HOUSING THE POOR UNDER THE SECTION 8 NEW CONSTRUCTION PROGRAM

STEVEN H. BLUMENTHAL*

Until recently federal housing subsidy programs were designed to serve two objectives. The first sought "to remedy the unsafe and unsanitary conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income."[1] The second goal was economic: By promoting new housing projects, Congress hoped to stimulate the economy and strengthen the construction industry.[2] The Housing and Community Development Act of 1974, omitting the second goal from its statement of policy, introduced a leased housing program that shifts emphasis away from new construction by changing the focus to revitalization of existing housing.[3]

The section 8 program, part of the Housing and Community Development Act of 1974, provides rental assistance for existing, newly constructed, and substantially rehabilitated housing.[4] Although there is no statutory preference,[5] many influences are trying

* B.A., University of Wisconsin-Madison, 1975; J.D., Washington University, 1978.

1. United States Housing Act of 1937, 42 U.S.C. § 1401 (1970).

2. *Id.* 57 SURVEY OF CURRENT BUSINESS, at S-13 (Dec. 1977) states that building materials and construction industries account for over 15% of the Gross National Product (GNP), while the construction industry employs more than 5% of the labor force.

3. *Compare* Housing and Community Development Act of 1974, § 201(a)(2), 42 U.S.C. § 1437 (Supp. 1975) *with* 42 U.S.C. § 1401 (1970).

4. 42 U.S.C. § 1437f (Supp. 1975). These terms are defined at 24 C.F.R. § 880.101(b) (1977) (new construction); 24 C.F.R. § 881.101(b) (1977) (new construction); 24 C.F.R. § 881.101(b) (1977) (substantially rehabilitated); 24 C.F.R. § 882.101(a)(2) (1977) (existing housing).

5. 24 C.F.R. § 880.103(a) (1977) provides that new construction shall be permitted only where there is not a pre-existing adequate supply or HUD establishes a priority

to shape section 8 into a new construction-only program.[6] The building industry is urging the Department of Housing and Urban Development (HUD) to emphasize the portions of section 8 that encourage new construction.[7] Federal budget projections indicate a heavy emphasis on new construction under the section 8 program.[8] In addition, most of the amendments to the program are designed to further new construction. Whether this pressure will succeed, however, is an open question. This Note will attempt to assess some fundamental issues concerning the likelihood of the program's success if primary emphasis is placed on constructing new housing for low income families. Before examining the program in detail, an overview of earlier housing subsidy programs is presented to better identify trends in federal housing policy, and place the section 8 program in perspective.

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for new construction. The use of new construction is also dependent on the needs of a community as stated in the housing assistance plan. *But see* H.R. REP. No. 634, 95th Cong., 1st Sess. 60 *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4525.

6. The Conference Committee specifically rejected a Senate provision limiting construction and substantial rehabilitation of units. CONFERENCE REPORT ON HOUSING & COMMUNITY DEVELOPMENT ACT of 1974, H.R. REP. No. 1279, 93d Cong., 2d Sess. 311, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4463 [hereinafter cited as CONFERENCE REPORT].

7. *See* Whitman, *Federal Housing Assistance for the Poor: Old and New Directions*, 9 URB. LAW. 1, 25-26 (1977); *Will the New Housing Law Work?*, BUS. WEEK, Mar. 31, 1975, at 78. Whitman argues that traditionally the most persuasive argument for employing new construction is the shortage of adequate housing and the fear that utilizing existing housing through a rent subsidy would inflate rents. Whitman, *Federal Housing Assistance for the Poor: Old and New Directions*, 9 URB. LAW. 1, 25-26 (1977). *See, e.g.*, PRESIDENT'S COMM'N ON URBAN HOUSING, THE REPORT OF THE PRESIDENT'S COMM'N ON URBAN HOUSING—A DECENT HOME 39 (1968) (the report forcasted a need for 26 million new or rehabilitated housing units within ten years).

8. The budget for fiscal year 1975 provided for 300,000 leased units comprised of 225,000 new construction units and 75,000 existing units. In the budget for fiscal year 1976, it was estimated that 200,000 units would receive approval consisting of 150,000 new and 50,000 existing. The budget for fiscal year 1977 proposed to assist 400,000 units consisting of 125,000 new and 275,000 existing. *Hearing on the Housing Authorization Act of 1976 Before the Subcomm. on Housing & Community Development of the House Comm. on Banking, Currency and Housing*, 94th Cong., 2d Sess. 72-75 (1976). President Carter's budget proposals for fiscal year 1979 continues this tradition. *See* Wall St. J., Jan. 24, 1978, at 5, col. 2.

I. THE BACKGROUND: EARLY FEDERAL PUBLIC HOUSING PROGRAMS

A. *Conventional Public Housing*

The United States Housing Act of 1937[9] signaled the federal government's first major effort to supply low rent housing.[10] The basic structure of the conventional public housing program remains unaltered through recent years: The federal government provides financial support to a local housing authority (LHA)[11] that enables the latter to plan and operate housing for low-income families.[12] Specifically, the LHA initiates the development process by submitting a proposal to HUD that, if accepted, will result in loan funds for preliminary project planning.[13] After final approval of the project, HUD enters into an Annual Contribution Contract (ACC), guaranteeing that the federal government will satisfy the principal and interest payments on financing obtained by the authority for housing construction.[14] The LHA may then arrange for construction and, after completion, the LHA selects tenants and maintains the project.[15]

Conventional housing program availability is limited to "low-income families."[16] To be eligible, a family's income must be below

9. 50 Stat. 888 *as amended*, 42 U.S.C. §§ 1401-1436 (1970 & Supp. III 1973). For the legislative history of the Act, see T. MCDONNELL, THE WAGNER HOUSING ACT: A CASE STUDY OF THE LEGISLATIVE PROCESS (1957).

10. The government made few attempts at providing inexpensive housing before 1937. These efforts are described in PRESIDENT'S COMM'N ON URBAN HOUSING, THE REPORT OF PRESIDENT'S COMM'N ON URBAN HOUSING: A DECENT HOME 54-56 (1968); Catz, *Historical and Political Background of Federal Public Housing Programs*, 50 N.D.L. REV. 25 (1973).

11. Housing authorities are public corporations established and operated in accordance with local laws. The requisite enabling legislation now exists in all 50 states. *See* [1973] 3 HOUS. & DEV. REP. (BNA) *Reference File* 16:0101-47.

12. *See generally* D. MANDELKER, HOUSING SUBSIDIES IN THE UNITED STATES AND ENGLAND 45-80 (1973).

13. NATIONAL HOUSING & ECONOMIC DEVELOPMENT LAW PROJECT, 1 HANDBOOK ON HOUSING LAW: GUIDE TO FEDERAL HOUSING, REDEVELOPMENT AND PLANNING PROGRAMS, ch. IV, pt. II, at 3-5 (1971) [hereinafter cited as HOUSING LAW HANDBOOK].

14. 42 U.S.C. §§ 1410(a), (c) (1970).

15. 42 U.S.C. § 1410(g) (1970).

16. 42 U.S.C. § 1402(1) (1970). Prior to 1974, public housing was available solely to families of low income.

the authorized ceiling,[17] and if the income rises above a "continued occupancy" level, the LHA must evict the resident family.[18] Rent levels "within the financial reach of families of low income" are set by the LHA consistent with the congressional definition of public housing.[19] In 1969 Congress passed the Brooke Amendment, limiting the authority of the LHA to set rent levels by establishing a maximum permissible rental charge equivalent to one-fourth of the tenant's monthly income.[20]

During the last twenty years, the conventional public housing program has received extensive criticism.[21] Among the program's drawbacks are a relatively poor design and appearance of low-rent developments, and massive racial and economic concentration, and thus segregation, that often accompanies public housing developments.[22] In response to these problems, Congress established a leasing program in the Housing and Urban Development Act of 1965.[23]

B. *Section 23*

The Housing and Urban Development Act of 1965 contained a different approach than the conventional public housing program to the problem of providing housing for low-income families. Under this program, commonly referred to as section 23, the LHA's role changed from landlord to tenant. The LHA was authorized to lease

17. HOUSING LAW HANDBOOK, *supra* note 13, ch. IV, pt. V, at 9.

18. 42 U.S.C. § 1410(g)(3) (1970). The over-income families could not be evicted if the LHA determined that they could not reasonably afford decent housing in the private market.

19. 42 U.S.C. § 1402(1) (1970), *as amended* (Supp. III 1973).

20. Housing and Urban Development Act of 1969, § 213(a), 42 U.S.C. § 1402(1) (1970). The tenant's monthly income is determined according to a statutory scheme that includes numerous deductions and exemptions. Housing and Urban Development Act of 1970, § 208(a), 42 U.S.C. § 1402(1) (1970), *as amended* (Supp. III 1973); HOUSING LAW HANDBOOK, *supra* note 13, ch. IV, pt. V, at 8-9.

21. L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING (1968); NAT'L COMM. AGAINST DISCRIMINATION IN HOUSING, HOW THE FEDERAL GOVERNMENT BUILDS GHETTOES (1968); Catz, *Historical and Political Background of Federal Public Housing*, 50 N.D.L. REV. 25 (1973); Friedman & Krier, *A New Lease on Life: Section 23 Housing and the Poor*, 116 U. PA. L. REV. 611 (1968); Friedman, *Public Housing and the Poor: An Overview*, 54 CAL. L. REV. 642 (1966).

22. *See generally* Friedman, *Public Housing and the Poor: An Overview*, 54 CAL. L. REV. 642 (1966).

23. *See* 79 Stat. 451 (codified at 42 U.S.C. § 1421b (1970)), which added § 23 to the Housing Act of 1937.

suitable units in privately-owned buildings and, in turn, sublease them to low-income tenants.[24] To obtain funds, the LHA was required to present HUD with a project application that described the local need for housing assistance and availability of acceptable vacant units.[25] If the proposal was accepted, HUD and the Authority then executed an ACC.[26]

The LHA leased units offered by private owners if the dwellings qualified as "decent, safe and sanitary." Although section 23 required that a maximum of ten per cent of the units in any structure be placed under assistance, the LHA could waive this provision and, in fact, this distribution quota had little practical effect.[27]

Theoretically, the program had many advantages over the conventional approach.[28] First, since the program applied to existing units, it offered the possibility of providing decent housing without the delays associated with new construction. Second, the program could be implemented with flexibility, providing housing assistance only where needed. Similarly, a tenant could not be evicted from leased housing because of excessive income. Rather, the LHA reduced the subsidy to a point where the tenant no longer required assistance. Third, the prospect of assured tenancy might motivate landlords to improve and maintain their units. Section 23 held many social promises as well, since housing would not be stigmatized as housing for the poor, and the program carried a great potential for better racial and economic integration.

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24. Section 23 utilized existing private accommodations that were or could be suitable for tenancy by eligible families. 42 U.S.C. § 1421b (a)(1) (1970). *See generally* Christensen, *The Public Housing Leasing Program: A Workable Rent Subsidy*, 1968 URBAN L. ANN. 57; Palmer, *Section 23 Housing: Low-Rent Housing in Private Accommodations*, 48 J. URB. L. 255 (1970).

25. U.S. DEPT. OF HOUSING & URBAN DEVELOPMENT, NO. RHA 7430.1 LOW-RENT HOUSING: LEASED HOUSING HANDBOOK ch. 2, § 1, at 1 (Nov. 1969) [hereinafter cited as SECTION 23 HANDBOOK].

26. 42 U.S.C. § 1421(d) (1970). HUD's annual contribution was statutorily limited to the cost of constructing an equivalent, conventional public housing project. *Id.* at § 1421b(3).

27. *Id.* at § 1421b(c). *See* Friedman & Krier, *supra* note 21, at 618-19. Palmer, *Section 23 Housing: Low-Rent Housing in Private Accommodations*, 48 J. URB. L. 255 (1970).

28. A general discussion of the expected benefits of section 23 can be found in H.R. REP. NO. 365, 89th Cong., 1st Sess. 9-15 (1965); Friedman & Krier, *supra* note 21, at 616-36. *See* W. GRIGSBY & L. ROSENBURG, URBAN HOUSING POLICY 37 (1975).

Although the promises of section 23 were not fully realized, the program was used extensively throughout the country.[29] Moreover, section 23 became the vehicle through which the Nixon Administration chose to advance its own solution to the housing problem. Although the Administration advocated utilizing a housing allowance,[30] Congress chose to amend section 23. The revised program, section 8, became the primary means of assisting in housing lower-income families.

C. *Section 236*

Section 236 of the Housing and Development Act of 1968 provided an alternative strategy for housing low-income families.[31] Under section 236, the government provided an incentive for constructing low-income apartments through a debt subsidy.[32] Specifically, the developer obtained an FHA insured market rate project mortgage. Repayment of the mortgage was made as though the loan bore a below market interest rate, typically one per cent.[33] The government was then responsible for the balance of the mortgage payment.

To ensure that these new units were affordable to low- and moderate-income families, the developer was required to pass on the savings from lower interest rates through reduced rents. Tenants were required to pay up to twenty-five per cent of their adjusted income toward the rent. As with the section 23 program, eligibility was determined at the initial leasing period, and a tenant whose income rose thereafter increased rental payments rather than being forced to va-

29. *Section 23-Public Housing Leasing Program*, 31 J. HOUSING 73 (1974).

30. CONG. REC. 30362, 30365 (1973) (President Nixon's message to Congress). This approach is analogous to welfare in that eligible families are given direct cash payments as a means of supplementing their economic capacity to obtain decent housing. *See* H. AARON, SHELTER AND SUBSIDIES: WHO BENEFITS FROM FEDERAL HOUSING POLICIES? (1972); Welfeld, *Rent Supplements and the Subsidy Dilemma*, 32 LAW & CONTEMP. PROB. 465 (1961). Congress authorized an experimental use of housing allowances in 1970. Housing and Urban Development Act of 1970, § 504, 84 Stat. 1786, *as amended*, Housing and Community Development Act of 1974, § 804, (codified at 12 U.S.C. § 1701z-3 (Supp. V 1975)).

31. Housing and Community Development Act of 1968, § 201(a), (codified in scattered sections 12 U.S.C. §§ 1701g-1715 and 42 U.S.C. §§ 1202, 1215) (1970).

32. Tatar, *The Investor and the Section 236 Housing Program*, 8 HOUS. L. REV. 876 (1971); 38 GEO. WASH. L. REV. 1073 (1970); 8 HOUS. L. REV. 911 (1971); 31 U. PITT. L. REV. 443 (1970).

33. 12 U.S.C. § 1715z-1(f) (1970). *See generally*, HUD HANDBOOK: RENTAL HOUSING FOR LOWER-INCOME FAMILIES (Section 236), (FHA 4442.1 Oct. 1968).

cate the project.[34]

Unlike the section 23 program, section 236 was designed solely to spur new construction of multi-family dwellings. Once again, however, the program did not live up to its potential.[35] Basically, the program failed because the mortgage subsidy proved inadequate in a period of rapidly inflating utility costs and real estate taxes. Since the tenant's rent was fixed at twenty-five percent of his income, the rental income proved inadequate to meet rising costs.[36] The developer had to carry this additional burden or else default on the mortgage and, in many cases, he chose the latter. Congress eventually provided additional subsidies to meet these expenses but, by that time, the Nixon Administration had established section 8 as its own solution to the low-income housing problem.[37]

II. SECTION 8: THE STATUTORY FRAMEWORK

Section 8 transferred some of LHA's authority to both HUD and individual owners. In new construction, HUD can enter into a housing assistance payment contract directly with the owner.[38] In all cases, the tenant rents directly from the owner, who has full responsi-

34. *See* Edson, *Section 235 and 236—The First Year*, 2 URB. LAW. 14 (1970).

35. *Hearings on the Suspension of Subsidized Housing Programs Before the Subcomm. on Housing of the House Banking and Currency Comm.*, 93d Cong., 1st Sess. 55 (1974). The Administration criticized a number of the public housing programs contained in the Housing and Urban Development Act of 1968, § 201(a), 12 U.S.C. § 1715z-1 (1976). First, the programs failed to primarily serve families with incomes at below the poverty level. In 1972, the median income level of those served under section 236 was $5,300, well above the low-income line. Address by Secretary of HUD, James T. Lynn, at the Third Urban Technology Conference 1973 (excerpts found in *Use Good Existing Housing for the Needy*, 89 THE AMERICAN CITY 23, (1974)). Second, the programs did not afford the poor much choice since the projects and their mortgages were subsidized. Third, the programs were considered "inordinately costly." *Id.* at 55.

36. *Hearings on the Suspension of Subsidized Housing Programs before the Subcomm. on Housing of the House Banking and Currency Comm.*, 93rd Cong., 1st Sess. 56 (1974).

37. Housing and Community Development Act of 1974, § 201(a)(8), 42 U.S.C. § 1437f (Supp. V 1975) (§ 8 of the revised U.S. Housing Act of 1937). Other than section 23, none of the existing housing programs were specifically dismantled by the Act. However, it is HUD's intention to use section 8 as the primary housing program. *See* Housing and Urban Affairs Daily, Aug. 23, 1974, at 102 (views of former HUD Secretary James Lynn).

38. 42 U.S.C. § 1437f(b)(2) (Supp. V 1975). With existing housing, HUD enters into an ACC with a LHA who, in turn, enters into a subsidy agreement with the owners. *Id.* at § 1437f(b)(1).

bility for rental and management of the unit.[39] The owner of the assisted units receives two separate rent payments, one from the tenant and one from HUD.[40]

The tenant's rent payment is limited to twenty-five per cent of his gross income.[41] Although the actual rent is usually the twenty-five per cent maximum, very large low-income families or households with exceptional medical expenses have a highest rate of only fifteen per cent.[42] Section 8 delegates the responsibility for establishing rent levels to HUD rather than to local authorities.[43]

The assistance payment from HUD, which covers the difference between a tenant's payment and the approved rent, restricts the price of acceptable units. HUD calculates "a fair market rental" for existing and newly constructed units of various types and sizes.[44] The maximum rent may not exceed the applicable fair market rent by more than ten per cent unless HUD determines that local needs require a twenty per cent excess.[45] Assistance contracts must provide

39. 24 C.F.R. § 1273.102(q) (1974), 39 Fed. Reg. 45170 (1974) (new construction); 24 C.F.R. § 1275.102(q) (1974), 40 Fed. Reg. 3735 (1975) (existing housing).

40. Assistance contracts for newly constructed units may have an initial term of five years, renewable exclusively by the owner for a total period of thirty years. 42 U.S.C.A. § 1437f(d)(i) (West Supp. 1978). This is similar to a project that is supported by a state agency. A total period of forty years is possible. 24 C.F.R. § 1273.103(g)(2) (1974), 39 Fed. Reg. 45272 (1974).

For existing housing the contract term is equal to the length of the lease, which may vary from one to three years. 24 C.F.R. § 1275.103(f) (1974), 40 Fed. Reg. 3737 (1975).

41. *See* note 20 and accompanying text *supra*.

42. 42 U.S.C. 1437f(c)(3) (Supp. V 1975). HUD's regulations categorize a household with six or more minors as "large" and a household with eight or more as "very large." 24 C.F.R. § 1273.103(t) (1974), 39 Fed. Reg. 45174 (1974).

43. 42 U.S.C. § 1437f(c)(3) (Supp. V 1975).

44. *Id.* at § 1437f(c)(1). Fair Market Rent is defined as "the rent, including utilities (except telephone), ranges and refrigerators, parking and all maintenance, management and other services, which, as determined at least annually by HUD, would be required to be paid in order to obtain privately developed and owned, newly constructed rental housing of modest (non-luxury) nature with suitable amenities." 24 C.F.R. § 880.102 (1977).

The conferees on the Housing and Community Development Act observed that "the establishment of realistic fair market rentals will be a prime factor in the success or failure of the new housing assistance program." CONFERENCE REPORT, *supra* note 6, at 139.

45. 42 U.S.C. § 1437f(c)(1) (Supp. V 1975). Any adjustments in a maximum rent "shall not result in material differences between the rents charged for assisted and comparable unassisted units." *Id.* at § 1437f(c)(2)(C). The owner has the burden to clearly demonstrate the necessity for the increases. *E.g.*, 24 C.F.R. § 880.110(c) (1976).

that maximum rents will be adjusted at least annually, either to reflect changes in the fair market rent figure or "if the Secretary determines, on the basis of a reasonable formula."[46]

Congress recently amended the section 8 program to extend the duration of the assistance payment from HUD, and establish a debt service subsidy in the event of vacancies. As orginally enacted, the program provided for assistance payments over a twenty year period.[47] To encourage conventional lending, Congress extended the allowable federal commitment to a maximum of thirty years.[48] Similarly, to withdraw the risk of vacancies from the building owner, Congress provided for a debt service subsidy, which prevents foreclosure during the period of vacancy by authorizing federal payment of mortgage payment.[49]

Under the amendments to section 8, eligible "lower-income families," are defined as families whose income is eighty per cent or less of the median income in the area of their residence, with adjustments for the size of the family.[50] Additionally, section 8 requires that at least thirty per cent of the families assisted have "very low incomes," that is, an income level no more than half of the median for the area.[51]

A beneficial "economic mix" within developments is promoted not only by the requirement that very low income households comprise a portion of each project, but also by the provision of the Act establishing a funding priority for those developments where no more than twenty per cent of all units are subsidized.[52] The statute does allow subsidies for all units in a project if the project consists of fifty units or less, or is designed exclusively for the elderly.[53]

46. 42 U.S.C. § 1437(c)(2)(A) (Supp. V 1975).

47. *Id.* at § 1437(e)(1).

48. *Id. as amended by* Pub. L. 95-24, Title I § 101(c), 91 Stat. 55 (codified at 42 U.S.C.A. § 1437f(e)(1) (West Supp. 1978)).

49. *Compare* 42 U.S.C. § 1437f(c)(4) (Supp. V 1975) *with* 42 U.S.C.A. § 1437(c)(5) (West Supp. 1978).

50. 42 U.S.C. § 1437f(f)(1) (Supp. V 1975).

51. *Id.* at § 1437f(f)(2). The 30% requirement for very low-income families applies at the time of initial renting of the dwelling units. *Id.* at § 1437f(c)(7). *See* note 111 *infra*.

52. 42 U.S.C. § 1437f(c)(5) (Supp. V 1975). The 20% preference is used to rank applications which are received within 60 days. *Id.* This distribution requirement is the primary vehicle used to promote "economic mix." *Id.* § 1437f(a).

53. *Id.* at § 1437f(c)(5).

III. SECTION 8 NEW CONSTRUCTION IN PERSPECTIVE

The section 8 program effectuates three basic goals.[54] First, the program tries to reach those families who need the most help in obtaining a decent place to live.[55] Second, the program implements a policy of racial and economic integration.[56] Third, section 8 is intended to substantially involve the private housing industry, since private involvement is one way to limit the expense of federal housing programs.[57]

These goals, although laudable standing alone, create problems when blended together into a functional housing strategy. This section examines whether a new construction private market strategy conflicts with the traditional federal role of providing housing for the less privileged.

A. *Federal Aid vs. Private Profit*

To provide decent, safe dwellings for low-income families, section 8 is dependent upon voluntary, active involvement by private developers. Because the private developer participates only when the opportunity for a profit is reasonably certain, the government must often provide sufficient financial incentives. When federal resources are limited, the government must hold down its costs while providing sufficient incentives to encourage active participation. In this light, section 8 may not motivate private developers to enter the program and construct new units for low-income families.

Section 8 establishes two financing methods that relieve the private developer from market uncertainty. First, a rent subsidy system allows the developer to keep abreast of increasing inflation. Second,

54. Section 8 creates three separate categories of assisted housing: existing, new construction and substantial rehabilitation. The regulations pertaining to new construction and substantial rehabilitation are identical in most respects. Therefore, unless otherwise designated, citations concerning these two programs will be made to new construction.

55. 42 U.S.C. § 1437f(a) (Supp. V 1975).

56. *Id.*

57. CONFERENCE REPORT ON HOUSING & COMMUNITY DEVELOPMENT ACT OF 1974, H.R. REP. NO. 1279, 93d Cong., 2d Sess. (1974). *See* 10 WEEKLY COMP. OF PRES. DOC. 1060 (1974) (President Ford's remarks on the Housing & Community Development Act of 1974). Economic theory generally relies on the principle that private market activity tends to be less costly than if government provided identical services. *See* M. FRIEDMAN, CAPITALISM AND FREEDOM, 190-95 (1962).

the program stimulates a demand for new dwellings by increasing the number of families able to compete in this market.

The rent subsidy system, distinguishing section 8 from all prior programs, is the key to private involvement. In theory, rent subsidies are effective incentives because the developer is concerned about rental income as a primary source of profit. The rents must satisfy finance obligations and operating costs while providing a reasonable return on the investment.[58] Where rents are insufficient to meet these obligations, a decline in management services, maintenance and upkeep of the project may result. Also, the developer is likely to default on his mortgage. Section 8 avoids these difficulties by maintaining a rent subsidy system tied to the prevailing fair market rent in a particular geographic area.[59]

B. *Automatic Rent Adjustments*

The section 8 program requires an annual rent adjustment to reflect changes in the area's fair market rent. Additionally, an increase is allowed where special circumstances indicate a "substantial general increase in real property taxes, utility rates or similar costs."[60] The Fair Market Rental (FMR), however, operates as an overall limitation on the contract rent since the statute prohibits the maximum monthly rent from exceeding the established FMR.[61]

58. [1976] 4 HOUS. & DEV. REP. (BNA) 30:0014.

59. "[The section 8] subsidy amount flows from the approved rent rather than from a fixed amount such as the interest on the mortgage. [Thus], the Section 8 program is able to eliminate one of the major problems that arose in Section 236 projects, the inability without further legislation to increase subsidies to compensate for the sharp rise in operating costs." G. MILGRAM, THE CURRENT STATE OF THE SECTION 8 HOUSING PROGRAM, reproduced in *Hearings Before Subcomm. on Housing & Community Development of the House Comm. on Banking, Currency & Housing*, 94th Cong., 1st Sess. 26 (1975).

See W. GRIGSBY & L. ROSENBURG, URBAN HOUSING POLICY, 165-75 (1975), where the authors discuss the economics of low-rent housing. Over 10% of cash in flow, an amount equal to about 80% of net income, is dissipated by expenditures on low-rent units that do not contribute to any improvement or maintenance of housing services. *Id.* at 171. In part, this explains why housing quality in the inner city is inferior.

60. 42 U.S.C. § 1437f(c)(2)(B) (Supp. IV 1974). The regulation, 24 C.F.R. § 880.110(c) (1976), provided that an owner must clearly demonstrate that the annual automatic increase is inadequate to meet his operating costs.

61. The maximum contract rent may exceed the FMR by up to 10% if the field office determines that special circumstances warrant such higher rent, or by up to 20%

By providing for annual automatic and special circumstance adjustments in the contract rent, the system benefits both the owner and tenant. The owner is insulated against spiraling operational expenses and real estate taxes, lessening the pressure to reduce services.[62] Furthermore, since his rental contribution is fixed, the tenant is not forced to absorb these increasing costs.[63]

Although automatic rent adjustments enhance the program's attractiveness, its key lies in determinating the FMR.[64] Clearly, a high FMR means a greater return for the developer. A provision viewed favorably by developers requires an annual adjustment in the FMR. However, the upward adjustment limit, since not statutorily determined, is subject to HUD discretion. In calculating the FMR, an area HUD office must consider "factual data, analyses, and recommendations from community sources familiar with prevailing rents and costs; tak[ing] into account the need to provide housing with suitable amenities."[65] Regardless of these procedural constraints, the final FMR is within HUD's discretion.[66]

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if the Regional Administrator determines such higher rent is necessary to the implementation of a Local Housing Assistance Plan. 24 C.F.R. § 880.108(a)(1)(2) (1976).

62. T. DUVALL & E. WHITE, ANSWERS TO QUESTIONS ON SECTION 8: LOWER-INCOME HOUSING ASSISTANCE (1975); Note, *The Housing and Community Development Act of 1974—Who Shall Live in Public Housing?*, 25 CATH. U.L. REV. 320 (1976).

63. Section 8 avoids one of public housing's most formidable problems—how to deal with rapidly rising costs and fixed revenues. Under the conventional housing program, LHA's are caught in a financial crunch. Prohibited by statute from raising the tenant's rent, the LHA and HUD have been unable to persuade the courts that staggering losses justify avoiding the statutory ceiling. *See, e.g.*, National Tenants Organization, Inc. v. HUD, 358 F. Supp. 312 (D.D.C. 1973); Barber v. White, 351 F. Supp. 1091 (D. Conn. 1972).

Note that any change in the tenant's income affects the amount the tenant must contribute. As income increases, the amount of the rent subsidy will decrease. Consequently, it is in HUD's best interest to house tenants with relatively stable sources of income to avoid possible decreases in future rent receipts.

64. CONFERENCE REPORT, *supra* note 6, at 313.

65. The procedure for calculating the Fair Market Rental is specified in U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM: NEW CONSTRUCTION PROCESSING HANDBOOK, ch. 8 at 8-10 (April 1975) [hereinafter cited as SECTION 8 HANDBOOK]. Basically, the area office valuation branch must construct hypothetical dwelling units and, from samples of market units drawn throughout the housing submarket, a comparable rent may be derived. Certain types of units may not be used as samples, such as HUD insured units. Once the comparable unit is determined, certain adjustments must be made because of the difference in utility and services provided. *Id.*

66. HUD has been slow in promulgating revised yearly FMR's. It is a difficult

The federal government and the private developer do not have harmonious roles. HUD's motivation involves keeping the FMR as low as possible.[67] By committing the government to a thirty-year participation, with an expectation of cost increases, HUD must either restrict its fund commitments or maintain the FMR at low levels. Yet with a policy of providing as many units as possible within the budgetary limit, the latter approach seems the only alternative.

C. *The Comparability Rule*

The comparability rule, an element of the rent subsidy system, further limits the upward adjustment of rents by providing that revision of maximum rents "shall not result in material differences between the rents charged for assisted and comparable unassisted units."[68] The comparability rule, in essence, compares the reasonableness of the rent to unsubsidized "equivalent living accommodations and services."[69] The rule attempts to prevent inefficiency by allowing the market place to dictate what is "reasonable" in rents and which operations, government or private, are efficient.[70] As a practical consequence, HUD field offices must assess the proposed (or revised) rent in relation to "samples of market rent comparables drawn from surveys for differing unit size and structure type" in the particular submarket of the intended project.[71]

In its original interpretation of the comparability rule, HUD construed "material differences" to mean that the contract rent of an assisted unit could vary no more than five per cent from the rent

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task to revise the rents and some developers advocate retroactive application once the FMR's are eventually established. [1977] 5 HOUS. & DEV. REP. (BNA) 22.

67. "Acceptable schedules of Fair Market Rents [should not be] high enough to support the production cost of inefficient developers or to encourage the production of units that are not modest in design." SECTION 8 HANDBOOK, *supra* note 65, at ch. 8, § 8-3, at 6. In light of the need to guard against unforeseeable cost increases in the future, HUD must either restrict its commitment of housing funds or maintain the FMR at lower levels that still entice developers. *See Hearings Before Subcomm. on Housing & Community Development of the House Comm. on Banking, Currency and Housing: The Implementation of Section 8*, 94th Cong., 1st Sess. (1975).

68. 42 U.S.C. § 1437f(c)(2)(C) (Supp. V 1975); 24 C.F.R. § 880.110(d) (1977).

69. SECTION 8 HANDBOOK, *supra* note 65, at § 9-3.

70. *See* note 57 *supra*.

71. The appraiser must also consider the rates of change in construction costs, utility expenses, financing charges, and the effect they are likely to have on the rates of change of market rent. SECTION 8 HANDBOOK, *supra* note 65, at § 9-3.

charged for a comparable unassisted unit.[72] This variance was available only when one hundred per cent of the project was assisted.[73] This position chilled private development because it failed to account for the added expense of dealing with the federal government.[74]

Responding to criticism, HUD recently modified the comparability test. Changes now allow a ten per cent variation in contract rents to reflect higher management costs regardless of the number of assisted units.[75] Furthermore, a five per cent increase is allowed, at field office discretion, when the developer can demonstrate that unique market conditions justify the increase.[76] Before rental adjustments are allowed, the project must undergo a strict examination, including a full cost analysis.[77] These modifications provide added flexibility without impinging on justifiable rental charges. Nevertheless, the comparability rule continues as the object of sharp criticism by private developers who argue that the rule is merely a device to hold down FMR's and thereby lessen funding commitments. By comparing only existing unassisted units, the rule fails to account for the

72. *Id.*

73. *Id.*

74. *Current Developments*, [1977] 4 HOUS. & DEV. REP. (BNA) 729. Low-income families, in the past, required a number of services and amenities that private landlords are not normally equipped to provide, which serve to raise the rents above physically comparable units in the unsubsidized market. "These needs may range from extra janitorial services through budget counseling and provision of space for day care centers." G. MILGRAM, THE CURRENT STATE OF THE SECTION 8 HOUSING PROGRAM, note 59 *supra*.

75. *Current Developments*, [1977] 4 HOUS. & DEV. REP. (BNA) 729-32.

76. *Id.* The rule can be applied with such flexibility that it undercuts its own purpose. For example, an area office, charged with the responsibility of defining the relevant submarket, might focus on an area of rental housing in the metropolitan area that attracts premium rents.

77. The test, in addition, includes a showing that the developers made a "conscientious effort" to plan a feasible project. Owners must show that higher rents are necessary and that the existing housing supply is inadequate to meet local housing needs. *Current Developments*, [1977] 4 HOUS. & DEV. REP. (BNA) 731.

The legislative history indicates that the comparability rule was intended to assure "that higher costs resulting from inefficient management practices are not compensated by increase in the subsidy. Thus, a housing owner whose operating cost increases are out of line with increases in comparable projects . . . may not increase rents and would have to either absorb the operating increase, or preferably, take effective remedial action with respect to its management problems." *House Comm. Report on the Housing and Development Act of 1974*, H.R. REP. No. 1114, 93d Cong., 2d Sess. 371-72 (1974).

replacement cost of a unit in a period of inflation. As a result, HUD's FMR calculations are too low to support a feasible project.

The comparability rule hinders the program in other ways, as well. For example, a developer who finances his project through the Federal Housing Authority (FHA) must comply with costly site selection criteria.[78] Requiring compliance with the Davis-Bacon federal minimum wage requirements renders projects more costly.[79] The rule neglects whether any premium should be granted to developers to encourage low-income family units.

D. *Financing*

Favorable financing is crucial to the success of any apartment development. As originally enacted, Congress provided various financing methods,[80] but HUD preferred that private lenders would form the primary financing force behind section 8.[81] Conventional financing imposes fewer direct costs on the federal government and is consistent with maximizing private involvement in the program. Private lenders are reluctant to provide financing, however, because of legal and financial complications. Prior to the recent amendments, lenders were hesitant to participate because the risk of vacancies was placed entirely on the owner.[82] Also, the law provided assistance payments to extend only twenty years, while conventional loan terms

78. 24 C.F.R. § 880.111-.112 (1977). COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE CONGRESS: MAJOR CHANGES ARE NEEDED IN THE NEW LEASED-HOUSING PROJECT 24-25 (1977).

79. 24 C.F.R. § 880.114(d) (1977). The Carter administration is considering abandoning the comparability rule. While no definite decision has been reached, HUD could adopt a policy of adjusting comparable rents for cost factors rather than abandon comparability completely. *Current Developments*, [1977] 5 HOUS. & DEV. REP. (BNA) 9.

80. 24 C.F.R. § 880.115(a) (1977) provides that "any type of financing may be utilized" including the following: 1) conventional loans; 2) mortgage insurance programs under the National Housing Act; 3) section 202 of the Housing Act of 1959; 4) Title V of the Housing Act of 1949; and 5) financing by tax-emempt bonds or other obligations.

81. *Hearings on the Housing Authorization Act of 1976 Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Currency and Housing*, 94th Cong., 2d Sess. 68 (1975) (statement of former HUD Secretary Carla Hills).

82. 42 U.S.C. § 1437f(e)(1) (Supp. V 1975) permits the assistance payments to continue over a forty-year period if the project is owned or financed by a state or local agency.

customarily last for thirty to forty years.[83] Congress subsequently corrected these impediments so that owners are now entitled to a debt subsidy in the event of vacancy,[84] and the federal commitment extends to thirty years.[85]

Despite the recent changes, conventional financing for low-income family units remains unattractive to both lenders and developers.[86] Lender hesitancy arises out of fear that a multi-family unit containing low-income subsidized families will scare non-assisted market renters away. The perceived result is ultimate foreclosure on the loan, making the lender unwilling to participate in a "social experiment."[87] Owners, too, are often reluctant to use conventional financing since lenders may require the developer to be personally liable as security for the loan.

Various alternative financing mechanisms do exist. For example, many developers can obtain a loan insured by the Federal Housing Authority (FHA) under the Government National Market Association (GNMA) Tandem Plan.[88] Under the Tandem Plan, GNMA in-

83. 42 U.S.C. § 1437(e)(1) (Supp. V 1975). Presumably, a twenty-year subsidy would not have been unattractive if the term of the mortgage were also twenty years. However, since the FMR is based on current rents, and the comparability rule prohibits material variations in rents of assisted and unassisted units, the rents could not be set at a level high enough to support amortization over this shorter period.

84. 42 U.S.C. § 1437f(c)(4) (Supp. V 1975). The Senate bill originally provided that assistance payments would continue with respect to an unoccupied unit only where the tenant vacates before the expiration of the lease *and* the owner is making a good faith effort to fill the vacancy. The Conference Committee adopted these two provisions, but in the alternative. CONFERENCE REPORT, *supra* note 6, at 1141. *Hearings on the Housing Authorization Act of 1976 Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Currency & Housing*, 94th Cong., 2d Sess. 32 (1975). *See also* G. MILGRAM, THE CURRENT STATE OF THE SECTION 8 PROGRAM, note 50 *supra*.

85. *See* note 48 *supra*.

86. H.R. REP. NO. 42, 95th Cong., 1st Sess. 9-15 (1977) *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 580-86 [hereinafter cited as CONGRESSIONAL BUDGET REPORT 1977].

87. COMPTROLLER GENERAL OF THE UNITED STATES, *supra* note 76, at 61. The CONGRESSIONAL BUDGET REPORT 1977, *supra* note 86, suggests another reason for conventional lender reluctance. The report notes that most section 8 projects are used as tax shelters. Utilizing accelerated depreciation to enjoy current tax deductions, all tax deduction benefits cease after 20 years. I.R.C. § 167(a) (1954). At that point, the owners either sell, abandon or refinance their dwellings. Given a continuing inflationary spiral, the temptation to sell may be irresistible, a situation viewed as too risky by the lender.

88. *See* Fitzpatrick, *FHA and FNMA Assistance for Multi-family Housing*, 32 LAW & CONTEMP. PROB. 439 (1967).

tervenes in the secondary mortgage market, purchasing low-interest rate mortgages at market rates and reselling them to the Federal National Mortgage Association (FNMA).[89] GNMA absorbs the differential in interest points, forming a subsidy, to encourage lower interest lending for low-income projects. From the developer's standpoint, Tandem Plan financing is attractive because of the lower interest rates on the loan.[90] Also, because of FHA insurance, the developer is not personally liable for the loan. These advantages, however, must be balanced against numerous drawbacks, including delays associated with FHA processing, a need to undergo *both* FHA and section 8 processing, and the stringent cost analysis involved in FHA processing.[91] Furthermore, the developer incurs additional costs through this financing method because of exacting property and building standards required to receive an FMA commitment.[92] Finally, uncertainty surrounding the continuation of the Tandem Plan forces developers to look for other financing avenues.[93]

A state Housing Finance Agency (HFA) serves as another financing source.[94] Essentially, a state HFA provides developers with below market interest rates on both construction and long-term loans. The HFA raises funds for re-lending principally from the sale of tax-exempt revenue bonds,[95] which are then retired through mortgage payments made by the developer. Unlike those issued by the federal government, these bonds are not backed by the state's full faith and credit, but rather are secured through the state's "moral obligation" to pay. Although this is, in effect, an authorization to obtain state funds in the event of any deficiencies, the obligation is not legally binding.[96]

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89. 12 U.S.C. § 1720(j) (1976).

90. *See* W. GRIGSBY & L. ROSENBURG, URBAN HOUSING POLICY 173 (1975), which illustrates how a lower debt service commitment, accomplished through lower interest rates, increases cash flow. *See also* CONGRESSIONAL BUDGET REP. 1977, note 86 *supra*; A. SOLOMON, HOUSING THE URBAN POOR (1974).

91. COMPTROLLER GENERAL OF THE UNITED STATES, *supra* note 76, at 62.

92. COMPTROLLER GENERAL OF THE UNITED STATES, A COMPARATIVE ANALYSIS OF SUBSIDIZED HOUSING COSTS (1976).

93. *Current Developments*, [1977] 5 HOUS. & DEV. REP. (BNA) 544.

94. 42 U.S.C. § 1440 (Supp. V 1975) specifically authorizes financing through a state housing finance agency.

95. *See* note 80 *supra*; I.R.C. § 103.

96. For examples of "moral obligation" clauses, see MICH. STAT. ANN. § 16.114 (1972); ILL. STAT. ANN. ch. 67 1/2 § 301 (Cum. Supp. 1972). *See also Development of State Housing Finance Agencies*, 9 REAL PROP. PROB. & TR. J. 471, 471-74 (1974).

State HFA financing has many advantages for both the developer and for low-income families. The primary benefit to the developer is an ability to secure lower-interest loans without the cumbersome time delays associated with FHA Tandem financing.[97] Eligible low-income families benefit, too, since the state agency can easily adapt to local community needs. Furthermore, since an HFA provides an efficient, low-cost financing source, the agency can exert pressure on the developer to make a project available to families.[98] State HFA financing, despite all of its advantages, is used reluctantly, perhaps due to unfavorable publicity surrounding New York City's financial crisis. A near default by the New York Urban Development Corporation put the "moral obligation" bond to the test.

While recent indications reveal renewed confidence in moral obligation notes issued by state HFA's,[99] another financing mechanism, section 11(b),[100] alleviates the difficulty of marketing moral obligation bonds.[101] Under the section 11(b) program, HUD, not the Internal Revenue Service, grants an exemption from federal income taxation to obligations issued by a public housing agency, or any instrumentality thereof, for producing low-income housing.[102] Section 11(b) has numerous advantages, which include avoiding the "stigma" of a state moral obligation bond, escaping state ceilings on indebtedness, and easy administration. This last benefit is derived from expanding the definition of public housing authority to include instrumentalities or agents, making it possible for a group of developers to form a public housing organization and issue tax-exempt bonds without numerous intervening parties. Nevertheless there is no assurance that investors will purchase bonds, the proceeds of which are used to house low-income families as opposed to other eligible, more

97. 24 C.F.R. § 883 (1977) provides for quick state HFA-section 8 processing by allowing the state agency to process the funds without a simultaneous review by HUD.

98. *Current Developments*, [1978] 6 HOUSING & DEV. REP. (BNA) 30:00014, demonstrates that HUD intends to increase this important HFA function. HUD, therefore, intends to require HFA's to allocate a greater percentage of funds to units for families.

99. The attractiveness of this technique is evident in the favorable bond ratings by Moody's. *See Current Developments*, [1977] 5 HOUS. & DEV. REP. (BNA) 567.

100. 42 U.S.C. § 1437 (Supp. V 1975).

101. *See Current Developments*, [1975] 5 HOUS. & DEV. REP. (BNA) 567.

102. 24 C.F.R. § 811.105 (1977); 24 C.F.R. § 811.102(c) (1977).

stable low-income groups.[103]

III. MAXIMIZING PRIVATE CONTROL VS. HOUSING THE LOWER-INCOME FAMILY

This section examines another conflict between the goal of aiding the poor and the goal of encouraging private industry involvement. Specifically, this section questions whether the section 8 new construction program can successfully house needy lower-income families.

Section 8 provides owner incentives by increasing demand for new multi-family dwellings. In theory, an increase in demand enhances an owner's profitability since the increase improves the chance for maintaining a project at full occupancy.[104] An increase in demand may also push market rents higher.[105] It is arguable, however, whether an increase in demand is sufficient to prompt a developer into undertaking a section 8 project specifically for low-income families. First of all, an adequate demand may already exist such that any futher increase would lack the motivating effect on a developer to undertake a low-income family housing development. Also, demand is only one of many factors a developer considers when contemplating a project.[106] Thus, section 8 motivation, by itself, would be insufficient to generate the necessary private industry response to assure the program's success.

From the tenant family's perspective, emphasizing new construction while simultaneously increasing demand is logically unsound because the supply never satisfies the demand for these units.

103. 24 C.F.R. § 811.102 (1977) defines "low-income housing" to include housing occupied by moderate-income families, elderly and the handicapped.

104. D. MANDELKER & R. MONTGOMERY, HOUSING IN AMERICA (1973); Downs, *Housing the Urban Poor: The Economics of Various Strategies*, 59 AM. ECON. REV. 646 (1969); *What Form Should Housing Subsidies Take?*, 31 J. HOUSING 160 (1974) (discussing the difference between production oriented subsidies and demand subsidies).

105. Advocates of new construction maintain that reliance on existing housing will cause severely inflated rents because of the lack of adequate existing supply. T. DUVALL & E. WHITE, ANSWERS TO QUESTIONS ON SECTION 8: LOWER INCOME HOUSING ASSISTANCE (1975). *See also* W. GRIGSBY & L. ROSENBURG, URBAN HOUSING POLICY (1975); A. SOLOMON, HOUSING THE URBAN POOR (1974); Whitman, *Federal Housing Assistance for the Poor: Old Problems and New Directions*, 9 URB. LAW. 1 (1977).

106. Mortgage interest rates and construction costs are equally as important as demand to prospective developers.

Additionally, a new construction strategy aggravates the notion of "horizontal inequality"[107] because few people receive the benefits of a new unit, with its corresponding amenities, whereas other eligible persons must remain in older housing. Furthermore, the initial cost per family is greatest where new construction provides housing, and its cost effectiveness remains doubtful.[108]

The section 8 new construction program is likely to discriminate against certain low-income families. First, the eligibility income limits for prospective tenants are designed to permit greater eligibility than allowed in past housing programs. Second, in the new construction area, the Act creates a trade off: To involve the private sector in the program, the tenant must forego many rights established in other housing programs.

A. *Eligibility*

Section 8 eligibility income limits correspond to an area's median income.[109] By defining eligibility in this fashion, rather than tying it to an officially established poverty level, greater numbers can participate.[110] Consequently, not only is the owner entitled to greater selectivity, but the amount of available assistance must be spread out over a larger group. Low-income families, who need the most help, suffer greatest since a less concentrated effort is expended for their benefit.

B. *The Trade Off*

The success of section 8 depends upon "aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing."[111] The program, however, delegates to owners of

107. A. SOLOMON, HOUSING THE URBAN POOR 17-18 (1975).

108. *Id.* at 69-70. Solomon charts out the consumption benefits per family (benefit = market rent – tenant rent) under various housing strategies. He concludes that, within the confines of a limited federal budget, the cost of new construction is substantially outweighed by its consumption benefit and therefore any housing strategy must consider equity cost effectiveness and political acceptability. *See also* Whitman, *supra* note 7, at 36-38.

109. *See* note 59 and accompanying text *supra.*

110. CONGRESSIONAL RESEARCH SERVICE, COMPARATIVE COSTS AND ESTIMATED HOUSEHOLDS ELIGIBLE FOR PARTICIPATION IN CERTAIN FEDERALLY ASSISTED LOW INCOME HOUSING PROGRAMS, prepared for *Senate Comm. on Banking, Housing and Urban Affairs,* 94th Cong., 2d Sess. (1976).

111. *See* notes 1-4 and accompanying text *supra.*

newly-constructed units "all ownership, management and maintenance responsibilities, including the selection of tenants and the termination of tenancy."[112] Outside of selection procedures, there are some regulations owners must follow.[113] Every family must fill out an application for admission that is to be maintained by an owner to provide racial, ethnic and gender data that ensures compliance with Equal Opportunity requirements.[114] However, the owner may avoid this requirement if there are no vacancies and his waiting list is such that, for an unreasonable length of time, the applicant could not be admitted.[115] Yet the regulations fail to define "an unreasonable length of time" and, presumably, the owner may interpret that phrase as he wishes.

HUD regulations require all proposals to contain assurances that the owner will comply with both Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968, which require racial equality in government-supported housing.[116] Also, projects planned for five units or more require an Affirmative Fair Housing Marketing Plan, which states methods of recruiting minorities for occupancy in assisted units.[117]

Responsibility for terminating tenancies is placed on the owner of a new construction project.[118] HUD does not require any particular eviction process unless an owner wishes to qualify for temporary assistance payments where a low-income family is evicted.[119] Specifically, the family must have "written notice of the proposed eviction, stating the grounds and advising the [f]amily that it has [ten]

112. *Compare* 42 U.S.C. § 1437f(e)(2) (Supp. V 1975) (new construction) *with* 42 U.S.C. § 1437f(d)(1) (Supp. V 1975) (existing housing). With respect to existing housing, the owner is far more restricted in tenant selection procedures, and he has no right to evict.

113. 24 C.F.R. § 880.218(b)(1), (5) (1977) requires compliance with equal opportunity guidelines when marketing and operating the project.

114. 24 C.F.R. § 880.218(b)(2) (1977).

115. *Id.* There is no requirement that the owner demonstrate to the applicant proof that the unit is in fact occupied.

116. 24 C.F.R. § 880.114(a) (1977).

117. 24 C.F.R. § 880.209(7) (1977). *See* Affirmative Fair Housing Marketing Regulations, 24 C.F.R. §§ 200.600-.640 (1977). Acceptable Affirmative Fair Housing Marketing plans include advertising through minority media and requiring developers to display fair housing signs at the project site.

118. *See* footnote 112 and accompanying text *supra.*

119. *See* footnote 121 and accompanying text *infra.*

days within which to present its objections."[120] The eviction must not violate the lease, the assistance contract, or any local law.[121]

Granting the owner virtually exclusive control over tenant selection and eviction creates possible discriminatory consequences. Along with the transfer of management and maintenance responsibilities, the private owner should also bear some risk of tenant defaults and damage to the dwelling.[122] These considerations are likely to affect evaluation of prospective tenants. Consequently, an owner may frown upon applicants from lower-income groups that may be stereotyped as unstable. Where plans call for a mix of residents, with some units occupied by tenants paying full market rent, the owner will be motivated to select only those lower-income persons who will not disturb or offend neighboring "market renters." Both considerations, management and tenant relations, discourage accepting families that show any social undesirability. Finally, the program has no requirement that an eviction occur only for cause.[123] This is critical to the tenant since, in a market where demand exceeds supply, the owner's waiting list allows him to fill units with "preferred" families. In this particular instance, the dwelling remains unoccupied for such a short time that the owner does not need a temporary assistance payment, and need not comply with the notification procedure.[124]

120. 24 C.F.R. § 880.107(c)(2) (1977).

121. *Id.*

122. Note, *The Leased Housing Program: How Tenantable a Proposition?* 26 HASTINGS L.J. 1145, 1197-1200 (1975); Note, *Federal Leased Housing Assistance in Private Accomodations: Section 8,* 8 U. MICH. J.L. REF. 676 (1975).

123. To receive an assistance payment for vacancies during the rent-up period, an owner must show that he has not rejected any eligible applicant except for good cause (acceptable to HUD). 24 C.F.R. § 880.107(b) (1977). This implies that the omission of the requirement that evictions occur for cause was a deliberate choice by HUD. *See* 24 C.F.R. § 880.220 (1977).

124. This tactic would be possible only in a seller's market, which is frequently the case where low-priced rental housing is concerned. *Compare* 24 C.F.R. § 880.107(c) (1977) *with* 24 C.F.R. § 882.215 (1977). Evictions from existing units are the "sole right" of the public housing agency, "with the owner having the right to make representation to the agency for termination." 42 U.S.C. § 1437f(d)(1)(B) (Supp. V 1975). As with new construction, the regulations require written notice of the proposed eviction, but the LHA must examine the grounds for eviction authorizing the eviction unless it finds the grounds insufficient under the lease. *Id.* Tenants and applicants have the right to a hearing when faced with eviction. *See, e.g.*, Caulder v. Durham Hous. Auth., 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971) (conventional public housing) (1971); Escalera v. New York City Hous. Auth., 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970) (same); Joy v. Daniels,

The tenant is in a precarious position, both in securing a unit and during occupancy. Rather than promulgating rules that relieve this situation, HUD chose not to take any remedial action that limits an owner's discretion and might jeopardize the involvement of the private sector. Some commentators suggest, however, that procedural due process rights afforded tenants under prior law are still available to the tenant in a section 8 project. This issue remains to be decided in the courts.[125] However, if procedural due process guarantees apply to the new construction program, voluntary participation may be curtailed since private owners face possible liability for constitutional violations.[126]

C. *Promoting Economic Integration vs. Housing the Poor*

Section 8 seeks two conflicting goals: promoting economic integration in assisted units and providing housing to lower-income families. The following discussion illustrates the tension between these goals, at the same time reflecting the underlying issue of whether social goals conflict with housing goals.

The tenant selection process is guided by a congressionally mandated policy of promoting an economic mixture of families in available projects, a statutorily created priority for those projects where no

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479 F.2d 1236 (4th Cir. 1973); Anderson v. Denny, 365 F. Supp. 1254 (W.D. Va. 1973) (federally subsidized housing). U.S. DEP'T. OF HOUSING & URBAN DEVELOPMENT, GRIEVANCE PROCEDURE IN LOW-RENT PUBLIC HOUSING PROJECTS (Feb. 22, 1971). *See generally* Note, *Procedural Due Process in Government-Subsidized Housing*, 86 HARV. L. REV. 880 (1973); Note, *The Leased Housing Program: How Tenantable a Proposition?* 26 HASTINGS L.J. 1145, 1176-1200 (1975).

125. To make the procedural due process argument, a tenant faces some difficulty in satisfying the state action requirement considering the use of privately-owned dwellings, and the possibility of mixtures of assisted and unassisted families. *See* Goldberg v. Kelly, 397 U.S. 254, 260-66 (1970). It should be possible to obtain procedural due process guarantees without overcoming this hurdle. *See* Bishop, *Assisted Housing Under the Housing and Community Development Act of 1974*, 8 CLEARINGHOUSE REV. 672, 682-83 (Supp. Jan. 1975). This author suggests using the fifth amendment since the test of public action under the fifth amendment is substantially the same as that for state action under the fourteenth amendment. This conceivably may be satisfied through the deep federal government involvement with the program at every level.

126. Note, *The Housing and Community Development Act of 1974—Who Shall Live in Public Housing?* 25 CATH. U.L. REV. 320, 333-34 (1976). *But see* Note, *The New Leased Housing Program: How Tenantable a Proposition?* 26 HASTINGS L.J. 1145, 1183-94 (1975).

more than twenty per cent of the tenants will be assisted families.[127] This policy tries to promote dispersal of the poor away from concentrated urban areas, while encouraging social integration among economic classes of people.[128]

The economic mix concept in the new construction area is opposed by developers who argue that high construction costs force high FMR's. High rents mean that only comparatively wealthy families, a group who would be reluctant to move into a subsidized building, could afford unsubsidized housing.[129] Moreover, strict adherence to the twenty per cent preference could mean a prohibitively expensive program because developers would be forced to build market competitive units with many amenities and larger floor plans, necessitating higher development costs.[130]

Perhaps out of a fear of antagonizing the private developer, the priority is now only a paper tiger.[131] The preference is limited to sixty days. More importantly, the law exempts from this priority system any development of fifty units or less and projects designed for the elderly and handicapped.[132] Since it is relatively inefficient to operate small projects, there will not be many such developments. However, developments for the elderly and handicapped may constitute a substantial part of the new construction program if developer animosity to the economic mix concept remains.[133]

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127. 42 U.S.C. § 1437f(c)(5) (Supp. V 1975); 24 C.F.R. § 880.104(a) (1977).

128. CONFERENCE REPORT, *supra* note 6, at 309. A similar policy was contained in the section 23 program, although the policy had little practical effect. *See* Friedman & Krier, *supra* note 21, at 618-19.

129. According to a survey by the National Association of Housing and Redevelopment Officials, a diverse socio-economic mix was not a deterrent to people seeking housing under the section 23 program. The study found that tenants look at good design and maintenance. Even if the tenants do not mind integration, the owners may be unaware of this fact or may fear damage to the image of the building. *See* D. MANDELKER & R. MONTGOMERY, HOUSING IN AMERICA 402 (1973); Bryan, *Can "Economic Mix" in Housing Work?* 31 J. HOUSING 367 (1974).

130. COMPTROLLER GENERAL OF THE UNITED STATES, *supra* note 78, at 35. Whitman, *supra* note 7 at 29.

131. Welfeld, *The Section 8 Leasing Program: A New Program in an Old Rut*, [1975] 2 HOUSING & DEV. REP (BNA) 1106, 1107.

132. 42 U.S.C. § 1437f(c)(5) (Supp. V 1975).

133. "Under (Section 8), the builders become the housing managers. It would seem that since they must rent out the units, they will seek the elderly, those without children and the upper reaches of low and moderate income families." 120 CONG. REC. 28141 (1974). The most recent statistics seem to bear out this early statement:

IV. FUTURE PROSPECTS

In order for the section 8 New Construction Program to be a successful housing strategy it must overcome numerous conflicting goals. The program, although dependent upon private housing industry involvement, lacks sufficient incentives to entice this group. While the rent subsidy system is an attractive feature, developers may feel reluctant to participate in the program knowing that HUD controls the system and that their interests are not necessarily in harmony with HUD's. Also, with respect to new construction, those most in need of decent housing are not likely to benefit where the developer-owner is charged with exclusive management responsibility.

Section 8 is designed to utilize not only new construction, but also existing and substantially rehabilitated housing. An existing housing emphasis holds several advantages. Tenants are assured of more adequate procedural due process guarantees since LHA takes a more active role in the program.[134] This aids in preventing discriminatory practices that reduce the effectiveness of the program in housing those who need the most help. Also, a greater dispersal of low-income families is possible because, unlike new construction, there are no exclusionary zoning ordinances that preclude a family from renting an apartment.[135] The initial costs to the government are substan-

SECTION 8 NEW CONSTRUCTION STARTS AND COMPLETIONS TO DECEMBER 31, 1975

	Invitation for Proposals	Preliminary Proposals Approved	Applications Received	Applications Approved	HAP ACC List Approval	*Section 8* HAP Agreement Approved (1)	HAP Executed (2)
TOTAL	76,646	14,298	207,057	125,882	81,169	1,471	279
ELDERLY	39,631	10,823	86,539	53,761	29,357	958	279
% of TOTAL FOR ELDERLY COLUMN	51.7%	75.7%	41.8%	42.7%	31.6%	65.1%	100.0%

(1) Construction Started
(2) Construction Completed

Source: 1975 Statistical Yearbook of the U.S. Department of Housing and Urban Development 107, Table 6

134. 42 U.S.C. § 1437f(d)(1) (Supp. V 1975).

135. Exclusionary zoning practices by suburban municipalities operate as an effective bar to constructing low-income family units. Under the section 8 new construction program, the owner is responsible for obtaining land with suitable zoning for multi-family uses. 24 C.F.R. § 880.204(h) (1977). In addition, HUD standards mandate that projects not be located in an area of minority concentration and shall promote a greater choice of housing opportunities. *Id.* at § 880.112(c)(1), (d). Suburban locations, therefore, are the most desirable areas, given the availability of va-

tially smaller, meaning that greater numbers of eligible families can participate.[136] One final advantage is perhaps the most important: Emphasizing existing housing bolsters private real estate while maintaining the viability of neighborhoods.[137] In most urban areas a surplus of existing housing has decayed due to the inability of owners to meet maintenance expenses.[138] Section 8, by assuring the owner of a steady cash flow from subsidized rents, provides a source of funds to maintain the housing units.

New construction programs do have merit. Where the existing housing supply is inadequate, or where high unemployment exists, new construction may be necessary. However, new construction should be viewed as a production strategy that serves an economic function as well as a housing function. New construction is most useful in housing the elderly and moderate-income families. Relying on existing housing for the elderly is impractical or excessively expensive since their needs are more exacting. Using new construction to house moderate-income families avoids the political prejudices against housing the poor in "luxury."[139] Finally, where new construction is pursued as a strategy for housing the poor, it

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cant land. Suburban communities, however, have been slow to respond to the need for low-income housing. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). *See generally* Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483 (1973); Burns, *Class Struggle in the Suburbs: Exlusionary Zoning Against the Poor,* 2 HASTINGS CONST. L.Q. 79 (1975); Davidoff & Davidoff, *Opening up the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509 (1971); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971).

136. GAO, A COMPARATIVE ANALYSIS OF SUBSIDIZED HOUSING COSTS (1976).

137. W. GRIGSBY & L. ROSENBURG, URBAN HOUSING POLICY (1975); A. SOLOMON, HOUSING THE URBAN POOR 176 (1974). Both authors believe that the federal commitment to new construction is only a commitment to physical structures but does not aid in stabilizing or upgrading neighborhoods. They further state that a successful housing program cannot divorce itself from a neighborhood revitalization program. *See* note 6 *supra*. The advantages of emphasizing section 8 existing housing are discussed in S.W. Green, *The Role of HUD in Recycling the Cities in the 1970's and 1980's*, in RECYCLING INNER CITY REAL ESTATE (1976). *Cf. A Federal Strategy for Neighborhood Rehabilitation and Preservation*, 11 HARV. J. LEGIS. 509-38 (1974).

138. *See* note 59 and accompanying text *supra*.

139. Ohls, *Public Policy Toward Low-Income Housing and Filtering in Housing Markets*, 2 J. URBAN ECON. 144 (1975). The author makes the point that increasing low-income purchasing power will ultimately filter upward, increasing the demand for new construction for all income levels. *Id.* at 171. *See also* Welfeld, *Rent Supplements and the Subsidy Dilemma*, 32 LAW & CONTEMP. PROB. 465 (1967).

could be more effectively implemented through other programs, such as mortgage subsidies.

Whatever strategy is utilized, it is crucial that the goals be identified to better understand the possible consequences. The section 8 new construction program, like other programs, contains its own internal conflicts. Yet realizing this tension helps ensure flexibility in administration, and allows intelligent decisions regarding policy priorities rather than a policy shaped by the strongest market force.

COMMENTS