary market operation described in the purposes clause, Section 301 of the National Housing Act:

The Congress hereby declares that the purposes of this title are to establish in the Federal Government a secondary market facility for home mortgages, to provide that the operations of such facility shall be financed by private capital to the maximum extent feasible, and to authorize such facility to—

(a) provide supplementary assistance to the secondary market for home mortgages by providing a degree of liquidity for mortgage investment capital available for home mortgage financing . . . .<sup>66</sup>

Section 302(b) provides that the FNMA is authorized to purchase mortgages insured by the FHA:

For the purposes set forth in section 301 and subject to the limitations and restrictions of this title, the Association [FNMA] is authorized, pursuant to commitments or otherwise, to purchase, lend (under section 304) on the security of, service, sell, or otherwise deal in any mortgages which are insured under the National Housing Act . . . .<sup>67</sup>

Section 304, entitled "Secondary Market Operations," provides that "so far as practicable" the operations of the FNMA shall be confined "to mortgages which are deemed by the Association to be of such quality, type, and class as to meet, generally, the purchase standards imposed by private institutional mortgage investors . . . ." The price paid by the FNMA should be "within the range of market prices."<sup>68</sup> Consequently, the purchase of tenant condominium mortgages by the FNMA would not require new legislation or express Presidential authorization, but merely an administrative determination that the mortgages "meet,

<sup>65</sup> 24 C.F.R. §§ 1600.71-73 (1967).

<sup>66</sup> 68 Stat. 612 (1954), 12 U.S.C. § 1716 (1964).

<sup>67</sup> 68 Stat. 613 (1954), as amended, 75 Stat. 176 (1961), 12 U.S.C. § 1717(b) (1964, Supp. II, 1965-66).

<sup>68</sup> As originally enacted in 1954, § 304 provided that the price paid by the FNMA be "at the market price." 68 Stat. 615. The language was amended to its present form by Act of Aug. 7, 1956, § 203, 12 U.S.C. § 1719 (1964).

generally, the purchase standards imposed by private institutional mortgage investors." For the middle-income phase of the condominium program this requirement presents no problem. For the low-income phase, the requirement should be met, since the program will provide housing at a cost within the means of the owner. The secondary market function receives about eighty-five percent of its capital from the public issuance of debentures and short-term discount notes.<sup>69</sup> The Association's authority to issue its obligations to the public was increased in September of 1966 by about 3.75 billion dollars.<sup>70</sup>

The second operation of the FNMA relevant to the condominium program is the special assistance function, defined by section 305.<sup>71</sup> Its purpose is described by section 301 as follows:

(b) [to] provide special assistance (when, and to the extent that, the President has determined that it is in the public interest) for the financing of (1) selected types of home mortgages (*pending the establishment of their marketability*) originated under special housing programs designed to provide housing of acceptable standards at full economic costs for segments of the national population which are unable to obtain adequate housing under established home financing programs . . . .<sup>72</sup>

The italicized language precisely describes the tenant condominium situation. First, special assistance for low-income condominium mortgages may be needed pending the establishment of their marketability. Second, the tenant condominium is designed to provide housing of acceptable standards "at full economic costs." Finally, the tenant condominium is designed to provide housing "for segments of the national population which are unable to obtain adequate housing under established home financing programs."

The special assistance function is financed by borrowing from the Treasury.<sup>73</sup> In September 1966, Congress authorized one billion dollars of special assistance funds, half of which was to be transferred from an

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<sup>69</sup> 1965 HUD ANN. REP. 148 table 93. As of December 31, 1965, the FNMA's secondary market operation had purchased mortgages insured under § 234 in the amount of \$3,400,000. *Id.* at 145 table 89.

<sup>70</sup> The Act of Sept. 10, 1966, 80 Stat. 738, amended §§ 303(d), (e), and 304(b) of the National Housing Act, 12 U.S.C. §§ 1718(d)-(e), 1719(b) (Supp. 11, 1965-66). This results in an increased borrowing power of about \$3.75 billion. See *1967 Mortgage Credit Hearings*, *supra* note 57, at 39-40.

<sup>71</sup> 12 U.S.C. § 1720 (1964).

<sup>72</sup> 68 Stat. 612 (1954), 12 U.S.C. § 1716 (1964) (emphasis added).

<sup>73</sup> National Housing Act § 305(d), 12 U.S.C. § 1720(d) (1964).

existing Presidential authorization.<sup>74</sup> This authorization is, by its terms, available for mortgages insured under section 234.<sup>75</sup>

## VI

### REHABILITATION COSTS

Although rehabilitation costs will vary from building to building and in accordance with the amount of work necessary, an examination of the cost data concerning several rehabilitation projects now under construction or recently completed makes possible certain general observations.<sup>76</sup> The complete rehabilitation of an apartment unit in New York City can be accomplished at a cost of from \$5,000 to \$8,000, exclusive of acquisition cost.

The New York City Rent and Rehabilitation Administration has undertaken to rehabilitate a number of buildings on an experimental basis, and the FHA has issued mortgage commitments on most of these projects. One such project involves the rehabilitation of West 114th Street between Seventh and Eighth Avenues in Manhattan. When completed it will consist of thirty-seven buildings containing 458 apartment units. The cost of the first three buildings completed amounted to an estimated \$307,561, or \$9,320 per unit, a figure which includes brick and mortar costs and the contractor's on-site expenses, as well as the cost of acquisition.<sup>77</sup>

A subsidiary of U.S. Gypsum Company has completed rehabilitation of six buildings on East 102d Street. The total cost of the first building completed, including acquisition cost, was \$219,000, or \$9,120 per unit (\$15.90 per square foot). Acquisition cost of that building was \$30,000, or \$1,250 per unit. Thus, rehabilitation cost, excluding acquisition cost but including builders' fees, was \$7,870 per unit.<sup>78</sup>

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<sup>74</sup> Act of Sept. 10, 1966, 12 U.S.C. § 1720(g) (Supp. II, 1965-66). As of June 1967, about \$400 million of this amount was still available. *1967 Mortgage Credit Hearings, supra* note 57, at 40 (testimony of Philip Brownstein, Ass't Sec'y for Mortgage Credit and Federal Housing Comm'r).

<sup>75</sup> See note 59 *supra*.

<sup>76</sup> The current thinking of the Administration with respect to rehabilitation is found in *1967 Senate Hearings, supra* note 53, at 12-13, 95-111 (testimony of Secretary Weaver).

<sup>77</sup> N.Y. CITY RENT & REHABILITATION ADMINISTRATION 7TH QUARTERLY REP., March 31, 1966, at 3. Subsequent *Quarterly Reports* do not include cost figures. Similarly, Secretary Weaver's recent discussion of the West 114th Street project does not include such data. See *1967 Senate Hearings, supra* note 53, at 100-02. Senator Percy, however, has stated that the average cost per unit is \$13,491. *Id.* at 201. See generally *1966 Executive Reorganization Hearings, supra* note 14, at 564-73 (testimony of Mayor Lindsay).

<sup>78</sup> N.Y. CITY RENT & REHABILITATION ADMINISTRATION 7TH QUARTERLY REP., March 31, 1966, at 7. Based on its New York experience, U.S. Gypsum has estimated a total cost figure

Conceivably, the experimental "Forty-Eight-Hour Rehabilitation Project" undertaken with \$250,000 of federal funds might lower rehabilitation costs still further. This program is intended to make possible the complete rehabilitation of a building within forty-eight hours, and was carried out on two buildings at 635 and 637 East Fifth Street in Manhattan.<sup>79</sup>

It must be understood that the programs upon which rehabilitation costs in New York City are estimated were experimental and not part of a broad-based program of rehabilitation.<sup>80</sup> Thus, in a new program for the annual rehabilitation of 5,000 apartment units planned by the City Housing and Redevelopment Board,<sup>81</sup> projected cost for a two-unit, owner-occupied masonry structure requiring extensive rehabilitation is \$5,400 per unit. For a five-unit, three-story masonry structure requiring extensive rehabilitation and gutting, the projected cost is \$6,000 per unit. For a twenty-five-unit Old Law walkup to six stories requiring extensive rehabilitation and gutting and installation of an elevator, \$7,600 per unit is envisioned.<sup>82</sup> These figures contemplate rehabilitation under federal programs, and consequently the labor costs they re-

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of \$12,000 per unit for a 150-unit project in Chicago. *ENGINEERING NEWS-RECORD*, Sept. 21, 1967, at 64.

<sup>79</sup> See generally *1967 Senate Hearings*, *supra* note 53, at 102 (testimony of Secretary Weaver); *N.Y. Post*, May 10, 1967, at 58, col. 2; *N.Y. Times*, March 30, 1967, at 91, col. 1.

<sup>80</sup> A national rehabilitation market of \$50-75 billion has been estimated by ACTION-Housing, Inc., a nonprofit corporation that seeks to promote rehabilitation and lower costs by new methods. *N.Y. Times*, Feb. 5, 1967, § 8, at 1, col. 2. See also *1967 Senate Hearings*, *supra* note 53, at 993-1013 (testimony of ACTION-Housing, Inc.).

<sup>81</sup> *N.Y. CITY HOUSING & REDEV. BD., A LARGE SCALE RESIDENTIAL REHABILITATION PROGRAM FOR NEW YORK CITY 33* (HRB Rep. No. 14, Feb. 1967) [hereinafter cited as HRB Rep. No. 14].

<sup>82</sup> *Id.* at 12 table 2. The Housing and Redevelopment Board cost seems reasonable in light of the experience of ACTION-Housing, Inc., in Pittsburgh, which has shown that 2-story, single-family row houses over 60 years old can be completely rehabilitated with modern facilities at a cost of \$6,000 per dwelling. *1967 Senate Hearings*, *supra* note 53, at 995. In a 1966 study for the City of Philadelphia, Charles Abrams reported a large supply of row houses, mostly in the Negro sections, which could be purchased at prices between \$2,000 and \$5,000. The buildings did not require rehabilitation. Mr. Abrams recommended that these row houses be made available as ownership housing to very low income families (\$2,700-\$3,600 per year). *Id.* at 712. The possibility of a similar program for New York City was described by Mr. Abrams as follows:

I am not saying that the Philadelphia situation or its price-levels are nationwide. In contrast to Philadelphia's row housing pattern, low income families in New York City and Chicago live in multi-family houses, but even in New York City the price of a ten-family house in Harlem is today only \$20,000 or \$2,000 per unit, reflecting in more vertical form the price levels I found in Philadelphia's row housing. If each unit in New York City could be improved at a cost of not more than \$4,500, a low income family would be able to afford the unit if the interest rate were 3 percent. No additional subsidy would be needed.

*Id.* at 713.

flect would comply with Section 212 of the National Housing Act.<sup>83</sup>

The foregoing discussion has focussed upon radical rehabilitation. But many buildings requiring less extensive rehabilitation are probably available. Such buildings, improved at a cost of \$1,500 to \$2,500 per unit, would bring homeownership opportunities within the reach of low-income families without subsidy.

The feasibility of ownership housing for low- and middle-income families depends on the builder's cost of construction or rehabilitation and the potential homeowner's cost of long-term financing. If the cost of construction or rehabilitation increases greatly, without a corresponding decrease in financing cost, homeownership becomes impractical. Section 212 of the National Housing Act requires mortgages insured under section 234(d)<sup>84</sup> to provide that wages paid construction workers be in accordance with the Davis-Bacon Act of 1931.<sup>85</sup> The provisions of this act are designed to protect local laborers and contractors against unfair competition from outside contractors whose lower costs reflect lower wage levels prevailing elsewhere.<sup>86</sup> It provides that wages and fringe benefits paid laborers on federal construction and certain types

<sup>83</sup> 12 U.S.C. § 1715(c) (Supp. I, 1965); see pp. 381-82 *infra*.

<sup>84</sup> The provisions of this section apply generally to FHA-insured projects, including the insurance of any loan or mortgage under §§ 207, 213, 220, 221(d)(3), 221(d)(4), 221(h)(1), 231, 232, 233, and direct federal loans pursuant to § 312. See Housing Act of 1950, § 402(f), 12 U.S.C. § 1749b(f) (1964). The AFL-CIO has recommended that a Davis-Bacon provision be included in Senator Percy's homeownership bill, which is discussed at pp. 393-99 *infra*. 1967 Senate Hearings, *supra* note 53, at 1557-58 (statement of C. J. Haggerty for AFL-CIO). The Davis-Bacon Act would apply to the two new mortgage insurance programs proposed in the omnibus bill reported by the Senate Committee on Banking and Currency. S. 2700, 90th Cong., 1st Sess. §§ 235(i)(2), 236(d)(1) (1967); S. REP. No. 809, 90th Cong., 1st Sess. (1967).

<sup>85</sup> 40 U.S.C. § 276a (1964).

<sup>86</sup> The Senate Report expressed the original intent of the Davis-Bacon Act as follows:

The Federal Government must, under the law, award its contracts to the lowest responsible bidder. This has prevented representatives of the departments involved from requiring successful bidders to pay wages to their employees comparable to the wages paid for similar labor by private industry in the vicinity of the building projects under construction. Though the officials awarding contracts have faithfully endeavored to persuade contractors to pay local prevailing wage scales, some successful bidders have selfishly imported laborers from distant localities and have exploited this labor at wages far below local wage rates.

. . . Not only are local workmen affected, but qualified contractors residing and doing business in the section of the country to which Federal buildings are allocated find it impossible to compete with the outside contractors, who base their estimates for labor upon the low wages they can pay to unattached, migratory workmen imported from a distance and for whom the contractors have in some cases provided housing facilities and food in flimsy, temporary quarters adjacent to the project under construction.

S. REP. No. 1445, 71st Cong., 3d Sess. 2 (1931). See also 74 CONG. REC. 6510 (1931) (remarks of Representative Bacon).

of federally-aided construction shall be at the rate prevailing in the area<sup>87</sup> for the particular work done.

Prevailing wage rates are determined by the Secretary of Labor through a continuing program "for the obtaining and compiling of wage rate information"<sup>88</sup> conducted by the Solicitor of Labor.<sup>89</sup> Unlike new construction, rehabilitation of multiple dwellings in New York City is primarily a nonunion business. The Solicitor of Labor has set union scale wages as the prevailing rate for both new construction and rehabilitation.<sup>90</sup> The cost of rehabilitation at union rates is two or three times the rate that would otherwise prevail. It seems clear that rehabilitation should be a distinct work classification, and that wages for rehabilitation should be different from those for new construction. Although the Davis-Bacon Act attempted to protect local labor from unfair competition with lower-priced outside labor, its effect in New York City has been to protect local union labor from competition with local non-union workers who are unable to gain membership in construction unions because of restrictive practices.

Interestingly, section 212 is expressly made applicable only to the blanket mortgage for construction of a condominium under section 234(d). It does not apply to the individual mortgages of the unit owners.<sup>91</sup> Consequently, an institutional investor could finance the blanket mortgage and upon completion divide it among the unit owners. FHA insurance would be available for the individual mortgages and they could be purchased by the FNMA.<sup>92</sup>

<sup>87</sup> "Area" is defined in 29 C.F.R. § 1.2(b) (1967) as the city, town, village, or other civil subdivision of the state where the work is to be performed.

<sup>88</sup> *Id.* § 1.3.

<sup>89</sup> The prevailing rate is the rate paid to the majority of those employed in the area. *Id.* § 1.2(a)(1). If there is no statistical majority, the prevailing rate is the rate at which the greater number of workers are paid, provided that the greater number comprises at least 30% of the total. *Id.* § 1.2(a)(2). Should the greater number comprise less than 30% of the total, the prevailing rate is the average rate, *id.* § 1.2(a)(3), determined by adding the hourly rates paid to all workers in the classification and dividing the resulting figure by the total number of such workers. *Id.* § 1.2(c).

<sup>90</sup> Decision of the Secretary, AG-17,077, July 23, 1967.

<sup>91</sup> National Housing Act § 234(c), 12 U.S.C. § 1715y(c) (1964).

<sup>92</sup> On September 13, 1967, the President announced the insurance industry's pledge of \$1 billion for mortgage investment in ghetto housing and industry. The money is to be subscribed by the life insurance companies on a prorated basis according to their assets. The FHA will insure the investments against risk of loss. N.Y. Times, Sept. 14, 1967, at 1, col. 1; American Banker, Sept. 15, 1967, at 9, col. 1.

An imaginative, if politically difficult, plan would be to use the \$1 billion as a revolving fund to finance blanket mortgages for condominium housing. After construction or rehabilitation, the blanket mortgage would be divided into individual mortgages which could be insured under § 234 and sold to the FNMA.

The monthly amortization tables indicate the flexibility of the proposed program. For the low-income phase of the program, a per-unit acquisition and rehabilitation cost of \$3,000 to \$15,000 can be expected. For the middle-income phase of the program, a per-unit cost of \$15,000 to \$40,000 is expected, and in some cases new construction might be feasible. For the low-income groups new construction would probably require subsidy, in the form of either an interest subsidy or an extension of the presently permitted mortgage term.<sup>93</sup>

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The insurance industry's pledge and other efforts to mobilize private interests in the solution of urban problems recently led Professor John Kenneth Galbraith to comment: "Private enterprise and private investment are being aroused to their responsibilities—as they have without result a hundred times before." Specifically referring to the insurance industry offer, Professor Galbraith stated: "Nothing will come of it." N.Y. Times, Oct. 17, 1967, at 77, col. 1.

The \$1 billion offer has caused Charles Abrams to suggest the desirability of legislation to permit a federal interest subsidy on private loans. Mr. Abrams points out that this proposal would, in addition to stretching limited federal funds, also avoid problems arising from the inclusion of direct federal loans in the federal budget. N.Y. Times, Nov. 6, 1967, at 46, col. 5. It is worth noting that the President's Commission on Budget Concepts recently warned that inclusion of direct loans in the budget may cause the "undue expansion" of guaranteed and insured loans which are not so included. The Commission stated:

Moreover, serious consideration should also be given to new forms of coordinated surveillance of direct, insured and guaranteed loans. Otherwise, an appropriate choice in terms of effective resource allocation may be difficult to achieve and the inclusion of direct loans in the budget may encourage an undue expansion of guaranteed and insured loans to avoid being counted in the budget.

N.Y. Times, Oct. 18, 1967, at 35, col. 4, quoting Report of the President's Comm'n on Budget Concepts.

<sup>93</sup> Assuming low land acquisition cost (as described at pp. 370-72 *supra*), new construction may be feasible for persons earning under \$7,000 a year. In New York City, new construction cost (including ordinary excavation, foundation footings, and contractors' overhead and profit) may be estimated at between \$1.50 and \$1.80 per cubic foot for a fireproof high-rise multiple dwelling. Assuming between 8,000 and 10,000 cubic feet to be attributable to a 2-bedroom apartment, the construction cost would be between \$12,000 and \$18,000 per apartment. See generally F. W. DODGE CO., BUILDING COST AND SPECIFICATION DIGEST (March 1967).

The New York City Housing Authority's current construction cost is about \$1.50 per cubic foot. The average Housing Authority room contains 2,025 cubic feet (including an allocable share of common areas such as hallways and cellar). A 2-bedroom apartment would therefore have 8,100 cubic feet attributable to it and cost \$12,150.

In the near future, the housing industry may be subject to radical change. *Engineering News-Record*, a construction industry journal, has warned that the industry may be bypassed by revolutionary changes developed and implemented outside the industry. One hopes that a major aspect of such developments, whether accomplished within or without the construction industry, would be lowered cost. The *Engineering News-Record* observed:

Hovering over the construction industry is a vague, but ominous threat—the fear that some day, in a burst of impatience with the complicated mechanisms of contemporary construction practice, society will turn to the giant aerospace industry, with its systems approach, to sweep away the cumbersome obstacles—the outdated building and zoning codes, the stultifying union restrictions, the buck-



Acquisition and Rehabilitation or Construction Cost	Monthly Amortization Payments			
	<i>A</i> 20 Year (at 3%) <sup>94</sup>	<i>B</i> 35 Year (at 5¼%) <sup>95</sup>	<i>C</i> 35 Year (at 5¾%) <sup>96</sup>	<i>D</i> 40 Year (at 5¾%) <sup>97</sup>
\$ 3,000 <sup>98</sup>	\$16.64	\$ 15.63	\$ 16.61	\$ 15.99
5,000	27.73	26.04	27.68	26.65
7,500	41.60	39.06	41.52	39.97
10,000	55.46	52.08	55.36	53.29
12,000	66.56	62.49	66.43	63.95
15,000	83.19	78.12	83.03	79.94
20,000	Not applicable	104.15	110.71	106.58
25,000	Not applicable	130.19	138.38	133.23
30,000	Not applicable	156.23	166.06	159.87
35,000 <sup>99</sup>	Not applicable	182.27	193.73	186.52
40,000 <sup>99</sup>	Not applicable	208.30	221.41	213.16

Section 312 of the Housing Act of 1964,<sup>100</sup> on which column *A* is based, is specifically limited to rehabilitation. Unlike most federal housing statutes, it provides for direct federal rehabilitation loans "to

passing organizational labyrinth—and bring the full potential of 20th-century technology to bear on our environmental problems. What makes this threat credible is the virtual monopoly in the low-cost housing market achieved by the mobile home industry, which according to two Portland Cement Association officials, "has grown outside the traditional construction industry—without benefit of its design professions, building contractors, and materials."

ENGINEERING NEWS-RECORD, November 9, 1967, at 75. See generally testimony concerning the construction industry in 1967 *Executive Reorganization Hearings, supra* note 14, at 3507-93; *id.* at 3257, 3284-85, 3300 (testimony of Dr. Jerome B. Wiesner, Provost, Massachusetts Institute of Technology).

<sup>94</sup> The 3% interest rate is based on § 312 of the Housing Act of 1964, 42 U.S.C. § 1452b (1964, Supp. I, 1965), which is limited to urban renewal or code enforcement areas.

<sup>95</sup> The 5¼% interest rate is based on § 234(f) of the National Housing Act, 12 U.S.C. § 1715y(f) (1964). This assumes that the 0.5% FHA premium will be waived. If not, the cost would be 5¾% as shown in column C.

<sup>96</sup> The 5¾% interest rate is based on the § 234(f) rate without waiver of the FHA premium.

<sup>97</sup> Under § 213 of the National Housing Act, 12 U.S.C. § 1715e (1964, Supp. I, 1965, Supp. II, 1965-66), a 40-year term mortgage at 5¾% interest is authorized. The language of § 213 seems to authorize condominium insurance although it has not been so interpreted by the FHA. The omnibus bill reported by the Senate Committee on Banking and Currency proposes the removal of statutory interest rate ceilings under §§ 213 and 234, and would authorize the Secretary of HUD to establish such interest rate as he finds necessary to meet the mortgage market. S. 2700, 90th Cong., 1st Sess. §§ 203(c), 203(i) (1967); S. REP. No. 809, 90th Cong., 1st Sess. 26, 49 (1967). See note 106 *infra*.

<sup>98</sup> A reasonable partial rehabilitation probably could be achieved for this amount of money. Condominiums for very low income persons would thus be possible.

<sup>99</sup> Section 234 presently does not authorize insurance for a mortgage in excess of \$30,000. Persons in this price range, however, are probably capable of a substantial down payment.

<sup>100</sup> 42 U.S.C. § 1452b (1964, Supp. I, 1965).

assist rehabilitation in an urban renewal area or an area in which [there is] a program of concentrated code enforcement activities . . . ."<sup>101</sup> The Secretary is to establish a limit on the term of such loans, and the interest rate may not exceed three percent of the principal outstanding at any time.<sup>102</sup> Appropriations of one hundred million dollars were authorized for each of the next five fiscal years. Authority to make rehabilitation loans terminates as of October 1, 1969.<sup>103</sup> Although the program appears excellent and would be of great aid to the low-income tenant condominium, the federal government has not utilized the statutory authorization of funds. The most recent *Annual Report* of the Department of Housing and Urban Development shows that the rehabilitation loan program has been capitalized at only ten million dollars and that no loans have been made.<sup>104</sup>

Section 221(d)(3) of the National Housing Act,<sup>105</sup> which involves purchases by the FNMA's special assistance function, provides for one hundred percent mortgages for a forty-year term at an interest rate no lower than three percent, or the government borrowing rate. But the section does not authorize condominium insurance.<sup>106</sup> A further limita-

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<sup>101</sup> 79 Stat. 479, 42 U.S.C. § 1452b(a) (Supp. I, 1965). On August 29, 1967, the Kate Maremont Foundation and Dr. Martin Luther King, Jr., announced that § 312 was to be utilized for rehabilitation in a condominium plan involving 11 buildings (156 units) in the Lawndale section of Chicago. The estimated acquisition and rehabilitation cost is \$1,200,000, and monthly payments of under \$100 are expected. Kate Maremont Foundation, Press Release, Aug. 29, 1967, reprinted in 113 CONG. REC. S13,555-56 (daily ed. Sept. 25, 1967). Monthly maintenance cost is estimated at \$40 per unit, and the rehabilitation cost at \$4,500 per unit. The low rehabilitation cost is said to be due to a "no partition changes" approach as opposed to gutting. Letter from Executive Vice President Victor de Grazia to the N.Y. City Dep't of Bldgs., Sept. 14, 1967, on file in the Cornell Law Library.

<sup>102</sup> Housing Act of 1964, §§ 312(c)(2)-(3), 42 U.S.C. §§ 1452b(c)(2)-(3) (1964).

<sup>103</sup> *Id.* §§ 312(d), (h), 42 U.S.C. §§ 1452b(d), (h) (Supp. I, 1965).

<sup>104</sup> 1965 HUD ANN. REP. 263, tables 273-75.

<sup>105</sup> 12 U.S.C. § 1715l(d)(3) (Supp. II, 1965-66).

<sup>106</sup> Discussions of § 221(d)(3) are found in Note, *Government Housing Assistance to the Poor*, 76 YALE L.J. 508 (1967), and Prothro & Schomer, *The Section 221(d)(3) Below Market Interest Rate Program for Low and Moderate Income Families*, 11 N.Y.L.F. 16 (1965). The former also contains a discussion of the rent supplement program, Housing and Urban Development Act of 1965, § 101, 12 U.S.C. § 1701s (Supp. II, 1965-66), and the Widnall plan, or leased-housing program. *Id.* § 103, 42 U.S.C. § 1421b (Supp. I, 1965).

Senator Ribicoff has introduced legislation that would make available to homeowners benefits similar to those provided in § 221(d)(3) and § 312. S. 1434, 90th Cong., 1st Sess. (1967). Apparently the Senator's program would be limited to dwellings with 4 units or less. Senator Ribicoff has testified that his legislation is intended to assist persons earning between \$5,000 and \$8,000 per year. 1967 Senate Hearings, *supra* note 53, at 285, 288 (testimony of Senator Ribicoff).

Senator Mondale's homeownership legislation is more limited in scope. S. 2124, 90th Cong., 1st Sess. (1967). It provides for a helpful interest subsidy (proposed § 235(c)), but is

tion on this section is that the project must be in a community with an limited to "existing, previously occupied, single-family dwellings [for sale] to low or moderate income purchasers" (proposed § 235(a)). Senator Mondale views his legislation as filling a gap between § 221(d)(3), which "program mainly provides rental housing," and § 221(h) which "covers housing to be substantially rehabilitated for resale to low-income families." 1967 Senate Hearings, *supra* note 53, at 473, 476 (testimony of Senator Mondale).

Senator Joseph S. Clark of Pennsylvania has also introduced homeownership legislation. S. 2115, 90th Cong., 1st Sess. (1967). See also 1967 Senate Hearings, *supra* note 53, at 82-85 (colloquy between Senator Clark and Secretary Weaver). In a statement accompanying his legislation, Senator Clark observed that tens of thousands of families who are of moderate means and can afford to buy a home have been denied FHA mortgage insurance because they fail to meet that agency's high financial standards. The Senator continued:

As a result of these standards, FHA home financing has tended to operate primarily as a subsidy to middle class families buying homes in the suburbs. By and large this subsidy has not been available to persons living in the older parts of our cities, to members of minority groups, and to other persons of modest means.

Senator Joseph S. Clark, News Release, July 13, 1967, reprinted in 113 CONG. REC. S9550 (daily ed. July 13, 1967). The Senator's bill would establish a special revolving insurance fund for which \$15 million is authorized for appropriation. S. 2115, 90th Cong., 1st Sess. § 235(j) (1967). The proposed legislation contains no interest subsidy. In explaining the thrust of his bill, Senator Clark stated:

The bill is aimed primarily at the family with an income of from \$4,000 to \$6,000—too high for public housing, but too low for help under FHA's existing programs. There is strong evidence that families in this income range can achieve home ownership with FHA financing and budget counselling, but without a subsidized interest rate. This bill is designed to give them that chance.

Senator Joseph S. Clark, *supra*, 113 CONG. REC. at S9550.

Recently, the Senate Committee on Banking and Currency reported out an omnibus housing bill entitled the "Housing and Urban Development Act of 1967." S. 2700, 90th Cong., 1st Sess. (1967); S. REP. NO. 809, 90th Cong., 1st Sess. (1967). The bill is intended "to assist lower income families obtain decent housing through homeownership." S. REP. NO. 809, *supra* at 3. To this end the bill proposes two new types of mortgage insurance, an interest subsidy, a special risk insurance fund, and a technical assistance service. The bill would authorize mortgage insurance—for condominiums and other forms of homeownership—to low- and moderate-income persons who because of their credit history or irregular income patterns cannot qualify for such insurance under existing FHA programs. S. 2700, 90th Cong., 1st Sess. § 102 ("Credit Assistance") (1967). The proposed interest subsidy authorizes the Secretary to make direct monthly payments on a market rate mortgage to the mortgagee. *Id.* § 101 ("Homeownership Assistance"). The mortgage insured and subsidized under this provision could be on a condominium, cooperative, or single-family dwelling. The amount of subsidy cannot exceed the benefits that would result to a mortgagor under § 221(d)(3). A person becomes eligible for subsidy if his monthly payments for mortgage amortization, taxes, insurance and mortgage insurance premium would exceed 20% of his income. The subsidy is determined on a sliding scale which is designed to make up the difference between the monthly payment and 20% of the mortgagor's income. At least every 2 years the mortgagor's income must be recertified in order to adjust the subsidy payment. The subsidy is available only if the purchaser's income does not exceed 70% of § 221(d)(3) income limits. In New York City 70% of the § 221(d)(3) limit is presently \$6,125 for a family of four. 1967 Senate Hearings, *supra* note 53, at 122. A further limitation on the subsidy is that, with minor exceptions, it will be available only for newly constructed or substantially rehabilitated units. S. 2700, 90th Cong., 1st Sess. § 101 (1967) (proposed National Housing Act § 235(i)(3)(A)); S. REP. NO.

approved "workable program."<sup>107</sup> As a matter of administrative policy, the FHA has to a great extent limited the use of section 221(d)(3) to urban renewal areas.<sup>108</sup>

## VII

### MAINTENANCE AND TAXES

In a condominium each householder owns his own apartment unit and therefore is responsible for its maintenance.<sup>109</sup> General costs, based

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809, *supra* at 9, 46. Therefore, the subsidy would not be available for a low cost homeownership program premised on improving existing units at a cost of \$1,500 to \$2,500 rather than on extensive rehabilitation. The bill provides for a "special risk insurance fund" for the payment of claims on mortgages insured under § 101 (homeownership assistance) and § 102 (credit assistance). S. 2700, 90th Cong., 1st Sess. § 103 (1967); S. REP. No. 809, *supra* at 11-12, 47.

The Senate committee estimates that the interest subsidy would be adequate to cover a total of 200,000 units over a 3-year period and authorizes \$70 million to be appropriated for such purpose. S. REP. No. 809, *supra* at 10.

The proposed bill would also extend § 221(d)(3) to include condominiums. S. 2700, 90th Cong., 1st Sess. § 104 (1967); S. REP. No. 809, *supra* at 12-13, 47.

Additionally, the omnibus bill would broaden existing law to authorize the sale of condominium units in multi-family public housing projects to tenants. S. 2700, 90th Cong., 1st Sess. § 216 (1967); S. REP. No. 809, *supra* at 37, 52. Existing law, as amended in 1965, provides that detached or semi-detached public housing units may be sold to tenants. Housing Act of 1937, § 15, as amended, Housing and Urban Development Act of 1965, § 507(a), 42 U.S.C. § 1415(a) (Supp. I 1965). The reaction of the Administration to the 1965 amendment was questioned in the 1967 Senate Hearings, *supra* note 53, at 71-75. Two years later, in September of 1967, HUD announced that a "precedent-making inclusion of home ownership of public housing will be launched with a 200-unit [single-family detached] facility in North Gulfport, Miss." HUD NOTES, Sept.-Oct. 1967, at 14. The HUD announcement also states that the North Gulfport "[t]enants can become home owners in from 13 to 21 years, depending on the speed with which they develop equity in the property." *Id.* at 15; see N.Y. Times, Dec. 10, 1967, § 8, at 1, col. 8. The present statute, § 15(9), appears to permit the immediate sale of units to tenants.

<sup>107</sup> Housing Act of 1949, § 101(c), as amended, 68 Stat. 623 (1954), 42 U.S.C. § 1451(c) (Supp. I, 1965).

<sup>108</sup> Prothro & Schomer, *supra* note 106, at 28; Note, *Government Housing Assistance to the Poor*, *supra* note 106, at 516.

Nathan Glazer has pointed out that, as of mid-1964, 80,070 dwelling units were completed or under construction as a result of urban renewal. The total of federal money used to accomplish this was \$4.3 billion. The extraordinary per-unit federal cost of urban renewal housing is therefore \$53,703. Glazer, *The Renewal of Cities*, in CITIES 175, 179-80 (Scientific American 1965). In commenting on the cost and approach of urban renewal, Mr. Glazer observed:

Suppose it is—as I believe—essential that cities radically improve their function in inspecting buildings, requiring repairs and supporting them where necessary. Suppose a major way to improve a city is to root out substandard buildings wherever they are rather than demolish a huge area that is decrepit in spots. What Federal aid would be available for that?

*Id.* at 189-90.

<sup>109</sup> In a condominium, expenses, such as for heat, electricity, and a superintendent,

on rental experience, will be reduced in a condominium because of the owners' stake in the building.<sup>110</sup> The cost of heating can be apportioned on a pro rata basis, and is estimated at five to ten dollars per month. Maintenance expenses for the public parts of the building include the salary of a building superintendent<sup>111</sup> and the cost of electric lighting. These expenditures also would be apportioned on a pro rata basis. The total of all maintenance costs is estimated at approximately fifteen dollars per unit per month.

A program of housing reform in an urban setting must maintain, rather than decrease, the city's tax base. Thus, under the condominium program, each householder, as owner of his own apartment unit, will pay taxes on it.<sup>112</sup> The present taxes, on a pro rata basis, usually would be between \$3.10 and \$4.15 per unit per month.<sup>113</sup>

Fire insurance on a typical twenty-unit masonry building costs about \$0.24 per \$100 on a one-year rate. A ten percent discount is avail-

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are assessed against the unit owner in proportion to the value of the unit compared to the value of the whole project. This assessment is determined in advance at an annual meeting, and the owners pay monthly installments into a maintenance fund administered by the condominium management.

The nature of a condominium is such that certain areas, such as the structural walls, roofs, elevators, halls, and even the land upon which it is built, are held as tenancy in common. Again, it is the nature of a condominium that the costs of maintaining these common facilities must be provided on a pro rata basis.

<sup>110</sup> Some formal management arrangement is essential; two methods are possible. The unit owners acting through their board of managers can hire a professional management company to operate the building and provide the necessary services. Alternatively, the board of managers can itself undertake the day-to-day management of the building. This latter alternative not only will result in a lower cost to the unit owner but is also consonant with the goals of a program directed both at providing reasonable low-income housing and at encouraging the political and financial sophistication of the participants.

<sup>111</sup> A superintendent may be hired on a full-time or part-time basis depending on the size of the building involved. Union rates for a full-time superintendent are about \$150 per month.

<sup>112</sup> The city provides a 12-year tax exemption for increased valuation due to specified improvements of multiple dwellings. In addition, a 9-year credit is allowed against real estate taxes otherwise payable up to the extent of 8½% of the cost of the improvement per year. The overall credit cannot exceed 75% of the cost. NEW YORK, N.Y., ADMIN. CODE § J51-2.5 (1963), as amended, Local Law No. 57 (1966). In effect, the city pays for 75% of the cost of an improvement over a 9-year period. However, a good deal of these lucrative benefits are lost if a substantial rehabilitation is done, because the credit available during each of the 9 years will greatly exceed the taxes otherwise payable and will be lost. For purposes of the proposed program these provisions would result in a tax-exempt status for 9 years.

<sup>113</sup> A brief study of the *Annual Record of Assessed Valuation of Real Estate* indicates that the assessed valuation on a 20-unit slum building is in the range of \$15,000-\$20,000. The per-unit annual tax would therefore be between \$37.50 and \$50.

able when the rate is prepaid for a three-year period.<sup>114</sup> Thus, fire insurance on a one-year rate covering \$200,000 in valuation would cost about \$480, or \$2.00 per unit per month. Liability insurance can be estimated at an additional \$2.00 per unit per month.<sup>115</sup>

The total cost of maintenance and taxes can therefore be estimated at between \$20 and \$30 per unit per month.<sup>116</sup> The program would still be feasible even if maintenance and tax costs rise to \$40 or \$45 per month.<sup>117</sup>

## VIII

### TOTAL MONTHLY PAYMENT

The total monthly payment under this program will be the mortgage amortization cost plus maintenance and taxes. On the basis of maintenance and tax costs of \$25 per month, the total monthly payments, according to column *B* of the amortization tables,<sup>118</sup> would be as follows:<sup>119</sup>

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<sup>114</sup> On a larger development, fire and liability insurance costs will be substantially reduced. For example, East River Housing's (*see* note 116 *infra*) annual cost for both fire and liability insurance is slightly over \$18,000 for 1,672 apartments. 1966 East River Housing Corp. Ann. Rep. 11.

<sup>115</sup> Fire and liability insurance cost might be reduced through some type of group coverage plan covering a large number of buildings and thereby minimizing sellers' commissions. For a discussion of the increasing industry practice of selling property insurance on a group basis, see Wall Street Journal, Nov. 30, 1967, at 1, col. 6.

<sup>116</sup> The maintenance estimate is supported by the experience of United Housing Foundation and its projects. United Housing Foundation is a federation of 24 housing cooperatives, trade unions, civic and neighborhood organizations, and other nonprofit groups. The Foundation has sponsored cooperatives with 15,061 units, and a cooperative under construction (Co-op City) will contain an additional 15,300 units. One Foundation project, East River Houses, constructed pursuant to the Redevelopment Companies Law, N.Y. PRIV. Hous. FIN. LAW §§ 100-125 (McKinney 1962), contains 7,307 rooms and 1,672 units. Monthly carrying charges on a 2-bedroom apartment have averaged \$77 per month since the project was completed in 1956. Excluding real estate taxes, which vary from city to city, the per-unit per-month maintenance and operating cost (including occupants' utilities) for the fiscal year ending June 30, 1966, was \$34.78. Excluding electricity and gas, the monthly cost was \$26.03. Included in the monthly cost are management and operating expenses, repairs and maintenance (including repainting of apartments on a 3-year cycle), certain taxes (state franchise, city general business, and payroll), and employee benefits and insurance. 1966 East River Housing Corp. Ann. Rep.; Interview with Ralph Lippman, President, East River Housing Corp., Nov. 21, 1967.

<sup>117</sup> The Housing and Redevelopment Board estimates operating costs for rehabilitated units at \$120 per room per year for walkups and \$140 per room per year for elevator apartments. HRB Rep. No. 14, *supra* note 81, at 13.

<sup>118</sup> *See* p. 384 *supra*.

<sup>119</sup> In the middle-income phase of the program, the tax and maintenance costs will probably be higher than indicated.

Acquisition and Rehabilitation or Construction Cost Per Unit	Total Monthly Payment
\$ 3,000	\$ 40.63
5,000	51.04
7,500	64.06
10,000	77.08
12,000	87.49
15,000	103.12
20,000	129.15
25,000	155.19
30,000	181.23
35,000	207.27
40,000	233.30

The above figures include no element of government subsidy. As noted above, the absence of subsidy will mean the absence of the indignity of income restrictions.

## IX

### THE OPERATION OF A CONDOMINIUM PROGRAM

The problems of providing housing are not accurately described in terms of blight and neighborhood decay, nor can they be solved merely by bringing existing structures up to standard. Housing is about people, not buildings. Local residents must have concrete opportunities for improving the quality of life in their neighborhoods.

The condominium housing reform can be accomplished through existing neighborhood organizations: churches, social clubs and fraternal organizations, block improvement associations, and tenant groups. These are the organizations that express the desires and needs of local residents.<sup>120</sup> New organizations with grass roots support might be organized by such groups and funded by private foundations for the purpose of providing technical assistance. Such organizations have already begun to undertake schemes of this type.<sup>121</sup> Many groups have already expressed interest in such programs, and have turned to local govern-

<sup>120</sup> Some of the better-known organizations working to improve housing in New York City include the WMCA Call for Action, the Metropolitan Council on Housing, The Catholic Archdiocese Committee on Housing, The Community Association of East Harlem Triangle, Christians United for Social Action, Cooper Square Group, Stuckers Bay Community Program, and the Chambers Baptist Church.

<sup>121</sup> The Kate Maremont Foundation has done pioneering work in this area both in New York City and Chicago. It is now working with local community groups to institute a condominium program in the Lawndale section of Chicago. See note 101 *supra*.

ment agencies for advice and assistance.<sup>122</sup> What then, is the role of local government?

Involvement by local government does not seem essential, though it may be desirable. Some existing homeownership programs have worked with little or no government involvement.<sup>123</sup> In other projects, cities and their agencies have directly participated in policy formulation and activities.<sup>124</sup> The strategy underlying any homeownership program

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<sup>122</sup> Rev. Norman Eddy of the Metro-North Citizens Committee has recently spent some time with the authors of this paper discussing the prospects for a condominium program in East Harlem.

The state urban renewal statute. N.Y. GEN. MUNIC. LAW §§ 500-25 (McKinney 1965), authorizes a municipality to undertake urban renewal projects and to have the powers "necessary or convenient" to carry out such projects. *Id.* § 503. The more significant urban renewal powers are (1) the authority to designate a site as appropriate for urban renewal, *id.* § 504; (2) the authority to prepare and approve an urban renewal plan, *id.* § 505; (3) the authority to condemn property for urban renewal purposes, *id.* § 506(1); (4) the authority to dispose of property to "qualified" sponsors without public auction and without sealed bids, *id.* § 507(2)(d); and (5) the authority to control re-use of property by means of restrictive covenants to maintain the integrity of the plan. *Id.* § 507(3).

The statute would also permit a municipality to institute a condominium-based program, at least for experimental purposes, without the necessity of a site designation or an approved urban renewal plan. Thus, § 503(e) provides that the municipality may:

(e) Develop, test and report methods and techniques and carry out demonstration and other activities in relation to or in connection with one or more programs of urban renewal or other programs relating to the arrest and prevention of conditions of deterioration or blight. (Emphasis added.)

In carrying out such demonstration the municipality itself may "reconstruct, repair, rehabilitate or otherwise improve" the property or sell it to a private party to effectuate the demonstration. *Id.* § 503(e). The sale may be made without public auction or sealed bids pursuant to § 507(2)(d). This provision would be most useful in situations where title is already in the municipality. See note 43 *supra*.

<sup>123</sup> The Interfaith Interracial Council of the Clergy has instituted a low-income homeownership program in Philadelphia with minimal local government involvement. Fourteen rehabilitated homes have been sold to low-income families, the most frequent income being \$3,900. Total monthly cost has been estimated at about \$65. 1967 Senate Hearings, *supra* note 53, at 737, 738, 744 (testimony of Interfaith Interracial Council); N.Y. Times, Oct. 1, 1967, § 8 (Real Estate), at 1, col. 6. A local organization in Boston, the Home Opportunities Foundation, has purchased and repaired a 4-family building in Dorchester. The group intends to sell the building as a condominium to persons earning less than \$6,000. Boston Sunday Globe, Oct. 15, 1967, at B45, col. 1. Flanner House Homes, Inc., a nonprofit corporation in Indianapolis, has provided homeownership since 1950 for some 400 low-income families (\$4,200-\$4,500 per year). New, prefabricated, single-family homes are provided at a monthly cost between \$75 and \$98. No down payment is required since the owner contributes "sweat equity" comprising 900 hours of labor. The "sweat equity" amounts to 39% of the value of the building. 1967 Senate Hearings, *supra* note 53, at 729, 733 (testimony of Dr. Cleo W. Blackburn); Wall Street Journal, Nov. 13, 1967, at 1, col. 1. See also discussion of St. Bridgets in St. Louis at note 136 *infra*.

<sup>124</sup> See discussion of Philadelphia Housing Development Corporation in 1967 Senate Hearings, *supra* note 53, at 712-13, 988-92. The background of this corporation's ownership program is discussed in the statement of Charles Abrams to the Ribicoff subcommittee. 1967 Executive Reorganization Hearings, *supra* note 14, at 3441, 3443-45.



should call for local government to supplement directly or indirectly the ability of local citizens and neighborhood organizations to "unslum" their surroundings.<sup>125</sup>

The initiative must come from below and not be imposed from above. No new legislation is needed; a new attitude, rather than a new policy, will suffice. It would be sufficient if the city supported a program of tenant ownership merely by overcoming the complicated technical, legal, and administrative entanglements involved in the acquisition and rehabilitation of tenements. Another area in which city participation is desirable is land assemblage. As discussed above,<sup>126</sup> no particular building is essential to the success of any program. Through normal tax foreclosures and otherwise,<sup>127</sup> the city should coordinate its code enforcement efforts with those of nonprofit groups engaged in low-cost rehabilitation and construction, thereby providing such groups with salvageable structures at a reasonable cost.

There is no prototype tenant condominium. The proposed reform comprehends both situations in which tenants pool their resources to purchase their building for rehabilitation and large-scale programs of rehabilitation or new construction intended to have a substantial impact on an entire district or city. In either case there would exist within the community an established method of providing housing opportunities for those most in need of them. The mere existence of such a process can mobilize renewed community efforts.

The housing problem of the low-income family entails a keen desire for homeownership, an inability to pay outright for a satisfactory home, and the lack of a financing mechanism to enable it to do so. A church, fraternal, or tenant organization representing the desires and needs of low-income families might decide upon a tenant condominium program for its members. Such an organization is likely to have sufficient funds to maintain its clergyman or other persons with sufficient authority, stature, and ability to institute a tenant ownership arrangement. Depending on the amount of money initially available to it, such an organization would purchase one or more salvageable structures for rehabilitation and would apply for FHA or conventional financing.<sup>128</sup> It would hire the rehabilitation contractors, involve area residents in a policy-making role, and employ the residents in the construction work

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<sup>125</sup> Compare the examples discussed in J. JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 270 (1961).

<sup>126</sup> See note 44 *supra*.

<sup>127</sup> See pp. 370-72 *supra*.

<sup>128</sup> See pp. 375-79 *supra*.

whenever possible. Before undertaking rehabilitation or construction, the sponsoring organization would offer a condominium apartment in the rehabilitated building to the tenants. Slum dwellers would thus have a way out. By their own efforts, and at a cost equivalent to present rents, they would be afforded a homeownership opportunity.

Nor can the powers of reaction now obstruct or pervert the program; no new legislation is needed. Slum dwellers can be given the opportunity to use their limited funds, otherwise allocated for rent, to obtain quality housing and the dignity of homeownership. And, as tax-paying landowners, they would be able to contribute tax dollars to pay for the services they require.

## X

### THE PERCY PROPOSAL

A progressive homeownership program was recently advanced by Senator Charles H. Percy of Illinois.<sup>129</sup> On April 20, 1967, he intro-

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<sup>129</sup> The Senator's program was first proposed in a speech before the Kiwanis Club of Chicago on September 15, 1966, *reprinted in* 113 CONG. REC. H102 (daily ed. Jan. 11, 1967).

As previously noted, Charles Abrams has advocated homeownership ideas for some time. The "Abrams Report" made a number of substantive proposals for housing in New York City, some of which are relevant here:

9. The public housing "project" should no longer be the norm for public housing endeavors. New York City's share of the 35,000 units of new public housing construction authorized annually under the Housing Act of 1965 (about 3,500 per year for the city) should be primarily devoted to providing buildings, not "self-contained" projects. The buildings should be inserted as part of existing neighborhoods, not massively superimposed upon them. They should encourage and reinforce integration where it already exists; they should help house the "overflow" families from older buildings which are being radically rehabilitated and uncrowded; they should add to the net supply of housing by taking advantage of potential building sites now idle or grossly underused as well as replace abandoned or unsalvageable buildings that mar a neighborhood. The Housing Authority should experiment with differing types and sizes of buildings.

Housing & Urban Renewal Task Force, Report to the Mayor, Jan. 10, 1966, at 7-8 [hereinafter cited as Abrams Report].

11. The Housing Authority should develop programs for leasing some of its existing housing projects to nonprofit corporations as a pilot effort. Nonprofit cooperatives, foundations and institutions should be stimulated into undertaking operation and management so that ultimately a substantial part of the Authority's massive management operations might be decentralized. Progress in this direction would help meet the objection to monolithic landlordism which has been one of the deterrents to popular approval of further public housing operations.

12. The Authority should simultaneously experiment with cooperative arrangements for its operations. Tenants in state and city projects who increase their incomes could be sold their apartments under a condominium plan. As rents of some tenants rise, the excess above the maximum rent could be deposited in escrow to be used as future down payments for the dwelling units. This would help stabilize the tenancy and reduce the way-station aspect of housing projects.

*Id.* at 9.

25. The city should encourage the establishment of organizations with foun-

duced a bill in the Senate entitled the "National Home Ownership Foundation Act."<sup>130</sup> Cosponsored by thirty-six Republican Senators, the bill is designed to make ownership housing available to low- and middle-income families.<sup>131</sup> To this end, the bill would create a national non-profit corporation with the authority to issue two billion dollars worth of federally-guaranteed debentures.<sup>132</sup> The funds raised would be loaned

dation assistance for aiding and advising religious, community and other non-profit groups to sponsor limited- and non-profit housing.

26. The city should embark upon a major program of rehabilitation of all salvageable structures, and of conservation of all good and repairable structures. This program should embrace (a) radical rehabilitation (providing new and modern dwelling units within old but sound walls), (b) strict enforcement of maintenance to meet codes, and (c) as and when the housing shortage is overcome, strict enforcement of the laws against overcrowding.

27. The emphasis in radical rehabilitation should be primarily to benefit families now living in squalor, rather than on displacing them to make way for high-income residents while the displaced families form new slums elsewhere. Radical rehabilitation and all the aids accompanying it should not be confined to renewal areas but should be employed wherever salvageable buildings are in bad condition.

29. The city's stock of 1,150,000 existing dwelling units in old masonry structures should be surveyed and reassessed in the light of the new possibilities opened up by technological advances in materials, ventilating equipment and lighting (e.g., installing prefabricated kitchen equipment in tenements, providing duplexes on the third and fourth and the fifth and sixth stories for large families, etc.).

30. The Housing Authority should be prepared to acquire salvageable structures for sale to nonprofit or limited-profit corporations for radical rehabilitation. Funds could be obtained either by its own bond issues or through other available city, state or federal sources.

*Id.* at 13-15.

The past record of changes, abolitions, consolidations and reorganizations of the city's housing and building agencies underscores the endless quest for a foolproof administrative mechanism. There is none, for whether the administrator be individual, board or commission, no substitute has ever been found for competence, integrity and imagination.

*Id.* at 4. In contrast to the substantive recommendations of the Abrams Report, a later Mayor's Task Force produced the "Logue Report," which found that "[a]ccurate data on New York City are particularly difficult to obtain." INST. OF PUB. ADMIN., STUDY GROUP ON HOUSING & NEIGHBORHOOD IMPROVEMENT, "LET THERE BE COMMITMENT," A HOUSING, PLANNING, AND DEVELOPMENT PROGRAM FOR NEW YORK CITY 9 (1966), reprinted in 1966 *Executive Reorganization Hearings*, *supra* note 14, at 2837-75. This report consequently recommended a procedural reorganization of the city's housing agencies. These recommendations have substantially been enacted into law by the City Council. N.Y. City Local Law No. 58 (1967).

<sup>130</sup> S. 1592, 90th Cong., 1st Sess. (1967).

<sup>131</sup> For a full discussion of the purposes of the bill, see 1967 *Senate Hearings*, *supra* note 53, at 191-226 (testimony of Senator Percy and Congressman Widnall); *id.* at 69-82 (colloquy between Senator Percy and Secretary Weaver); *id.* at 1517-45 (explanatory statement submitted by Senator Percy); 113 CONG. REC. S9184 (daily ed. June 29, 1967) (reply of Senator Percy to April 21, 1967, statement of Secretary Weaver).

<sup>132</sup> S. 1592, 90th Cong., 1st Sess. § 109(b),(d) (1967). Loans in one state may not exceed

to local "eligible borrowers," *i.e.*, nonprofit corporations or organizations. In turn, the local agency would rehabilitate or construct housing and sell it to the occupants. When appropriate, an interest subsidy of approximately four percent would be given to the purchaser.

After a four-month study, Secretary Robert C. Weaver of the Department of Housing and Urban Development recently issued an eight-page statement analyzing Senator Percy's proposal.<sup>133</sup> He observed that there has already been developed "a method of achieving . . . the home ownership objectives of the [Percy] proposal."<sup>134</sup> The Sullivan Amendment, Section 221(h) of the National Housing Act,<sup>135</sup> provides for the insurance of mortgages to finance rehabilitation and sale to low-income mortgagors. The term of each mortgage is to be determined by the Secretary, and the interest rate will be not lower than three percent.<sup>136</sup>

Although Secretary Weaver has asserted that this section meets the "home ownership objectives" of the Percy plan, his department has ruled that section 221(h) does not apply to multiple dwellings.<sup>137</sup> Also, Secretary Weaver has stated that the interest subsidy provision in the

12½% of the \$2 billion total. *Id.* § 110(d). The issuance would not constitute a part of the public debt subject to statutory limits. 1967 Senate Hearings, *supra* note 53, at 143-45.

<sup>133</sup> N.Y. Times, April 22, 1967, at 34, col. 1. For later discussions by the Secretary, see 1967 Senate Hearings, *supra* note 53, at 8-12, 69-82, 91-95.

<sup>134</sup> Only last year the Congress enacted the Sullivan Amendment which utilizes Section 221(d)(3) for the acquisition and rehabilitation of housing for non-profit groups for resale to families of very low income. Thus we have already developed a method of achieving, without additional and burdensome administrative machinery, the home ownership objectives of the proposal.

U.S. Dep't of HUD, Statement by Robert C. Weaver, Secretary, on the Proposed National Home Ownership Foundation Act, April 21, 1967, at 7 [hereinafter cited as Weaver].

<sup>135</sup> (Demonstration Cities and Metropolitan Development Act of 1966, § 310(a)), 12 U.S.C. § 1715l(h) (Supp. II, 1965-66).

<sup>136</sup> The Sullivan amendment, sponsored by Congresswoman Leonor K. Sullivan (D. Mo.) is based on the experience of a small Catholic parish in St. Louis, St. Bridgets of Erin. The parish, located in a Negro slum area, has formed a nonprofit corporation, Bicentennial Civic Improvement Corp., for the purchase, rehabilitation, and resale of existing slums. Over the past 4 years, the corporation has provided ownership housing for about 70 low-income families. The owner's purchase price is financed 20% by the nonprofit corporation (at a nominal interest rate) and 80% by a local savings and loan association (15-year term at 6%). The owner's monthly payment is about \$65, including amortization of his loans, insurance, and taxes. Letter from Albert J. Nerviani, Community Relations Consultant Chief, Housing Section, Dep't of Public Safety, St. Louis, Mo., to the N.Y. City Dep't of Bldgs., Dec. 13, 1966, on file in the Cornell Law Library. See 1967 Senate Hearings, *supra* note 53, at 974-87 (testimony of Bicentennial Civic Improvement Corp.).

<sup>137</sup> Letter from John W. Kopecky, Acting Chief, Urban Renewal Section, Office of the General Counsel, U.S. Dep't of HUD, to the N.Y. City Dep't of Bldgs., March 8, 1967, on file in the Cornell Law Library. The omnibus bill reported by the Senate Committee on Banking and Currency (See note 106 *supra*) would authorize § 221(h) insurance for condominiums. S. 2700, 90th Cong., 1st Sess. § 106 (1967); S. REP. No. 809, 90th Cong., 1st Sess. 17, 47 (1967).

Percy legislation "provides a wholly inadequate subsidy to the low-income home buyer at an incalculable total cost to the taxpayer";<sup>138</sup> and yet the cost to the taxpayer is fixed by statute.<sup>139</sup>

Moreover, an interest subsidy is the cheapest type of subsidy known. For example, assume that a housing program involves five billion dollars in capital expenditure and that all the mortgages require a total interest subsidy, *i.e.*, no interest is actually paid by the mortgagor. Based on a four percent government borrowing rate, the annual cost to taxpayers would be 200 million dollars.<sup>140</sup>

The flexibility of an interest subsidy in conjunction with a program of long-term mortgages (75 or 100 years) could provide new and imaginative housing to every segment of the American population. Since the building will likely last that long, there is no reason the mortgage should not also. The condominium program proposed herein does not entail an interest subsidy, but if such a subsidy could be obtained, housing could be made available to very low-income families.

The Percy legislation authorizes the National Home Ownership Foundation to "seek to arrange" equity insurance with private companies to cover a period of unemployment that may strike a homeowner. A related proposal, recommending direct federal equity insurance, was submitted to Secretary Weaver's predecessor department in 1963 by Charles Abrams. The proposal was rejected because of the "administrative cost" involved. Mr. Abrams has written:

It is clear that the real obstacle is not the administrative cost but FHA's traditional aversion to innovation and to the assumption of social functions.<sup>141</sup>

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<sup>138</sup> Weaver, *supra* note 134, at 1. The interest subsidy under the Percy legislation may not exceed the "average market yield to maturity on all outstanding marketable obligations of the United States." S. 1592, 90th Cong., 1st Sess. § 113(a) (1967).

<sup>139</sup> S. 1592, 90th Cong., 1st Sess. § 113(c) (1967).

<sup>140</sup> The leverage inherent in an interest subsidy has long been recognized and its use advocated by Charles Abrams. C. ABRAMS, *supra* note 56, at 258-62. See also *Hearings Before the Subcomm. on Housing of the Senate Comm. on Banking and Currency*, 85th Cong., 2d Sess. 81-86 (1958).

<sup>141</sup> C. ABRAMS, *supra* note 56, at 265. For a discussion of the economics of such insurance, see *id.* at 262-65; 1967 *Senate Hearings*, *supra* note 53, at 716-17 (statement of Charles Abrams). See also *Wall Street Journal*, July 19, 1963, at 5, col. 2, discussing the Housing and Home Finance Agency report recommending study of equity insurance. A preliminary study by the insurance industry has indicated the feasibility of such insurance. 1967 *Senate Hearings*, *supra* note 53, at 1109-17 (testimony of J. Henry Smith and Richard Doss for Am. Life Convention, Health Ins. Ass'n of America, and Life Ins. Ass'n of America). The omnibus bill (see note 106 *supra*) contains a provision similar to that proposed by Senator Percy. S. 2700, 90th Cong., 1st Sess. § 108 (1967); S. REP. No. 809, 90th Cong., 1st Sess. 18-19, 48 (1967); see *id.* at 70 (individual views of Senator Percy).

Secretary Weaver characterizes the Percy proposal as "hopelessly naive":

The proposal to develop insurance to protect the purchaser against inability to make the mortgage payment because of disability, or unemployment, is hopelessly naive. There is little hope that private insurance companies, without substantial subsidy, can provide the insurance needed at acceptable rates.<sup>142</sup>

If private insurance companies will not provide this needed protection, it would be advisable to return to the Abrams proposal of direct federal insurance. Secretary Weaver, however, has given no indication that his department will support an effort to provide this sensible and humane insurance.

The central fact of any homeownership program is the monthly cost to the occupant. Secretary Weaver has stated that, "while well-intentioned," the Percy proposal demonstrates "little real understanding of the problems of producing housing within the economic means of poor people."<sup>143</sup> The Secretary describes the Percy plan as "totally unsupported by any factual analyses" and based on a "bewildering maze of financial juggling."<sup>144</sup> This criticism of Senator Percy's plan would lead one to expect both clear and substantiated cost analysis from Secretary Weaver. In fact, his cost analysis assumes that the National Home Ownership Foundation would have to pay close to six percent for its federally-guaranteed debentures. Though this may be true in the current market, the experience of FNMA indicates that a rate of five or five-and-one-quarter percent is more common.<sup>145</sup> Secretary Weaver assumes a typical acquisition and rehabilitation cost of \$12,500 and a maintenance cost (taxes, repairs, fuel) of \$53.49 per unit per month.<sup>146</sup> In view of the New York experience, where costs are the highest in the coun-

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<sup>142</sup> Weaver, *supra* note 134, at 7.

<sup>143</sup> *Id.* at 1.

<sup>144</sup> *Id.*

<sup>145</sup> The FNMA issued \$1.1 billion worth of participation certificates at an interest rate of 5.2% on January 19, 1967. According to the most recent HUD *Annual Report*, an issuance of \$150 million of secondary market debentures on October 11, 1965 was sold at an interest rate of 4.5%. 1965 HUD ANN. REP. 148 table 92. Since 1956, \$6.78 billion of such debentures have been issued. The highest interest rate was 5.35% (December 10, 1959). *Id.* On November 28, 1967, the FNMA sold \$1 billion worth of participation certificates at yields of 6.35% (2-year maturity) and 6.4% (20-year maturity). The rate is the highest for a long-term federal security since July 1861, when a \$50 million Civil War bond issue was priced to yield 6.7%. N.Y. Times, Nov. 29, 1967, at 67, col. 4. On January 16, 1968, FNMA sold \$1.25 billion worth of participation certificates at a yield of about 6%. N.Y. Times, Jan. 17, 1968, at 61, col. 3.

<sup>146</sup> The latter figure is not separately stated by Secretary Weaver, but is derived by deducting amortization and interest costs from the total figure.

try,<sup>147</sup> the acquisition and rehabilitation cost seems unrealistically high.<sup>148</sup> A more reasonable estimate of maintenance costs is between twenty and thirty dollars per unit per month.<sup>149</sup> Secretary Weaver assumes a mortgage term of thirty years; but nothing in the Percy proposal requires this term, and a forty- or fifty-year term may be appropriate. In any event, the length of the mortgage would be determined by the "Board."<sup>150</sup> Finally, the Secretary assumes that a low-income family will spend no more than twenty-five percent of its income for housing. As of 1961, however, the Department of Labor statistics show a national average of 29.5 percent and a New York average of 30.8 percent of income expended on housing.<sup>151</sup> Further, these average figures do not accurately reflect the housing expenditures of low-income families, who usually pay a higher percentage of their incomes for housing than do middle-income families. In fact, the 1960 Census of Housing showed twenty percent of the nation's renter families paying thirty-five percent or more of their gross income for rent.<sup>152</sup> Based on the above assumptions, Secretary Weaver constructs a hypothetical monthly cost under the Percy plan of \$132.50 per month without an interest subsidy and \$100 per month with a four-and-one-quarter percent interest subsidy. These are computed by adding a monthly amortization of \$79.01 (a six-and-one-half percent mortgage on \$12,500 over a thirty-year term) to a maintenance figure of \$53.49. From this construction, the Secretary concludes that the Percy legislation is inadequate and costly.<sup>153</sup>

A more realistic set of assumptions is as follows: (1) the National Home Ownership Foundation will pay five or five-and-one-quarter percent on its debentures;<sup>154</sup> (2) the rehabilitation and acquisition cost will be no higher than \$10,000 per unit; (3) the maintenance cost will be no higher than thirty dollars per unit per month; and (4) the term of the mortgage can be forty or fifty years, and perhaps longer. On the basis of

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<sup>147</sup> Abrams Report, *supra* note 129, at 10. For data on cost differential by building system, sewer line cost, and cost of common labor, skilled labor, equipment operators, electricians, mechanical trades, and plumbers, see ENGINEERING NEWS-RECORD, Sept. 21, 1967, at 92-113.

<sup>148</sup> See discussion of estimated rehabilitation costs at pp. 379-87 *supra*.

<sup>149</sup> See discussion on maintenance costs at pp. 387-89 *supra*.

<sup>150</sup> S. 1592, 90th Cong., 1st Sess. § 110(17) (1967). The term of the interest subsidy may not exceed 30 years. *Id.* § 113(a). However, at that point the owner would have sufficient equity to permit refinancing of the mortgage to secure funds to pay full interest cost.

<sup>151</sup> BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, POST-WORLD WAR II PRICE TRENDS IN RENT AND HOUSING IN THE NEW YORK METROPOLITAN AREA 7 (Regional Rep. No. 7, June, 1967).

<sup>152</sup> C. ABRAMS, *supra* note 56, at 146-47 and materials cited therein.

<sup>153</sup> Weaver, *supra* note 134, at 1.

<sup>154</sup> See 1967 Senate Hearings, *supra* note 53, at 1540 (statement of Senator Percy).

a no-interest subsidy and an NHOF borrowing rate of five percent, a \$10,000 mortgage would be granted for a forty-year term at a five-and-one-half percent interest rate. The amortization cost would be \$51.58 per month and the total monthly payment about eighty-one dollars. Even with Secretary Weaver's high maintenance estimate of \$53.49, the total monthly cost would be about \$105.

With a full four-and-one-quarter percent interest subsidy and a thirty-year term, the monthly amortization cost would be \$33.33.<sup>155</sup> With a thirty-dollar per month maintenance expense, the total monthly cost would be \$63.33. Based on Secretary Weaver's maintenance estimate, the total monthly cost would be \$86.82. If, as the Department of Labor statistics estimate, a family spends thirty percent of its gross income on housing, this would provide housing for persons earning \$3,250 a year. This is substantially below the \$4,800 a year that Secretary Weaver indicated would be necessary under Senator Percy's legislation.<sup>156</sup>

In terms of New York's housing problems, however, the Percy program would be severely undercapitalized. The program would be capitalized at two billion dollars, with no more than twelve-and-one-half percent, or \$250 million, going to any one state.<sup>157</sup> The authors' essential disagreement with the Percy proposal, however, stems from the belief that no legislation is needed.

## XI

### THE KENNEDY PLAN

Senator Robert F. Kennedy of New York has introduced legislation entitled "Urban Housing Development Act of 1967."<sup>158</sup> His proposal involves a combination of tax incentives and low-interest mortgages designed to enlist the "energies and resources of private enterprise"<sup>159</sup> in the construction or rehabilitation of low-income housing in "urban poverty areas."<sup>160</sup> The plan is intended to produce rentals

<sup>155</sup> Amortization would be at  $1\frac{1}{4}\%$ , assuming the NHOF borrowing rate is 5%.

<sup>156</sup> Weaver, *supra* note 134, at 5.

<sup>157</sup> S. 1592, 90th Cong., 1st Sess. § 110(d) (1967).

<sup>158</sup> S. 2100, 90th Cong., 1st Sess. (1967). The testimony of Senator Kennedy on S. 2100 is found in *1967 Senate Hearings, supra* note 53, at 622-67 and *Hearings on Tax Incentives To Encourage Housing in Urban Poverty Areas Before the Senate Comm. on Finance*, 90th Cong., 1st Sess. 56-114 (1967) [hereinafter cited as *1967 Senate Finance Comm. Hearings*]. Along with his testimony before the Finance Committee on September 14th, Senator Kennedy submitted an amendment to S. 2100 which substantially revised the bill. See *id.* at 421.

<sup>159</sup> 113 CONG. REC. S9593 (daily ed., July 13, 1967) (remarks of Senator Kennedy).

<sup>160</sup> An "urban poverty area" is an area containing at least 250,000 people which is



between \$70 and \$100 per month and to return to investors a yield of between thirteen and fifteen percent per year.<sup>161</sup> No family whose adjusted gross income exceeds \$6,000 is eligible for an apartment.<sup>162</sup> The 1960 Census for New York City showed 1,136,000 households, out of a total of 2,655,000, earning in excess of \$6,000. Households earning between \$6,000 and \$10,000 numbered 728,000.<sup>163</sup> The low-interest mortgage aspect of Senator Kennedy's program provides for fifty-year mortgages at a two percent interest rate, granted through the special assistance function of the FNMA. The bill authorizes FNMA to purchase or make commitments for three billion dollars worth of mortgages over a six-year period.<sup>164</sup>

Among the proposed tax incentives are an investment credit,<sup>165</sup> accelerated depreciation,<sup>166</sup> "restoration" of basis,<sup>167</sup> addition to depreci-

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so designated by the Bureau of Census, the Office of Economic Opportunity, and the Secretary of Housing and Urban Development. S. 2100, 90th Cong., 1st Sess. § 3(2) (1967).

<sup>161</sup> 113 CONG. REV. S9596 (daily ed. July 13, 1967) (remarks of Senator Smathers). Senator Kennedy has observed that in some large cities rehabilitation is feasible at a cost between \$6,500 and \$7,500. In these cities the Senator believes rents of \$45-\$50 will be possible. 1967 Senate Finance Comm. Hearings, *supra* note 158, at 62-63, 73; N.Y. Times, Oct. 2, 1967, at 46, col. 5.

<sup>162</sup> S. 2100, 90th Cong., 1st Sess. § 103(3) (1967). A limited exception to this rule is provided for certain displaced families. *Id.* § 103(2).

<sup>163</sup> N.Y. CITY COMMUNITY RENEWAL PROGRAM, NEW YORK CITY'S RENEWAL STRATEGY/1965, at 12.

<sup>164</sup> S. 2100, 90th Cong., 1st Sess. §§ 201-03 (1967).

<sup>165</sup> *Id.* § 301(a) (proposed INT. REV. CODE OF 1954, § 41). Assuming the taxpayer's equity investment percentage were 100% and his total cost \$100,000, including land cost, *id.* § 301(c) (as amended, *see* note 158 *supra*) (proposed INT. REV. CODE OF 1954, §§ 1392(a)(1), 1391(9), 1391(3)), he would be permitted a credit against tax of \$300,000. The credit may be carried back 3 years and forward 7 years. *Id.* (proposed INT. REV. CODE OF 1954, § 1392(b)). A taxpayer's equity investment is determined by subtracting from total basis the amount of any subsidized mortgages granted under the plan. *Id.* (proposed INT. REV. CODE OF 1954, § 1391(5)).

<sup>166</sup> *Id.* § 301(c) (as amended) (proposed INT. REV. CODE OF 1954, § 1393(b)) would permit an asset having a useful life of 50 years to be depreciated over a 7-year period.

<sup>167</sup> *Id.* (proposed INT. REV. CODE OF 1954, § 1394). The Kennedy bill, as amended, would allow a "restored" basis, after the building has been fully depreciated, in the amount of the taxpayer's cost basis reduced by the amount of straight-line depreciation computed on a 50-year useful life. *Id.* (proposed INT. REV. CODE OF 1954, § 1394(b)(1)). A limited capital gain tax is payable on the restoration. *Id.* (proposed INT. REV. CODE OF 1954, §§ 1394(a), 1396(d)). The owner may restore the basis at least 5 times over a 50-year period. At each restoration, the basis will be diminished by the amount of straight-line depreciation figured on a 50-year term. As a result of this provision, the allowable depreciation deduction will exceed the taxpayer's investment. That deductions exceed cost basis has been the basic objection to the percentage depletion deduction:

When depletion goes beyond the investment in the resource, it is not a necessary or equitable or appropriate tax deduction. It is a subsidy plain and simple. If we conclude that for reasons of defense or economic growth a particular industry should be subsidized, we should be frank about it and subsidize it directly so that

able basis of demolition and site improvement costs and the absence of any salvage value for the building,<sup>168</sup> and availability of Subchapter S treatment to a corporation having corporate shareholders.<sup>169</sup> These provisions, of course, will only be helpful to taxpayers who have substantial income and tax liability from other sources. The provisions will not benefit organizations whose income is exempt in any event, such as foundations, pension trusts, and churches.<sup>170</sup>

The Senator's proposals for federal subsidy by way of tax incentives raise several problems. Initially, the special preferences proposed compromise the principles of tax reform.<sup>171</sup> Also, the permission for a cor-

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we can measure whether the cost of the subsidy is commensurate with the purpose.

There should be no hidden subsidies in the tax laws.

Rudick, *Depletion and Exploration and Development Costs*, in 2 TAX REVISION COMPENDIUM 983 (House Comm. on Ways and Means, Comm. Print 1959).

<sup>168</sup> S. 2100, 90th Cong., 1st Sess. § 301(c) (1967) (proposed INT. REV. CODE of 1954, § 1393(a)). Demolition and site improvement expenses are normally added to land cost and are hence nondepreciable.

<sup>169</sup> *Id.* (proposed INT. REV. CODE of 1954, § 1391(4)); 113 CONG. REC. S9595 (daily ed. July 13, 1967) (remarks of Senator Kennedy).

Considering all the tax advantages of the Kennedy bill, Senator Williams of Delaware prepared two hypothetical cases to demonstrate possible return to an owner over a 35-year period. Both assumed a \$1 million project cost exclusive of land, that the owner contributed the entire cost, and that the owner's marginal tax rate was 50%. In Senator Williams' first hypothetical case the owner retains the property for the 35-year period and avails himself of the investment credit, accelerated depreciation, and restored basis provisions. Undersecretary of the Treasury Joseph W. Barr agreed with Senator Williams that S. 2100, as modified by Senator Kennedy's oral testimony of September 14th (*see note 158 supra*), would provide the owner with \$2,135,000 in after-tax benefits. Additionally, the owner would still have title to the project. *1967 Senate Finance Comm. Hearings, supra note 158*, at 163, 165 (supplemental statement prepared by the Treasury Department). *See also id.* at 150-63 (colloquy between Senator Williams, Senator Kennedy, and Undersecretary Barr); *id.* at 180-89 (comparison submitted by Senator Kennedy). With the same hypothetical, the Treasury Department estimated that S. 2100, as formally amended by Senator Kennedy (*id.* at 421), would provide \$1,619,000 in after-tax benefits. *Id.* at 163, 166 (supplemental statement prepared by the Treasury Department) (the figure of \$161,000 at line 13, page 166 would seem to be a typographical error). *See also id.* at 249-56 (colloquy between Senator Williams and former Commissioner Caplin).

Senator Williams' second hypothetical assumed that the project would be sold at the end of each depreciation cycle and the proceeds reinvested in another qualified project. *Id.* at 155. Under this hypothetical the Treasury Department estimated an after-tax benefit of close to \$4 million resulting from the bill as orally amended by Senator Kennedy. *Id.* at 163, 165 (supplemental statement prepared by the Treasury Department). After formal amendment of the bill, the Treasury Department estimated the benefits at about \$2.2 million. *Id.* at 166.

<sup>170</sup> *1967 Senate Finance Comm. Hearings, supra note 158*, at 393-95 (statement of Lawrence M. Stone, former Treasury Department Tax Legislative Counsel).

<sup>171</sup> While speaking in 1963 about existing special privileges in the Internal Revenue Code, President Kennedy observed:

Some reforms will improve the tax structure by reducing certain liabilities. Others will broaden the tax base by raising liabilities and will meet with resis-

poration to be a shareholder of a Subchapter S corporation would create a virtually tax exempt class of income. Subchapter S corporations do not pay the corporate tax,<sup>172</sup> but the shareholders of such a corporation include in their gross income their proportionate share of the corporation's income.<sup>173</sup> This amount "shall be treated as an amount distributed as a dividend."<sup>174</sup> Consequently, if a corporation qualifies as a shareholder of a Subchapter S corporation, it will be permitted the eighty-five percent dividends-received deduction allowed corporations under section 243.<sup>175</sup> The Senator's proposal, therefore, results in an effective tax rate of 7.2 percent.<sup>176</sup> The usual requirement that a Subchapter S corporation shareholder be an individual<sup>177</sup> reveals Congress's intent to avoid creation of such tax havens.

Although the immediate social benefits accruing from the Kennedy proposal may override the tax inequities created, the long range results of the program seem more doubtful. In effect, the heavy subsidies will solidify the present landlord-tenant system by boosting landlords' profits. Since the market value of buildings will rise, acquisition costs for condominium programs will increase; and since such programs have no

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tance from those who benefit from existing preferences. But if this program of tax reduction is aimed at making the most of our economic potential, it should be remembered that these preferences and special provisions also restrict our rate of growth and distort the flow of investment. They discourage taxpayer cooperation and compliance by adding inequities and complexities that affect similarly situated taxpayers in wholly different ways.

*Hearings on Tax Revision Before the House Comm. on Ways and Means, 88th Cong., 1st Sess., pt. 1, at 12 (1963) (message of President Kennedy).* Former Commissioner Mortimer M. Caplin has written in a similar vein:

Frequently tax preferences are granted as incentives of one sort or another. But is our tax law the proper vehicle for providing special incentives or subsidies? Doesn't such a legislative policy weaken our tax system and result in continuing inequities to other taxpayers? The tax laws cut across the whole fabric of our complex society. We must recognize our inability to cure all of our ailments by new variations of tax relief. If we continue to attempt this, the main function of our tax laws—the raising of revenue—is destined to fail.

Caplin, *Threats to the Integrity of our Tax System*, 44 VA. L. REV. 839, 842-43 (1958). Mr. Caplin expressed support for Senator Kennedy's bill in hearings before the Senate Finance Committee. *1967 Senate Finance Comm. Hearings, supra* note 158, at 252-61.

<sup>172</sup> INT. REV. CODE OF 1954, § 1372(b).

<sup>173</sup> *Id.* § 1373(b).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* § 243(a).

<sup>176</sup> *I.e.*, 48% (corporate tax rate) of 15% (dividend remaining subject to tax after 85% deduction). The revenue loss with respect to rental income will not be large, since rents are limited so as to provide no more than a 3% yield on minimum equity. S. 2100, 90th Cong., 1st Sess. § 102(a) (1967). However, the sale of a project before the end of the minimum holding period or without qualified reinvestment might result in a substantial revenue loss.

<sup>177</sup> INT. REV. CODE OF 1954, § 1371(a).

income, they will not reap the benefits of the Kennedy tax incentives. The condominium system, offering the great social values inherent in homeownership, will thus be at a disadvantage in competing with the rental system.<sup>178</sup>

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<sup>178</sup> Senator Kennedy has stated that he would be "very enthusiastic" about a homeownership program if a low monthly cost could be achieved. The Senator expressed this view in a colloquy with Senator Percy:

Senator PERCY. I would just like to quote a constituent of yours, who spoke to Mayor Lindsay and myself one Sunday afternoon about a month ago. His is a low-income family from Brooklyn, and he had bought his own home after 18 years of payments. I asked him whether he preferred to pay rent or make mortgage payments. "When you're renting," he said, "you're just buying drinks for somebody else."

....

Senator KENNEDY. Senator, if you can tell me how you are going to get homeownership down to \$70 or \$80 a month under your bill, I would be very enthusiastic about it as a plan for the ghettos.

1967 Senate Hearings, *supra* note 53, at 654.

Senator Kennedy has explained that his plan, while initially authorizing only rental housing, will provide inducements for a possible transition to ownership housing. In his view this would avoid initially "the complex and difficult" legal and financial problems of ownership of multiple dwellings. The Senator observed:

The home management corporation can thus become one of the focal points of community activity—an organization with a specific purpose and yet an ability to engage individual participation in a wide range of social functions.

Ultimately, the role of the corporation in the project itself may grow from maintenance assistance to ownership; the bill provides, after an 8-year period, inducements for the owner to sell the building to his tenants. Thus the management corporations could provide a gradual transition from ordinary renting to cooperative or condominium ownership, avoiding at the outset the complex and difficult legal and financial problems of ownership of multiple dwellings.

113 CONG. REC. S9595 (daily ed. July 13, 1967). The inducement provided in the Kennedy bill is that the owner may sell his project to a home management corporation, S. 2100, 90th Cong., 1st Sess. § 3(7) (1967), and not recognize any gain on the transaction. As originally proposed, an 8-year waiting period was required. *Id.* § 301(c) (proposed INT. REV. CODE of 1954, § 1396(c)). This has been shortened, however, to a 2-year period by an amendment proposed by Senator Kennedy, 1967 Senate Hearings, *supra* note 53, at 1589-90 (Letter from Senator Kennedy to Senator Sparkman, Aug. 4, 1967). The provisions concerning sale to a home management corporation were further amended at the time of Senator Kennedy's testimony before the Senate Finance Committee. 1967 Senate Finance Comm. Hearings, *supra* note 158, at 77, 79-80; see *id.* at 66, 75, 83-84, 93-94. The same nonrecognition benefits will accrue to the owner if, after a 10-year period, he sells to a third party and makes a "qualified reinvestment" of the proceeds. S. 2100, 90th Cong., 1st Sess. § 301(c) (1967) (proposed INT. REV. CODE of 1954, § 1396(a),(b)).

As amended by the Senator's letter of August 4, 1967, *supra*, the bill provides that the home management corporation "shall, subject to the approval of the Secretary, have an option to purchase such project" at any time after the expiration of a 2-year minimum holding period. *Id.* § 101(a)(4)(G). Prior to amendment, this section provided that the home management corporation "shall have a first option to purchase." Therefore, the original language provided that the home management corporation had a first option to buy if the owner chose to sell. Under the amended language, however, if after 2 years the Secretary approves, the owner must sell. The maximum purchase price, under the

## CONCLUSION

It is wasteful for a low- and middle-income housing program not to take advantage of the human desire to own a home. Direct purchase, strict housing code enforcement, tax foreclosures, and an aggressive emergency repair program can make a large number of buildings available for acquisition by nonprofit organizations, which, in turn, can rehabilitate the buildings and institute the condominium system. Additionally, in the program's middle-income phase, buildings might be purchased directly from their present owners; even new construction would be possible. In light of present property values, costs, and financing, the resulting system of individual homeownership would not require higher monthly payments from unit owners than does the present tenancy system.

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August 4th amendment, was established as the principal amount of any insured mortgage and the amount of the owner's initial equity reduced by any investment credit granted to the owner. *1967 Senate Hearings, supra* note 53, at 1589. As a result of this price formulation the owner would lose the benefit of the investment credit and retain most of the benefit of accelerated depreciation taken. Since the owner could be bought out after 2 years, the August 4th amendments would have severely limited the impact of the tax benefits previously discussed. As will be discussed below, the Senator's amendments of September 14th substantially increased the purchase price which the home management corporation must pay.

The August 4th amendments, unlike the original bill, provided for a financial mechanism to enable the home management corporation to make the purchase. *Id.* at 1589-90. A new § 235(e) was proposed which would have authorized a 50-year mortgage at a below-market interest rate (the current government borrowing rate) to finance the purchase by the home management corporation. *Id.* at 1590. The apparent theory of the August 4th amendments was that a home management corporation—assisted by a 50-year below-market interest rate mortgage—could economically purchase and maintain the building.

The amendments submitted by Senator Kennedy to the Senate Finance Committee on September 14th made substantial changes in the pattern of the August 4th amendments. Initially, the option price which the home management corporation must pay is increased. The new price formulation is the total cost of the project reduced only by the amount of straight line depreciation computed over a 50-year period. S. 2100, 90th Cong., 1st Sess. § 101(a)(5)(C) (1967) (as amended). Consequently the owner will retain the benefits of the investment credit as well as accelerated depreciation. *1967 Senate Finance Comm. Hearings, supra* note 158, at 163, 166 (supplemental statement prepared by the Treasury Department). The purchase and maintenance of the building is to be financed by (1) a 50-year 6% mortgage, S. 2100, 90th Cong., 1st Sess. § 201 (1967) (as amended) (proposed National Housing Act § 235(a)); (2) a 5% increase in "occupancy charges," *id.* § 102(a)(2) (as amended); and (3) a subsidy payment paid to the home management corporation in the "amount needed" to make mortgage payments. *Id.* § 108(a) (as amended). Since the subsidy is to be paid to the corporation it would seem that the statute contemplates a cooperative, rather than a condominium form of tenant ownership. This also seems implicit in the fact that the bill contains no provision for the release of the blanket mortgage and the substitution of individual mortgages. Senator Kennedy, however, has expressed his intent that condominiums be included. *1967 Senate Finance Comm. Hearings, supra* note 158, at 60, 71.

In both the low- and middle-income phases of the program, income restrictions on eligible occupants would be unnecessary, since there would be no government subsidy. The tax base, upon which all citizens must rely for essential services, would be maintained. Finally, this housing reform can be accomplished without new expense to the government and without legislation other than that which has been enacted and is waiting for use.