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THE PUBLIC HOUSING LEASING PROGRAM:  
A WORKABLE RENT SUBSIDY?

After all, money, as they say, is miraculous.

*Thomas Carlyle*

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The Housing and Urban Development Act of 1965<sup>1</sup> embodied three types of governmental programs to improve the housing of low and middle income families—government owned and constructed housing, loans at below-market interest rates to building owners,<sup>2</sup> and subsidies to tenants.<sup>3</sup> Although the federal government had long provided low-rent public housing<sup>4</sup> and aided the construction of new housing

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1. 79 Stat. 451 (1965).

2. 12 U.S.C. § 1715 l (d) (3) (1964), *as amended* 12 U.S.C. § 1715 l (d) (Supp. II, 1966). Indeed, it was largely because the administration wanted to phase out the 221 (d) (3) below-market interest rate program that it proposed the rent subsidy program itself. A program of subsidized interest rates had proved undesirable principally for budgetary reasons because the full amount of the sub-market interest rate loans appeared as a direct expenditure in the administrative budget. Moreover, the fluctuating interest rate on loans made under the below-market 221 (d) (3) program had led even its supporters to become dissatisfied with its operation. *See, e.g., Hearings, on H.R. 5840 Before the Subcommittee on Housing of the House Committee on Banking and Currency, 89th Cong., 2nd. Sess., Ser. 2, pt. 1, at 1199 (1965) (statement of Ira S. Robbins, National Ass'n of Housing and Redevelopment Officials) [hereinafter cited as 1965 Hearings].*

3. Subsidizing tenants was hardly a new technique for improving the housing of low income families. Subsidies have long been given by local welfare authorities to enable recipients to obtain housing.

4. Since its inception in 1937, the low-rent public housing program has provided housing for more than 750,000 families. 1965 *Hearings, supra* note 2, at 201 (statement of Robert C. Weaver). By February 28, 1965, there were 581,092 units of public housing. 1965 *Hearings, supra* note 2, at 217. For a discussion of the history of public housing *see* G. BEYER, *HOUSING AND SOCIETY* 462-67 (1965).

through its mortgage insurance programs,<sup>5</sup> the 1965 Act marked the federal government's first attempt to provide decent housing for low-income families by increasing through subsidies the amount which they could afford to pay for housing available in the private market.

Subsidizing low-income families recognizes the basic housing problem facing the American city: low-income families cannot afford to pay enough rent to obtain housing which is decent, safe, and sanitary. Among those families with an annual income of less than \$2,000 in 1960, over 46.4 per cent lived in substandard units.<sup>6</sup> The tenant's inability to pay a higher rent frequently prevents the landlord from properly maintaining the building, since rehabilitation or even ordinary maintenance is not economical.<sup>7</sup> And the low return on investment in low-rent housing limits the amount of new low-rent housing that is being constructed.<sup>8</sup>

5. Although the FHA mortgage program had over 38 billion dollars of insurance outstanding, as of November 30, 1964, it had done little to aid urban housing until the adoption of the 221 (d) (3) mortgage insurance program in 1964, which provides housing for middle-income groups. 1965 *Hearings*, *supra* note 2, at 131.

6. U.S. BUREAU OF THE CENSUS, U.S. CENSUS OF HOUSING: 1960, pt. 1, table A-4. This observation is further confirmed by noting that where the rental payment was less than \$30 per month 78.8 per cent of the units were substandard while at the more usual rent of \$80-99 per month only 4.9 per cent of the units were found to be substandard. *Id.* at table A-2.

7. A frequent proposal to ameliorate the condition of the slum tenant is to impose additional duties on the landlord either through statutory change or through collective bargaining contracts negotiated by the tenants themselves. While in the short run these efforts might indeed improve the condition of the building by channelling a larger share of profits into improvements and maintenance, they hardly provide a complete solution to the need for decent low-rent housing. Unless an organization such as a tenant union can reduce the cost of maintenance through a program of tenant education, rents must necessarily increase as more money is allocated for maintenance and improvements. If such tenant economies were not achieved and rents were not increased, an actual decline in the supply of low-rent housing would be likely for in many cases it would no longer be profitable to invest in an enterprise with such a low return on capital for the relatively high risk of investment.

Imposing additional duties upon the owners of low-rent housing can be successful only if coupled with a mechanism for increasing the amount which these tenants can afford to pay as rent. Clearly, a good case can be made for imposing certain duties on landlords because they are in the best position to perform the service or prevent the harm. See Calabresi, *The Wonderful World of Blum and Kalven*, 75 *YALE L.J.* 216 (1965). But in imposing legal duties we must ask if the gain from imposing a legal duty is greater than the costs which it necessarily produces. For an economic analysis of this type of problem, which emphasizes the ways in which the parties can obtain a satisfactory solution through bargaining, see Coase, *The Problem of Social Cost*, 3 *J. LAW & ECON.* 1 (1960).

8. Although some slumlords obtain a high return on their investment in slum property, this could hardly be the general case considering the shortage of low-

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The Act provided two new programs for utilizing private low-rent housing by increasing the purchasing power of low-income tenants<sup>9</sup>—the leasing of private housing by public housing agencies<sup>10</sup> and the rent supplement.<sup>11</sup> While the leasing provision, a Republican pro-

rent housing. Moreover, the actual profits of these slumlords are difficult to calculate because they frequently obtain such a high return by consuming their capital—the building itself—by their failure to maintain. It is likely that the average owner of low-rent housing gets a return on his investment of about eight per cent. Considering the risk of such an investment in light of strict code enforcement, receiverships, and increasingly generous defenses to forcible detainer actions, it cannot be surprising that there is a shortage of decent low-rent housing in most communities while there is often a surplus of luxury apartments which yield a higher return. Indeed, some of the more pessimistic observers have speculated that private investment can no longer provide housing for the low-income segment of the population. For a theoretical discussion of the economic problem see R. TURVEY, *THE ECONOMICS OF REAL PROPERTY* (1957).

9. The Act in its final form gave little assistance to the so-called middle income families who were above the public housing ceilings but still unable to afford decent housing in the private market. Because of a desire to protect the owners of private housing from competition by the government, the Housing Act of 1937 had set the income limit for public housing below the level of income necessary to obtain decent housing in the private market. The Act, as amended in 1949, required that income limits on admission for public housing be 20 per cent below the income needed to meet the cost of standard private housing in the community. Thus, many families who were slightly above the income limits for public housing were forced by the act to remain in slum housing. While the rent supplement program as originally proposed by the administration was intended to aid these "middle income" families, by the time the bill emerged from Congress, the supplement was limited to those eligible for public housing who were also displaced by governmental action, sixty-two years of age or older, physically handicapped, occupying substandard housing or a victim of a natural disaster. 12 U.S.C. § 1701s (c) (Supp. II, 1966).

10. 42 U.S.C. § 1421b (Supp. II, 1966). The terminology in the area is confusing. Most commonly the leasing program is referred to as the rent subsidy program which leads to much confusion since the Federal program of rent supplements is also popularly known as the rent subsidy program. *E.g.*, Chicago Daily News, October 15, 1966, at 20, col. 7.

Even before the 1965 Act, local authorities could lease private units in the community. Yet only with the adoption of a flexible annual contribution formula in the 1965 Act did such a program become practicable. See note 27, *infra*.

11. 12 U.S.C. § 1701s (Supp. II, 1966). It was on this second program, the payment of rent supplements, that the administration had originally pinned its hopes of an all-out assault on the shortage of lower and moderate income housing. Introducing the act to Congress, President Johnson described the rent subsidy as "the most crucial new instrument in our effort to improve the American city." 111 CONG. REC. 3910 (1965). With the federal government channeling large amounts of money into the lower and moderate income housing market through the payment of rent supplements, the program promised to result in the construction of 500,000 new units in four years. 111 CONG. REC. 14872 (1965) (remarks of Rep. Barrett).

The rent supplement program pays the building owner the amount by which the rent for the unit exceeds one-fourth of the tenant's income. 12 U.S.C. § 1701

posal of the year before, encountered little resistance, the strikingly similar rent supplement program met with vehement Congressional opposition. Sounding the tocsin, Arthur Krock proclaimed, "The real issue is whether the Federal Union is to undergo its greatest transformation thus far into a collective state."<sup>12</sup> With the opposition mobilized, the rent supplement program was greatly restricted as it passed through Congress and has had little impact because of continued congressional unwillingness to appropriate funds.<sup>13</sup> The leasing program, on the other hand, promises to work some significant changes in the landlord-tenant relationship and indeed, in the low-rent housing market itself. Because the leasing program offers a novel approach, likely to find continuing Congressional support, this article will examine it as a potential solution to our need for decent low-rent housing.

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(d) (Supp. II, 1966). For a complete discussion of this program see, Krier, *The Rent Supplement Program of 1965: Out of the Ghetto into the . . . ?* 19 STAN. L. REV. 555 (1967). As with the leasing program, the government would enter into a contract with the building owner guaranteeing the payment of the subsidy. Unlike the leasing program, however, there would be little government control, and the features of the traditional landlord-tenant relationship would be retained. The tenant would not be a sublessee of the government but a lessee of the building owner. The government's only relation to the landlord would be the payment of the subsidy over the 40-year period of the contract. The rent supplement tenant would pay his rent directly to the landlord, and the government would retain no responsibility for the actions of the tenant. For a detailed description of the operation of the contract see 1965 *Hearings, supra* note 2, 248 (statement of Robert C. Weaver).

12. New York Times, May 27, 1965, at 36, col. 3. *But see* reply of Rep. Barrett, *id.*, June 14, 1965, at 32, col. 4. The violent resistance which the rent subsidy program encountered surprised some of its supporters. The startled New York Times declared, "For no valid reason the rent supplement program has become the focus of controversy." New York Times, June 14, 1965, at 32, col. 1. After all, the rent supplement program was very similar in effect to the leasing program contained in the same bill. Both were government subsidies to enable lower income families to afford more expensive housing. Yet the conservatives' criticism should have been anticipated. In the opinion of the program's critics the program was obnoxious because it allowed a neighbor to pay a lower rent for the same accommodations. Moreover, the payments seemed remarkably similar to a gift because the government retained so little control. Such criticism has continued and even greater opposition is likely in the 90th Congress.

13. The maximum yearly appropriation authorized was reduced from \$50 million in the administration's bill to \$30 million in the final act. 12 U.S.C. 1701s (a) (Supp. II, 1966). The actual contract authorization for fiscal 1966 was, however, only \$12 million. In addition, the appropriation bill imposed a workable program requirement which made projects subject to local approval. Pub. L. 89-426, (May 13, 1966). Such a local control rider attached to the appropriation poses another major threat to the supplement plan since local authorities could use the workable program requirement to block supplement projects which might promote both racial and economic integration.

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### I. THE LEASING PROGRAM—ITS OPERATIONS AND ADVANTAGES

Although more complex than the better known rent supplement program, the public housing leasing program is still very simple in its operation. Under the leasing program, public housing authorities are permitted to lease suitable apartments from private owners who are willing to make some of their units available for public housing.<sup>14</sup> The authority, in turn, subleases these units to tenants eligible for public housing.<sup>15</sup> The owner receives the full rent from the public housing agency while the agency collects a lower rent based on the tenant's income.<sup>16</sup>

With the acute shortage of public housing and the growing dissatisfaction with the vertical ghettos produced by the existing public housing program,<sup>17</sup> the leasing of private housing is an attractive new approach. By early 1965 the number waiting for public housing throughout the nation stood at over 500,000.<sup>18</sup> Moreover, limiting the maximum average unit cost of public housing to \$20,000, irrespective of family size or the number of bedrooms, frequently prevented public housing from meeting the needs of large families.<sup>19</sup> In addition, existing projects often intensified existing educational, recreational, and law enforcement problems because of the increased population density they produced.

By avoiding the political stalemates and administrative difficulties associated with the construction of large public housing projects, the leasing of private housing could increase the supply of public housing. In many communities the fear of a sharp increase in the num-

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14. The relationship between the landlord and the authority is governed not only by a lease but also by contract in the form of a participation agreement.

15. In Chicago the sublease agreement is almost identical to the normal Chicago Housing Authority tenant lease. The tenant agrees to pay the Chicago Housing Authority for necessary repairs to the premises. The lease declares that the agency's power of revocation is "unqualified and unrestricted, nor need any reason be given therefor."

16. The Chicago Housing Authority charges the tenant \$1.00 per month rent for each \$55 of annual income after certain authorized deductions including social security payment, retirement payments, compulsory insurance payments, union dues, special work clothes, excess transportation, excess medical payments, support contributions and child care.

17. *E.g.* 111 CONG. REC. 16938 (1965). See generally BAUER, *THE DREARY DEADLOCK OF PUBLIC HOUSING*, ARCHITECTURAL FORUM, May 1957, p. 140; Abrams, *Public Housing Myths*, THE NEW LEADER, July 25, 1955, pp. 3-6.

18. 111 CONG. REC. 14881-82 (1965). This is a somewhat deceptive estimate of actual needs since many communities have failed to establish public housing authorities. The number in New York City alone stood at over 100,000.

19. See 1965 *Hearings*, *supra* note 2, at 312.

ber of low-income families living in an area has prevented the construction of additional public housing or, indeed, even the establishment of a public housing authority. Because housing of low-income families under the leasing program would not result in any concentration of public housing tenants, some communities previously unwilling to establish a public housing program may establish authorities and confine their participation to the leasing program.<sup>20</sup> Moreover, once an authority was established, the amount of housing available would depend not on local approval of potential sites but the availability of dwellings in the private housing market.

This program could also promote the most efficient utilization of the existing private housing supply by making low-income families aware of available housing in the community. As the initial step for participation in the leasing program, the housing authority obtains a list of all available private housing which would be suitable for low-rent housing.<sup>21</sup> The agency then contacts the building owners and urges them to participate in the program. By discovering the units suitable for low-rent housing in the community and making its findings available to community organizations serving low-income families, the agency could eliminate the geographical factors which often confine the low-income family's search for housing to its own neighborhood.

The program's greatest contribution to the efficient utilization of the supply of decent housing in the community is, however, the availability of the subsidy contained in the public housing rent formula. Many low-income families continue to live in slum conditions despite the availability of decent housing in their own communities because they are unable to pay the higher rents demanded by these vacant properties.<sup>22</sup> With the public housing contribution, this vacant housing would be fully utilized. Because they pay only a portion of the unit's full rent, public housing tenants would be able to occupy more expensive accommodations while paying the same rent previously paid for substandard housing.

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20. San Jose, California, a city which did not previously have a public housing program, has established an authority and is participating exclusively in the leasing program. In the first month of operation over 670 applications were made to the authority and 44 families placed in housing units leased by the local housing authority from private landlords. The majority of the families were placed in three and four bedroom units. San Jose Mercury, Nov. 10, 1966, at 7, col. 1.

21. 42 U.S.C. § 1421b (b) (Supp. II, 1966).

22. 1965 *Hearings*, *supra* note 2, at 75 (statement of Robert Weaver).

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Unlike the existing public housing program, which forces tenants to move once their earning power increases above the maximum permitted by the authority, the leasing program can produce stable, economically-integrated housing for low-income families. The leasing program will integrate low-income tenants with those of higher economic levels rather than confining them to the high-rise ghettos of existing public housing. Because the law permits the public housing agency to lease only 10 per cent of the units in any building to accommodate public housing tenants, some economic integration is assured.<sup>23</sup> Although the amount of integration is limited somewhat by requiring that rentals charged by the public housing agency be within the financial range of low-income families, the program is still a substantial improvement over confining the poor to existing public housing projects. The association with wealthier tenants produced by the leasing program should expose the public housing tenant to a different way of living, and eliminate the stigma of poverty so often associated with present public housing projects. In addition, the leasing program can create a more stable environment than existing public housing because the tenant will not be forced to move when his income exceeds the public housing ceiling.<sup>24</sup> The low-income family placed by the public housing agency in a private unit is encouraged to enter into a leasing agreement with the building owner at the market rent once his income has exceeded the public housing ceiling.<sup>25</sup>

The landlord, too, will benefit from participation in the program since the rents paid by the public housing agency will often enable him to improve or maintain his building. Those landlords in deteriorating neighborhoods who cannot afford to maintain their build-

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23. 42 U.S.C. § 1421b (c) (Supp. II, 1966). The 10 per cent limitation proposed by the act can, however, be waived whenever the agency determines it should not apply because of the building in which the units are leased. In Chicago, for example, the participation agreement between the authority and the landlord provides for the leasing of 33 per cent of the units in a building. Because of the small number of units in some buildings participating in the program this seems to be a reasonable figure. Even with the figure at 33 per cent there is no possibility that the leasing project would produce a concentration of public housing families.

24. Both the landlord participation agreement and the lease between the Chicago Housing Authority and the landlord provide options for tenant occupancy after the tenant no longer requires public assistance. Indeed the Chicago authority expects that in many cases the landlord will charge the tenant a lower rent in order to keep him in the building.

25. The Federal Housing Assistance Administration is also encouraging local authorities to include a provision in the lease allowing the tenant to purchase the unit.

ings because tenants are unable to afford rents which would make maintenance economically feasible will be assisted in their efforts to keep the buildings in repair by the higher rents paid by the public housing agency. In addition, many landlords whose buildings are in a substandard condition will be able to improve their units, since the agency is authorized to lease apartments which can be rehabilitated.<sup>26</sup> By entering into five-year leases<sup>27</sup> with the public housing agency these landlords will be able to obtain loans to be used in renovating their buildings. Consequently, the program would add to the supply of decent low-rent housing in the community.

Eventually, a broad leasing program could produce an increase of low-rent housing through new construction. By increasing the amount which low-income families can afford to pay for housing, the leasing program would create a greater demand for housing which can be obtained at the subsidized rent levels. Initially, this increased demand will inflate the cost of such housing by moving more people into the low and middle income housing market which, at first, will be unable to expand sufficiently to satisfy the increased demand. Assuming, however, that the combination of higher rents and the reduction of risk to the landlord because of the guarantees made by the agency would make investment in such moderate rent housing profitable, the overall effect of the program will be to increase the supply of low-income housing.

## II. POLITICAL AND SOCIAL LIMITATIONS ON THE PROGRAM

Yet even in its present restricted form, the leasing program has not been a complete success, partly because the act limits the rents which the public housing agency may pay for private housing. The housing authority's subsidy for accommodations in private housing must not exceed the fixed annual contribution which the federal government would have granted the agency for the construction of new housing designed to accommodate the comparable number, sizes, and kinds of families.<sup>28</sup> The federal government's annual contribution for new public housing is the amount necessary to amortize and pay the interest on loans obtained to finance the project, while operat-

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26. Interview with Edmund H. Sadowski, Assistant General Counsel, Chicago Housing Authority, September 26, 1966.

27. 80 Stat. 1284 (1966).

28. 42 U.S.C. § 1421b (e) (Supp. II, 1966).



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ing expenses are borne by rents charged the tenants.<sup>29</sup> Even though this limitation does not make the program unworkable, it clearly does require economy. In Chicago, for example, the housing agency is authorized to pay up to \$97.50 per month for renting a private apartment of one bedroom; up to \$118.50 per month for two bedroom units; up to \$141.00 for four bedrooms; and up to \$179.00 per month for apartments with five bedrooms.<sup>30</sup>

An additional limitation, not contained in the Act itself, has even more severely limited the program's effectiveness. The Federal Housing Assistance Administration has restricted the ability of the public housing agency to enter the private housing market where there is a low vacancy rate in standard housing in the community. No leasing program is permitted to reduce the city-wide vacancy rate to lower than three per cent for any size unit.<sup>31</sup> In Chicago, this limitation has confined the program to studio and one bedroom units because in other size units the vacancy rate is lower than the established three per cent.<sup>32</sup> Such a limitation has been imposed because of the federal government's fear of inflation. Yet, if the supply of low-rent housing is to be increased, as the federal government certainly desires, there will be some inflation initially. As the effective demand for such housing increases because of the public housing subsidy, prices will

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29. For a fuller explanation of the flexible formula for annual contributions adopted by the 1965 Act *see* 1965 *Hearings, supra* note 2, at 204. Since the local housing authority could obtain annual contributions measured by the fixed annual contribution which the federal government would have granted for new housing designed to accommodate a comparable number of families, programs for utilization of private housing either through lease or purchase became possible. Indeed, even programs for tenant lease-purchase can now be established by the authority. A proposal for such a program has been made by Ira S. Robbins, 1965 *Hearings, supra* note 2, at 1203-04. *See also* Address by Marie C. McGuire, National Council on Aging Conference, March 3, 1965 reprinted in part in 1965 *Hearings, supra* note 2, at 1204.

30. CHICAGO HOUSING AUTHORITY PAMPHLET, 1966 LEASING PROGRAM (1966) [hereinafter cited as 1966 LEASING PROGRAM]. An average tenant would pay only \$65 for a one-bedroom apartment and \$98.50 for a five-bedroom unit.

31. The vacancy rate is for standard dwellings and does not preclude the leasing of new units or units which can be rehabilitated.

32. Letter from Edmund H. Sadowski, Assistant General Counsel, Chicago Housing Authority, to author, September 29, 1966. The full rigor of this limitation has been avoided by a provisional authorization allowing the leasing of units within the restricted sizes. Chicago's low vacancy rate does not seem atypical. For the first quarter of 1966 the vacancy rate for standard rental housing in metropolitan areas was only 2.8 per cent. While in the United States the rental vacancy rate was 7.5 per cent, in the Northeast the rate was only 4.9 per cent. U.S. BUREAU OF THE CENSUS, CURRENT HOUSING REPORTS, Series H-111 (1966).

necessarily rise, but only until the demand can be met by the construction of additional low-rent housing.

Community segregation practices, too, have restricted the ability of public housing agencies to obtain decent apartments. Because the agency possesses no power of condemnation to compel landlords to participate in the program, the housing must voluntarily be made available for public housing use. With the low vacancy rate in the ghetto, particularly in housing that would qualify as decent, safe, and sanitary, obtaining vacant units is difficult. Outside the ghetto the forces of segregation could limit the program substantially. Landlords already reluctant to rent to Negro tenants would hardly be induced by the limited subsidy offered by the public housing agency to accept low-income Negro tenants. Only if there were a tacit agreement excluding or severely limiting the number of Negro tenants would it be likely that the landlords in all-white neighborhoods would participate.<sup>33</sup> Consequently, the program's effectiveness would seem to be confined to those neighborhoods where the white exodus has already created a vacuum in the housing market.<sup>34</sup>

The unwillingness of landlords in all-white neighborhoods to participate in the leasing program could, of course, be overcome by granting the agency the power to condemn a leasehold interest.<sup>35</sup> Such a power is easily sustained under the rationale of previous condemnation cases allowing condemnation for a use restricted to private persons as long as there is a definite benefit to the community.<sup>36</sup> Yet,

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33. Clearly these are two undesirable alternatives. The Chicago Housing Authority has made it clear that "*NO discrimination may be exercised in the selection or approval of tenants or in the provision of services, or in any other manner, against any person because of race, creed, color, or national origin.*" 1966 LEASING PROGRAM (emphasis in original).

34. The 190 apartments occupied thus far are "scattered throughout the city" according to Harry J. Schneider, Managing Director, Chicago Housing Authority. In some instances, he said, Negro tenants were moved to previously all-white buildings in "certain changing neighborhoods." Chicago Tribune, October 3, 1966, at 5, col. 1. While community segregation practices restrict the leasing program, they can be overcome by basic economic forces. A landlord with a high vacancy rate in an all-white area might come to participate in the program because it is the only way in which he could realize a profit on his investment. Site location for government-owned public housing projects has been stalled by the same community balkanization. Because site selection requires community approval, it seems less likely to succeed in the face of prejudice than the leasing program which depends primarily on the forces of the private housing market.

35. While clearly such a power was not contemplated by Congress in approving the leasing program, the combination of the flexible formula for annual contributions and state eminent domain statutes render it a possible solution. See e.g., Ill. Rev. Stats. ch. 67½, § 8.15 (1965).

36. See *People ex rel. Gutknecht v. Chicago*, 414 Ill. 600, 111 N.E.2d 626

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this power would be a mixed blessing. In all likelihood it would bring with it substantial community control over site selection<sup>37</sup> and would subject the agency to the same political and social resistance which has paralyzed existing public housing in many communities.<sup>38</sup> Inroads upon discriminatory practices of landlords could, however, be made with the aid of strong open occupancy legislation. In those cases where discrimination can be established, the public housing authority, with its legal resources, should be able to compel obedience to the statute.<sup>39</sup>

Aside from a guarantee that the number of public housing tenants would be limited,<sup>40</sup> the best hope for overcoming existing segregation patterns in the community is the economic power which the leasing program gives the public housing agency. Where vacancy rates in the white community are high, landlords will be forced to weigh carefully the competing costs of receiving the full rent for the unit by accepting Negro tenants or suffering a loss of rent by following community social behavior. In almost any protracted struggle between vacancy and participation, the landlord will opt for participation. A modification of existing segregation patterns is far more likely to result from economic demands than from any change in the community's political and social behavior.

While the amounts paid by the public housing authority hardly seem inducements to landlord participation, except where the landlord could not obtain an equal sum either because of the tenant's inability to pay or because of a high vacancy rate, the monetary value of the rental payments does not reflect the true value of participation to the landlord. Both the guarantee of rentals, and the assurance of recovery by the owner against the public housing agency for damage done to the building by a tenant, provide economic incentives for owner participation. Since the housing authority is the lessee and the

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(1953) noted in 101 U. PA. L. REV. at 1246 (1953). *Contra*, *Adams v. Housing Authority of Daytona*, 60 So. 2d 663 (Fla. 1952).

37. Such a control could take the form of the workable program requirement 42 U.S.C. §§ 1410 (e), 1451 (c) (1964) imposed upon the choice of location of both existing public housing and 221 (d)(3) housing participating in the rent supplement program. See note 13, *supra*. Or the approval of a redevelopment plan by local authorities. For an example of a condemnation statute, which does this see Ill. Rev. Stats. ch. 67½, §§ 8.14, 8.15 (1965).

38. See note 20 and accompanying text, *supra*.

39. The only problem would seem to be one of standing. It is likely that the agency could not bring the action on behalf of itself since it is not being discriminated against. It could, however, provide representation for an aggrieved tenant.

40. See note 23 and accompanying text, *supra*.

public housing tenant its sublessee, the housing authority remains liable for damage done by the tenant. This should eliminate the landlord's common complaint that he cannot recover against the low-income tenant for damage done to the building. It should also reduce much of the risk associated with investment in low-income housing. Moreover, because of its liability for damage, the housing authority is pressured to embark on a program of tenant education which could produce a reduction in the landlord's cost of ordinary maintenance.

Because of the agency's role as sublessor, the public housing leasing program will be more costly than a direct subsidy program. Although the program's initial administrative costs would be low because the organization and information necessary for such a program is, for the most part, already to be found in existing public housing authorities, the potential liability of the housing authority for damage done by its sublessees would impose higher costs.<sup>41</sup>

### III. CHANGES IN THE LANDLORD-TENANT RELATIONSHIP

The leasing of private housing by a public housing agency presents a substantial modification of the traditional landlord-tenant relationship. The public housing authority executes a normal lease with the building owner, and then subleases to a public housing tenant. The landlord is responsible to the housing authority for the maintenance of the building, while the authority is liable for the acts of its sublessee.

Although the housing act provided that the selection of tenants remained with the landlord, subject to the agency's annual contribution contract with the federal government, in practice the landlord's power of selection is far from absolute. From the outset it was obvious that if the vast numbers already waiting for public housing were to be treated equitably, the agency would have to impose administrative restrictions on the landlord's choice of tenants. In addition, if the agency were to implement its policy of integration by assigning those first on the waiting list to the first vacancy, it would also have to restrict the landlord's choice.<sup>42</sup>

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41. The increased costs of the leasing program would not be offset by the lower costs of public housing debt financing since payments would be direct cash subsidies. See 1965 *Hearings*, *supra* note 2, at 429 (statement of Ira S. Robbins urging the use of the public housing financing formula as the most inexpensive method of increasing the supply of low-rent housing).

42. See generally, Comment, *Public Housing and Discrimination*, 64 *MICH. L. REV.* 871, 875 (1966).

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Chicago has solved this problem by offering the landlord three programs of tenant selection—each of which restricts his traditional freedom of choice.<sup>43</sup> One program allows the owner to select the tenant with the approval of the housing authority. A second permits tenant selection by the Chicago Housing Authority with no right of approval in the owner. It is the third program, however, that seems most likely to provide a workable solution. It allows the landlord to reject tenants referred by the housing authority, thereby utilizing the existing waiting lists while giving the landlord a role in tenant selection. This third program also has a safeguard against discrimination since it permits the landlord to reject only two referrals within a six-month period. To say that the landlord retains the function of tenant selection, subject to the provisions of the contract between the landlord and the agency, is clearly a false promise of autonomy. His role in the selection of tenants must necessarily be substantially reduced.

At least theoretically, the greatest change in the normal landlord-tenant relationship is the complete denial of the landlord's power to remove tenants. Although the owner may ask the agency to remove a tenant, the agency retains the sole right to give notice to vacate.<sup>44</sup> In practice, however, this limitation has not proved substantial. The lease between the tenant and the public housing authority permits eviction without cause and has frequently been upheld by the courts as necessary for the efficient management of public housing.<sup>45</sup>

Even though no reason is given for the termination of the lease, the housing authority does set down criteria for removal in its internal regulations. The three major grounds for termination are excessive income, non-payment of rent, and undesirability. It is unlikely that the agency would not accede to the landlord's recommendation to

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43. Chicago Housing Authority Participation Agreement (Sublease Plan).

44. 42 U.S.C. § 1421b (d) (3) (Supp. II, 1966). In Chicago the authority's control has been greatly weakened by allowing the landlord to terminate his participation in the program upon 15 days notice in writing. Chicago Housing Authority Participation Agreement.

45. See e.g., *Thorpe v. Durham Housing Authority*, 267 N.C. 431, 148 S.E.2d 290 (1966), *rev'd per curiam*, 87 Sup. Ct. 1244 (1967). The Court apparently believed that this problem had been solved by the Department of Housing and Urban Development in a circular of Feb. 7, 1967, which provided: "Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction and given an opportunity to make such reply or explanation as he may wish." In his concurring opinion, Justice Douglas argued that the circular had done little to protect the tenant against arbitrary action by the housing authority and that the basic problem of eviction without cause remained to be faced by the Court. 87 Sup. Ct. at 1248.

evict an "undesirable" tenant. In Chicago, the initial determination of a tenant's undesirability is made by the building owner who then refers the action to the Central Rental Office for review.<sup>46</sup> When the Central Rental Office determines that a tenant's lease should be terminated, the recommendation is reviewed by a three-man board. This board is composed of one member from the Rental Office, one member of the legal office, and the deputy director of the housing authority.<sup>47</sup> The review, however, is not a group review since each member examines the file independently. After review the tenant is served with a fifteen-day notice of termination, and if he fails to vacate, a forcible detainer action may be brought by the private landlord.

This review procedure hardly seems an effective protection of the tenant's rights. All review is by housing authority personnel. Only if the tenant refuses to move is the case reviewed by the courts, and even that procedure is unlikely to delay removal since a tenant can be evicted without cause. With the liberal eviction provisions of the public housing authority, the landlord could very well have more power to evict a public housing tenant than his non-public housing tenants.

The eviction provisions which characterize the conventional relationship between the tenant and the public housing authority have such a potential for arbitrary action that they have been frequently challenged both in and outside the courts.<sup>48</sup> Indeed, in one city, tenants have succeeded in requiring the public housing agency to show cause before evicting.<sup>49</sup> Although such a broad power of eviction can perhaps be justified on grounds of necessity, unless the need for quick eviction is very great it would seem unwise to continue to evict without cause because action of this kind has a negative psychological effect on the public housing tenant. With the use of standard private leases, another stigma of being a public housing tenant would be removed.

Under the statute, the maintenance of the unit remains within the landlord's control. The Act, in a section notable for its vagueness, provides that "maintenance and replacements shall be in accordance

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46. Chicago Housing Authority Regulations. These are internal operating procedures which apparently have no binding effect upon the authority.

47. *Id.*

48. *See* case cited in footnote 45, *supra*.

49. Public housing tenants in Boston have succeeded in obtaining a lease which allows the agency to evict only for cause.

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with the standard practice for the building concerned."<sup>50</sup> The participation agreement between the housing authority and the landlord, however, spells out the standard of maintenance in more detail. It requires the landlord to submit a current certificate of building inspection and allows the housing authority to inspect the building periodically to see that it is being properly maintained. How often this power will be exercised is in doubt. But the housing agency's staff of inspectors and lawyers, coupled with its superior bargaining position, makes it much more likely that the tenant will live in a properly maintained building. The role of the housing agency as intermediary between landlord and tenant and its ability to enforce rights claimed by both represent a significant improvement over the normal landlord-tenant relationship.

### IV. AN APPRAISAL

The program for leasing of private housing by public housing agencies embodied in the 1965 Housing and Urban Development Act is a valuable new approach to providing housing for low-income families. Because the acquisition of housing units depends on the forces of the market, rather than on the approval of local political authority, its chances for success at a time when political forces have become deadlocked over public housing are great. Moreover, the program is more consistent with accepted welfare theory and more likely to result in an actual improvement in the living conditions of low-income families than direct subsidy programs. The sublease arrangement places the public housing agency in a position to demand the effective enforcement of the tenant's right to maintenance while assuring the landlord of his right to recover for damage done to the building by the tenant. In addition, the leasing program offers a flexible and politically acceptable mechanism for utilizing private investment to meet the nation's low-income housing needs.

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50. 42 U.S.C. § 1421b (d) (4) (Supp. II, 1966).

APPENDIX

While the traditional landlord-tenant relationship is used as the vehicle for conducting the leased public housing program, the role of the public housing authority as an intermediary, the availability of a public subsidy, and the limitation of the program to tenants of a designated economic class all create problems of administration which alter the conventional instruments which are used in leasing transactions. Problems arise particularly with reference to the selection and eviction of tenants, as the lessor's usual plenary authority must be shared with the public housing agency. The following clauses, drafted by William Hardy, a senior law student at Washington University School of Law, are included here to illustrate possible approaches to a solution of selection and eviction problems.

1. TENANT SELECTION

The Owner agrees to elect and abide by one of the following options in the selection of tenants for occupancy of the dwelling units covered by this lease, and the [public housing] Authority will execute subleases of the dwelling units with the tenants so selected:

OPTION "A"

The Authority shall select the Tenants subject to the approval of the Owner. Rent will be due for the term of the lease between the Authority and the Owner, and the Authority shall pay the rent to the Owner in monthly installments during the lease term including those periods of vacancy caused by the Authority's failure to refer a Tenant to the Owner. However, no rent is due from the Authority, and the Authority shall not pay rent to the Owner, from the date the Owner refuses to accept a Tenant until the date a Tenant is approved for the premises, and the rent provided for in the lease is to be reduced by this amount. The Authority shall refer Tenants to the Owner within a reasonable period of time not to exceed one week after a vacancy occurs, or after the Owner refuses to approve a referred Tenant. After the Authority has referred a Tenant to the Owner, the Owner shall have five days within which to indicate to the Authority in writing his approval or disapproval of the Tenant, and after the expiration of this five-day period the Owner is deemed to have approved the selection of that Tenant if the Authority has received no notice from the Owner. If, during any six-month period, the Owner fails or refuses to accept two referrals, the Authority shall have the right to terminate this lease upon 15 days' notice in writing to the Owner.

OPTION "B"

The Authority shall select the Tenants with no right of approval in the Owner. Rent is due for the term of the lease between the Authority and the Owner, and the Authority shall pay the rent to the Owner in monthly installments during the lease term, whether or not a dwelling unit covered by this lease is occupied.

OPTION "C"

The Owner shall select the Tenants subject to the anti-discrimination provision in paragraph — of this lease and subject to the approval of the Authority in accordance with its eligibility requirements. Rent is due for the term of the lease between the Authority and the Owner, and the Authority shall pay the rent to the Owner in monthly installments during the lease term. However, the Authority shall pay no rent to the Owner on



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any dwelling unit covered by this lease for any period of time during which that dwelling unit is vacant or is occupied by an unapproved Tenant.

Immediately upon the execution of this lease, the Owner shall file a statement in writing with the Authority, indicating which of these options he elects. During the term of the lease, after fifteen days' notice in writing to the Authority, the Owner may elect a different option and shall file a written statement indicating his change in option with the Authority. During the term of this lease, the Owner may change options no more than twice.

### *Comments*

Strictly speaking, the housing authority is the "tenant" of the leased premises, while individuals and families selected for residence in the dwelling units are sub-tenants. However, the selection of the word "tenant" to describe the actual occupants is closer to realities and is easier to comprehend. The draft clause incorporates options resembling those employed by the Chicago Housing Authority in its participation agreement with the landlord. Option "A" gives the owner the right to approve tenants selected by the Authority but qualifies this right by cutting off rent from the date the owner disapproves a tenant and by providing for termination if the owner refuses two tenants during any six-month period. This option gives the owner a limited right of selection, but discourages arbitrary and repeated exercise of his right to refuse tenants. Option "B" provides for selection by the authority with no right of approval in the owner. Presumably, this option will appeal to those owners who are primarily concerned with guaranteed rental payments for the lease term and who are willing to relinquish the right of tenant selection in return for this assurance. Option "C" is designed to appeal to those owners who wish to retain the right to select tenants, and who feel confident they can find tenants who meet the authority's standards, thereby preventing the occurrence of vacancies and the consequent loss of rent.

## 2. TENANT EVICTION

The [public housing] Authority shall have the sole right to give notice to vacate to any Tenant in a dwelling unit covered by this lease, and shall have the sole right to initiate legal proceedings to evict any such Tenant. However, in any case in which a Tenant violates any of the provisions of the sublease between the Tenant and the Authority the Owner may recommend to the Authority in writing that it initiate proceedings to evict the Tenant. [If within thirty days after receipt of the Owner's recommendation the Authority has not initiated proceedings to evict the Tenant, the Owner may request a hearing on the Authority's failure to initiate eviction proceedings before the Tenant Review Board established by the Authority.

### *Comments*

The federal statute authorizing the leased public housing program provides that the public housing authority has the sole right to give notice to vacate to occupants of the leased premises, but that the owner has the right to make "representations" to the authority asking for termination of a tenancy. This provision is vague on several counts. It is not clear on who has the right to initiate the legal eviction proceedings, although under the law of some states a lessor does not have standing to evict a sublessee and only the housing authority could take legal action in any case. While the owner may make "representations," it is not clear whether any sanctions can be imposed on the authority for failure to take action on his representations. Nor does it appear that any limitations are placed on the

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grounds which the owner may allege in making his representations. No additional clarification is provided so far by administrative regulations.

This draft carries out the apparent intent of the federal statute, that sole power to evict be lodged with the housing authority. However, the owner is in a much better position to police his dwellings, and may become aware of tenant conduct which ought to provide a basis for eviction. Experience with leased public housing experiments prior to the enactment of the federal statute, in which the right of eviction was left with the owner, had indicated that owners were in some instances evicting tenants considered by them to be undesirable but who nevertheless were not guilty of any serious misconduct. For this reason, owner recommendations for eviction are limited to those cases in which the tenant has actually violated some provision of his sublease with the authority. This instrument will have to be carefully drafted so that the tenant cannot be evicted for trivialities. The bracketed clause is an option which gives the owner some recourse in case the authority ignores his recommendation. Many public housing authorities have tenant review boards which pass on recommendations for eviction. Presumably, some of them have the power to make binding recommendations to the authority. Another alternative would give the owner the option to terminate the lease whenever the authority refuses to evict tenants after a representation by the owner. Whether a lease clause of this kind would be acceptable to the federal agency is not clear.

Language to resolve the problem of divided responsibility for eviction is hard to construct. Even the best screening policies will not eliminate in advance those tenants who turn out to be destructive. Because the authority does not own the premises, pressures to evict undesirable tenants from leased premises may not be as strong as they are in projects which the authority owns. On the other hand, possible tendencies on the part of owners to evict public assistance recipients, unwed mothers, and other disadvantaged occupants must also be controlled. Curiously, occupants of dwelling units leased by a public housing authority may turn out to have a stronger legal position than tenants in the authority's own projects.