Entitlement under Section 235 of the National Housing Act

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ENTITLEMENT UNDER SECTION 235 OF
THE NATIONAL HOUSING ACT†

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INTRODUCTION

From the earliest days of the Republic, home ownership has consistently figured as one of the fundamental aspirations of American citizens.¹ Part I of this article is an overture to the

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1. More than a century and a half ago, Alexis de Tocqueville astutely observed that

In no country of the world is the love of property more active and more anxious than in the United States; nowhere does the majority display less inclination for those principles which threaten to alter, in whatever manner, the laws of property. 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (Vintage Books ed. 1956).

de Tocqueville believed that widespread ownership of private property was critical to its survival as an institution.

The extension of the propertied class as a means of encouraging a stable political mentality reaches back to the early days of the Republic and has a distinctive Jeffersonian flavor; in 1776, Thomas Jefferson proposed that Virginia grant fifty acres of land to every white man of full age who had less than that amount. R. HOFSTADER, AMERICAN POLITICAL TRADITION 31 (1954). The Congress believed that the extension of home ownership would diminish the threat to property implicit in the urban civil disorders. As de Tocqueville observed:

When a child begins to move in the midst of the objects that surround him, he is instinctively led to appropriate to himself everything that he can lay his hands upon; he has no notion of the property of others; but as he gradually learns the value of things and begins to perceive that he may in his turn be despoiled, he becomes more circumspect, and he ends by respecting those rights in others. ¹ A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (Vintage Books ed. 1956).

In a similar vein, Senator Charles Percy articulated the association which the Congress believed exists between home ownership and social stability.

Related to improved maintenance of the individual’s home is a respect for the property of others. Homeowners, unlike renters who can walk away from their house or apartment, have an investment. They are not just urban “tent dwellers” or “sharecroppers” as they have been called, paying rent to a slum lord or public housing agency, but owners, building up an estate, modest as it
enactment of §235 of the National Housing Act in which a number of important movements are explored: the importance of home ownership in the hierarchy of American values; the social consequences of the exclusion of lower income and minority families from the mainstream of suburban home ownership; the advantages, tax and otherwise, which home ownership historically has afforded the American upper and middle classes; the critical lack of experience and sophistication of most lower income families concerning the purchase of a home and the perils of home ownership; the significant role assumed by the federal government in underwriting home ownership; the differential distribution of government largess to home owners according to economic and ethnic variables; and suburban resistance to the location in suburban areas of federally subsidized housing for lower income or minority families. Part II focuses on entitlement under §235 of the National Housing Act. It may be useful to legal services attorneys, community action program personnel, social workers and to the leaders and opinion brokers in the lower income community who are involved in counseling lower income families on alternative housing opportunities. In Part III, the Congressional hearings on §235 and the 1971 Report of the U.S. Commission on Civil Rights are examined. The counselor to lower income families is apprised of the potential difficulties which await his clients under §235. In Part IV pending litigation under §235 is reviewed. Questions of standing and federal jurisdiction under §235 are considered. The writer contends that the federal courts must assume jurisdiction of cases challenging conformity of HUD or FHA policies with individual rights secured by federal statute or the Constitution. Based upon a review of the provisions of §221(d)(2) of the National Housing Act and its legislative history, the writer maintains that the Congress intends the FHA to assume a more activist, consumer-oriented approach to property inspection and appraisal—a role protective of the lower income consumer.

I.

A Perspective on Home Ownership in America

The primary purpose of the home ownership program for
lower income families established by §235 of the Housing and Urban Development Act of 1968 was to enable the United States to meet its national goal of a “decent home and a suitable living environment for every family.” Section 235 of the 1968 Act provided for the first time a large-scale means by which lower-income families could participate in the benefits of home ownership.4


3. The Housing and Urban Development Act of 1968 has been called one of the ten most important pieces of legislation since the founding of this nation. President Lyndon B. Johnson on December 14, 1968, at the dedication of Austin Oaks Housing Project in Austin, Texas in Coan, The Housing and Urban Development Act of 1968: Landmark Legislation for the Urban Crisis, 1 Urban Lawyer 1 (1969). It has also been called the Magna Carta to liberate our cities. President Lyndon B. Johnson on August 1, 1968, at the signing of the Housing and Urban Development Act of 1968, in Washington, D.C., Id. One of the purposes of this article is to attempt to determine whether the § 235 program has lived up to these expansive expectations.

4. The way for the § 235 program had been paved by the success of the § 221(h) program enacted by Congress in 1966—the only prior single family home ownership program for lower income families. 80 Stat. 1255 (1966), as amended, 12 U.S.C. § 1715z(j) (1970). The FHA 221(h) program was

. . . a limited experimental program which authorizes insured mortgages at 3 percent interest to non-profit organizations for the acquisition and rehabilitation of substandard homes for subsequent resale with 3 percent mortgages, to low income families. Hearings on HR15624, HR15625 and Related Bills Before the Subcommittee on Housing of the House Committee on Banking and Currency, 90th Cong., 2d Sess., pt. 1, at 76 (1968) [hereinafter cited as 1968 Hearings].

HUD Secretary Weaver said that the FHA 221(h) program was “very successful” and recommended that it “be made permanent, and incorporated into the new section 235 . . . .” 1968 Hearings, 64. The exchange between Mayor Tate of Philadelphia and Mr. Fino (R-N.Y.) in the 1968 Hearings on housing evidences the enthusiasm generated by . . . the 221(h) program; where you can get a house for $65-a-month carrying charges and $200 down. And that is less than the rent was before . . . [Mr. Tate]

Mr. Fino: We are providing the same kind of accommodations in public housing. We have been giving . . . decent living quarters for people.

Mr. Tate: Not like this. You have a home here, not just a housing unit. You have a home. 1968 Hearings, 249.

Rehabilitation under FHA 221(h), it was said, could not be done

. . . in a great big way. It has to be done slowly and carefully because you must take these families literally by the hand and help them first to manage their incomes; second, to learn how to assume the responsibility of homeownership. It's a constant follow-up job.

. . . [I]n St. Louis, we have hundreds of low income families applying for these rehabilitated houses, but everybody should not own their own home unless they show the capacity of handling it. And that is what we are attempting to do, to make them prove themselves before they are accepted as a prospective homeowner.
Adequate housing is vital to the social well-being of the nation. The National Advisory Commission on Civil Disorders reported that widespread discontentment with housing conditions and costs were "important factors in the structure of Negro discontent" and were closely related to the civil disorders which swept many of the nation's cities several years ago. Social scientists have long acknowledged the effect of areas characterized by physical deterioration on the crime rate and on juvenile delinquency. Nor have the courts been silent on the fundamental importance of adequate housing.

And if, over a period of six months they show they can control their handling of their money, then they are sold one of these homes. Each one the nonprofit group works with must join a credit union, attend adult classes and participate in upgrading their abilities. [Mrs. Sullivan (D-Mo.)] 1968 Hearings, 253-54.

5. Rep. by the Nat'l Advisory Comm'n on Civil Disorders at 472-73 (New York Times ed., 1968). The § 235 program was part of the national response to the civil disorders of a landless, black, urban proletariat. By extending home ownership to lower income families under § 235 the Congress hoped to diminish the threat to the institution of property implicit in the urban civil disorders.


7. Craven, Criminology at 87 (1959). See also Federal Emergency Administration of Public Works, Housing Division, The Relation Between Housing and Delinquency at 40 (1936); Malsen, Housing and Juvenile Delinquency, Federal Probation (June, 1948).

8. In Berman v. Parker, 348 U.S. 26, 32-33 (1954), the Court observed:

Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

The Supreme Court has acknowledged concern for

. . . the ability of . . . families to obtain the very means to subsist—food, shelter, and the other necessities of life. Shapiro v. Thompson, 394 U.S. 618, 627 (1969) [emphasis added].


Recently, a lower federal court suggested that:

[adequate shelter] must be considered to be one of the essential fundamentals of human life . . . . Because the effect of the [duration residency] classification is to infringe upon a constitutional right [the right to travel], as well as a fundamental human need [adequate shelter], the state must show a "compelling state interest" in maintaining the [duration residency] regulation [for admission to public housing]. Cole v. Housing Authority, 312 F. Supp. 692 (D. R.I., 1970) [Emphasis added].

A Nation of Homeowners

There are many advantages to home ownership. To the single family, detached home symbolizes the American dream.\(^9\) Most American families own their own homes. About 63 percent of the nation’s housing units are owned by the families who occupy

9. As former President Johnson pointed out:
Homeownership is a cherished dream and achievement of most Americans
. . . . Owning a home can increase responsibility and stake out a man’s place
in his community. The man who owns a home has something to be proud of and
a good reason to protect and preserve it. Message by President Johnson to

Senator Edward W. Brooke recently underscored the special psychological benefits
of home ownership to the poor.

Homeownership can be of far greater benefit to the poor than a mere roof and
four walls. Homeownership can be a source of pride and stability, influences
that will extend to the homeowner’s job and family life. U.S. COMM’N ON CIVIL
RIGHTS, HOMEOWNERSHIP FOR LOW INCOME FAMILIES 2 (1971).

The significance attached to home ownership in the United States is supported by com-
parative international statistical data. Among selected western nations with substantial
private home ownership, only one nation, Yugoslavia, significantly exceeded the United
States in the percentage of owner occupied dwellings. The United States, however,
ceeded Yugoslavia in home ownership in urban areas with an owner occupancy rate of 58
percent compared with 47.4 percent for Yugoslavia.

<table>
<thead>
<tr>
<th>Country</th>
<th>Year</th>
<th>% of Owner Occupied Dwellings</th>
<th>Dwellings, Owner and Non-Owner (in Thousands)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>1961</td>
<td>37.8</td>
<td>2,153</td>
</tr>
<tr>
<td>Belgium</td>
<td>1961</td>
<td>49.7</td>
<td>3,016</td>
</tr>
<tr>
<td>Czechoslovakia</td>
<td>1961</td>
<td>50.4</td>
<td>3,820</td>
</tr>
<tr>
<td>Denmark</td>
<td>1960</td>
<td>45.0</td>
<td>1,483</td>
</tr>
<tr>
<td>Finland</td>
<td>1960</td>
<td>60.5</td>
<td>1,211</td>
</tr>
<tr>
<td>France</td>
<td>1962</td>
<td>41.5</td>
<td>14,538</td>
</tr>
<tr>
<td>Hungary</td>
<td>1960</td>
<td>62.2</td>
<td>2,711</td>
</tr>
<tr>
<td>Ireland</td>
<td>1961</td>
<td>59.8</td>
<td>676</td>
</tr>
<tr>
<td>Italy</td>
<td>1962</td>
<td>50.2</td>
<td>13,352</td>
</tr>
<tr>
<td>Netherlands</td>
<td>1956</td>
<td>29.3</td>
<td>2,519</td>
</tr>
<tr>
<td>Norway</td>
<td>1960</td>
<td>52.8</td>
<td>1,068</td>
</tr>
<tr>
<td>Portugal</td>
<td>1960</td>
<td>44.5</td>
<td>2,201</td>
</tr>
<tr>
<td>Sweden</td>
<td>1960</td>
<td>36.0</td>
<td>2,582</td>
</tr>
<tr>
<td>Switzerland</td>
<td>1960</td>
<td>33.7</td>
<td>1,580</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>1961</td>
<td>43.9</td>
<td>14,104</td>
</tr>
<tr>
<td>West Germany</td>
<td>1961</td>
<td>35.3</td>
<td>15,564</td>
</tr>
<tr>
<td>Yugoslavia</td>
<td>1961</td>
<td>77.5</td>
<td>4,082</td>
</tr>
<tr>
<td>United States</td>
<td>1960</td>
<td>62.0</td>
<td>53,024</td>
</tr>
</tbody>
</table>

U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, HUD INTERNATIONAL BRIEF 11 (June,
1971).
them. Home ownership also affords significant tax advantages. In addition, home ownership constitutes a practical savings program for lower income families and provides an effective hedge against inflation. There is no landlord to evict. The mortgage payments are fixed—there are no increases in rent. Home improvements inure to the benefit of the owner occupant—not some absentee landlord. There is no building manager with keys to the front door and a proclivity to make unannounced visits.

Home ownership, however, is not without its perils. Maintenance costs are high. Service or repairs may be needed which are either too difficult for the homeowner or too expensive. Sudden loss of income or sharp downward fluctuations in income can threaten both the homeowner’s equity and his credit rating. Latent structural or other major defects may undermine the value of the homeowner’s investment. Taxes and insurance take a heavy toll. Mobility is diminished.

Although a home is the largest single consumer purchase most families ever make, real estate conveyances have historically fallen within the hegemony of the consumer-be-damned doctrine of caveat emptor. The real estate market is no place for the unwary—it is the preserve of the arm’s-length transaction. Real estate sales are made on a market which is largely unregulated on behalf of the consumer. Even when a government agency such as the FHA is involved in a real estate transaction, its posture traditionally has been one of passivity or disinterest in the consumer or his problems. There has been little protection in real estate transactions against

. . . scandalous practices . . . [or] selfish interests. . . .

. . . [F]ew home buyers enter the housing market on an equal bargaining position with those selling the home, be it new or used. The buyer seldom has either the access to all the components of the house or the expertise to evaluate them, and must by necessity rely on the assurances of the seller.

. . . [P]rotection of the home-buying consumer is of spe-


11. In 1968, 16.5 million individual taxpayers itemized deductions for mortgage interest payments amounting to nearly $10 billion. In addition, 23.6 million individual taxpayers itemized deductions for real estate taxes amounting to more than $8 billion. BUREAU OF INTERNAL REVENUE, INDIVIDUAL RETURNS: DEDUCTIONS AND EXEMPTIONS, at tables 2.6, 2.10 (1968).
cial importance in the 235 program. This program has injected into a complex market an extremely unsophisticated buyer and it would seem that . . . [the federal government] owes a special duty to recognize the infirmities of this buyer and to see that he is treated fairly.  

Inequality of Access to Home Ownership

The benefits of home ownership have not been equally available to all groups of Americans. Two identifiable groups are substantially under-represented among the nation's homeowners: lower income families and non-white families. In 1960 nearly nine out of every ten families with incomes in excess of ten thousand dollars ($10,000) per year were homeowners; only one out of every two American families with incomes of six thousand dollars ($6,000) or less owned their houses. As income increases, the incidence of home ownership increases:

Home Ownership within Income Groups (1960)

<table>
<thead>
<tr>
<th>Income Groups</th>
<th>Homeowners (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under $3,000 per year</td>
<td>43</td>
</tr>
<tr>
<td>$3,000 to $6,000 per year</td>
<td>50</td>
</tr>
<tr>
<td>Over $6,000 per year</td>
<td>67</td>
</tr>
<tr>
<td>Over $8,000 per year</td>
<td>80</td>
</tr>
</tbody>
</table>

Since 1960, opportunities for non-affluent families to purchase houses through ordinary channels have worsened. In 1960, the median price of new housing was sixteen thousand dollars ($16,000) compared with a median annual income of sixty-five hundred dollars ($6,500). During the decade that followed, median income rose to eighty-five hundred dollars ($8,500) a year but the median price of new housing, because of such factors as the rising cost of land, site development, construction, and money

12. Interim Report on HUD Investigation of Low and Moderate Income Housing Programs: Hearings Before the House Committee on Banking and Currency, 92d Cong., 1st Sess., at 3 (1971) (Mr. Widnall) [emphasis added].
14. Id.
15. Id.
skyrocketed to about twenty-seven thousand dollars ($27,000). As President Nixon noted in April, 1970:

Nearly half of all American families probably cannot afford to pay much more than $15,000 for a home, yet today the only significant amounts of new housing available in that price range are mobile homes.

In addition to the under-representation of lower income families in the ranks of homeowners, there are significant racial barriers to homeownership. One reason for the under-representation of non-white families is their disproportionate representation among lower income families. As of 1968, fewer than a third of all non-white families earned as much as eight thousand dollars ($8,000) a year. By contrast, nearly three of every five white families were at or above that income level. When income is held constant, however, non-whites still represent a smaller percentage of homeowners at every income level than the overall population. The persistence of discriminatory housing practices and the isolation of minorities in the central cities are major factors which account for the disproportionately low incidence of non-white families among the nation's homeowners.

17. Id.
19. HOME OWNERSHIP FOR LOW INCOME FAMILIES, supra note 13, at 3.
20. Id. One result of the exclusion of nonwhites from homeownership in the new construction of the suburban areas has been that they had "little alternative but to live in over-crowded, substandard housing in segregated, older neighborhoods." Interim Rep., supra note 12, at 3. Negroes and other nonwhites in substandard housing were "more than twice the proportion among whites." Nat'l Comm'n on Urban Problems, Building the American City 9-10 (1968). One recent study concluded that "nonwhite households with incomes of $8,000 to $9,999 seemed to fare worse than white households with incomes of $2,000 to $3,999." PASCAL, THE ECONOMICS OF HOUSING SEGREGATION (1965).
21. Id. Minorities have been largely excluded from areas where most houses are being built.

Nearly three-fourths of the total national growth in the Negro population since 1960 has occurred in the central cities of the metropolitan areas. As a result, 55 percent of the total Negro population now resides in central cities compared with 26 percent of the white population. Hearings on the Quality of Urban Life Before the Ad Hoc Subcommittee of the House Committee on Banking and Currency, 91st Cong., 1st Sess., at 219 (1969).

In contrast, eighty percent of all new housing is built in suburban parts of metropolitan areas. Edgar Kaiser, Chairman of the President's Committee on Urban Housing observed that
The dramatic increase in the percentage of Americans who own their own homes can be attributed to the complex array of mechanisms associated with federal involvement in the housing and home finance market.22 The enormous indirect federal subsi-

[During the 10 years from 1950 to 1960, we as a nation built nearly 17 million new housing units. But only 4 million were built in central cities. At the same time, 1½ million units were lost by demolition, disaster and condemnation. More recent data indicate the trends are continuing. While suburban homebuilding was booming, we find it not generally available to our nonwhite population. During 1950 to 1960, the Negro population doubled in our cities while the white population increased only slightly . . . (W)hite population is now declining in our cities while the Negro population is dramatically increasing. At the same time the white population in the suburbs is increasing rapidly while the Negro population is growing only at a very small rate.

Today, approximately 60 percent of the nation's non-white families live in the central city—two thirds of them in crowded and substandard housing. Often, even though minority families may succeed in improving their incomes, they are prevented from escaping the pockets of poverty because of racial prejudice in housing.

. . . Making housing available for low and moderate income families, generally throughout the metropolitan area, should be an objective of all federal programs. 1968 Hearings, supra note 4, at 514.

As William Taylor, Staff Director of the U.S. Commission on Civil Rights testified at the 1968 hearings:

. . . in all that has been said about the disorders of recent years, we should not overlook one basic factor—that we are developing a society in which the affluent and the impoverished, the white and the nonwhite, live in isolation from one another. We are developing a society where it is possible, as the commission learned at its Cleveland hearing, for a Negro child raised in the heart of a large city to reach adolescence without ever having known a white person of his own age . . . a society . . . that is rapidly being divided into opposite camps, hostile and mistrustful of each other. 1968 Hearings, pt. 2, supra note 4, at 876.

The United States Commission on Civil Rights has suggested that the

. . . confinement of minorities to central cities has meant that their homeownership has come about chiefly through the "filtering process" by which central city housing, abandoned by families who move to the suburbs is made available for purchase by those who remain. U.S. Comm'n, supra note 13, at 3.

One of the limitations of the filtering concept is the fact that

. . . the very bottom of the barrel, the broken down housing which is beneath any reasonable standard of appropriateness, continues to stay on the market.


That isolation of minorities in central cities necessarily restricts their opportunities to obtain decent housing and to become homeowners was persuasively supported by the findings of the recent St. Louis hearings. U.S. Comm'n on Civil Rights, Hearings in St. Louis, Mo. (1970). Four of every five homes occupied by black families were built before 1940 while fewer than half the homes owned by white families were that old. More than 90% of the increase in the housing inventory of the St. Louis metropolitan area since 1960 had taken place in the suburbs which are nearly all-white.

22. In 1920, only 40 percent of the nonfarm housing units were owned by families who lived in them. Before the federal intervention of the 1930's.
dies of homeownership in the form of preferential tax treatment, guaranteed loans and housing credit stimulated by federally insured savings and loan deposits figure significantly in the "new property" of government largess and have gone largely to middle and upper income families. According to one estimate, three-and-a-half times as much in housing subsidies in the form of income tax deductions go to middle and upper income families as go to the poor in the form of direct subsidies. During the 1960's the federal government accelerated its efforts to diminish

. . . the prevalent financing vehicle was the short-term, unamortized, low-loan-to-value mortgage. Thus, loans rarely were made for more than 50 percent of the value of the house. They frequently were for periods as short as 5, or even 3, years. Moreover, they were typically "straight" loans, repayable not in equal monthly installments, but in large lump sum at maturity.

Largely through the intervention of the Federal Government, by such means as Federal Housing Administration mortgage insurance and Veterans Administration loan guaranty programs, as well as through legislation authorizing increased liberalization of conventional mortgage terms for federally insured mortgage lenders, home finance and homeownership are within the reach of most American families. The typical mortgage now is long term, high-loan-to-value, and fully amortized. The impact of these changes on the nature of home finance can be seen by the fact that while the Nation's population over the last 50 years has doubled, the number of owner-occupied homes being purchased through mortgage finance has increased more than tenfold and the outstanding residential mortgage debt has increased more than thirtyfold. U.S. Comm'n, supra note 13, at 2.

23. Several years ago Professor Charles Reich of Yale Law School suggested that a "new property" had arisen out of the . . . emergence of government as a major source of wealth . . . [T]oday's distribution of [governmental] largess is on a vast, imperial scale. The values dispensed by government . . . are steadily taking the place of traditional forms of wealth . . . Increasingly, Americans live on government largess—allocated by government on its own terms and held by recipients subject to conditions which express "the public interest." Reich, The New Property, 73 Yale L.J. 733 (1964).

Professor Reich observed that [i]nequalities lie deep in the administrative structure of government largess. The whole process of acquiring it and keeping it favors some applicants and recipients over others . . . [L]arger, richer, more experienced companies or individuals [have been favored] over smaller ones. Id. at 765.

Entitlement to loans and to the preferential tax treatment accorded homeowners amounts to a vast largess which can be measured only in billions of dollars annually. Individual entitlement to the federally generated housing credit, money, benefits and services has made us a "nation of homeowners—or, more accurately, of home mortgagors." U.S. Comm'n on Civil Rights, Housing 28 (1961). The distribution of federal housing largess has strongly favored middle and upper income families over low income families and white over nonwhite families.

the differential access to decent housing based upon economic and racial factors.

Suburban Resistance To Federally Subsidized Housing For Lower Income Families

The vast cleavages between black and white, the inner city and suburbia, the poor and the affluent, are major social and political problems in the United States. Nowhere is the potential

25. For more than two decades following its enactment in 1937, public housing was the only federal lower income housing program. United States Housing Act of 1937, 50 Stat. 888, as amended 42 U.S.C. § 1401 et seq. (1970). The low rent public housing program, financed by annual contributions to local housing authorities, remains the principal legislative tool by which the federal government provides assistance for housing lower income families.

In 1961 the FHA 221(d)(3) program was enacted to serve families whose incomes are above those of public housing tenants but below those necessary to obtain decent housing in the market. Housing Act of 1961, 79 Stat. 149 (1961) as amended 12 U.S.C. § 1715l (1970). The FHA 221(d)(3) program was the first large scale federal experiment which was intended to put home ownership within the reach of economically marginal families.


In 1968 Congress enacted the FHA 236 program which provides subsidies in the form of interest reduction payments to mortgage lenders on behalf of the landlord to reduce rents to a level within the means of lower income families.

The § 235 program differs from the four federal housing programs above, in that it provides the opportunity for lower income families to buy rather than rent their homes with all of the attendant advantages and responsibilities of homeownership.


The U.S. Civil Rights Commission has noted that while these measures have gone far to remove the legal basis for housing discrimination their effectiveness has been severely undermined by inadequate enforcement. U.S. Comm'n, supra note 13, at 4.

friction from these cleavages more apparent than in the location of housing accessible to low income and minority families in suburban areas.27

White suburban resistance to the location of lower income and minority families in suburban areas has been exacerbated by suburban perceptions and inferences arising from the deterioration of inner city housing and the concentration of minority families in older, dilapidated apartment buildings, public housing projects, and single-family homes evacuated by white families in...

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... [T]he economic mix [of communities] is the most sensitive and explosive and emotional problem we have in the country today ... You add on top of it the minority group problem and the country and the full dimension of the situation comes into focus [Secretary of Housing and Urban Development George Romney].

Opposition to federally assisted location of lower income and minority families in suburban areas thrust itself into national prominence in 1970 in the blue collar Detroit suburb of Warren, Michigan, where 14,800 signatures were collected on petitions calling for a referendum to repeal the city's new urban renewal program. N.Y. Times, August 17, 1970, at 18, col. 3. Warren voters subsequently rejected a $10 million urban renewal program. N.Y. Times, Nov. 8, 1970, at 56, col. 1. Mayor Bates of Warren attributed the vote to "innuendos and untruths" referring to stories that the federal government was trying to force Negroes into white suburban areas. Id. Shortly thereafter a federal suit was filed in Detroit against Warren and several federal agencies alleging that planned cut off of urban renewal funds to Warren was designed to keep Negroes out. N.Y. Times, Dec. 27, 1970, at 43, col. 1. The incident in Warren arose after publication of reports in the Detroit News that government experts had selected Warren as one of the targets in a national drive to change suburban zoning laws and white attitudes that have kept black families largely restricted to central cities. N.Y. Times, July 29, 1970, at 27, col. 1. Similar controversies have erupted in many other metropolitan areas: See N.Y. Times, Nov. 11, 1970, at 30, col. 3; Nov. 16, 1970, Pt. IV, at 5, col. 4; Jan. 7, 1971, at 21, col. 4; Jan. 8, 1971, at 15, col. 1; Jan. 10, Pt. IV, at 3, col. 2 (Black Jack, Mo.); N.Y. Times, Jan. 29, 1971 at 1, col. 1 (Mahawah, N.J.); N.Y. Times, March 26, 1971, at 78, col. 4 (Oyster Bay, N.Y.); N.Y. Times, April 23, 1971, at 18, col. 1 (Union City, Calif.); N.Y. Times, June 15, 1971, at 47, col. 1 (New Caanan, Conn.).

One of the most creative attempts to break the suburban barrier around the central cities originated in Dayton, Ohio, where governing officials approved a plan to disperse federally subsidized low and moderate income housing throughout the five county metropolitan area. N.Y. Times, Dec. 21, 1970, at 1, col. 2.

President Nixon has stated that the federal government should use its leverage to promote racial integration in housing

... only to the extent that the law requires ... [I]t is not the policy of this Government to use the power of the Federal Government or Federal funds in any other way, in ways not required by the law, for forced integration of suburbs. I believed that forced integration in the suburbs is not in the national interest. N.Y. Times, Dec. 11, 1970, at 32, col. 4.
racially changing areas. Suburbanites generally associate minority occupancy with overcrowding. Unscrupulous real estate speculators often partition as many as eight efficiency or two-room apartments into older, previously single-family homes. To most suburbanites, minority housing summons the spectre of squalid, unkempt, unfit housing. Images of minority and lower income families are often inferred from observation of ghetto conditions over which the occupants have no control—conditions which are the despair of ghetto residents themselves. For example, several years ago a property management company attempted to impose a five dollar ($5.00) fine on a former client of mine in a large apartment complex in southwest Atlanta who had purchased an extra garbage can for her family of four. Yet trash and garbage, which is often strewn about lower income or minority neighborhoods, is frequently attributed to the personal slovenliness of residents rather than to infrequent collection by the city or to inadequate disposal facilities furnished or allowed by landlords. The higher incidence of crimes of violence and of juvenile delinquency in areas of physical urban blight contribute to the fears of suburbanites. The higher incidence of illegitimacy among lower income and minority groups offends some people. The vernacular of the ghetto—the vulgarities, the syntax, the unpolished as well as the ungrammatical usages (for example, double negatives and dropping of -ings)—frighten many cultivated middle and upper income families who contemplate with apprehension school associations between their children and children of lower income and minority families.

The only major investment of many suburban homeowners is in their home. There is a very real fear that the movement of lower income and minority groups to the suburbs will undermine home values and lower the quality of neighborhoods.28 The phe-

28. Some “protection” is afforded to suburban property owners through the FHA requirement that no more than 10 percent of the value of a home sold under § 235 may be derived from land cost. Thus, the cost of land in many middle and upper income neighborhoods would be prohibitively high for lower income housing. FHA regulations could be interpreted to provide additional “protection.”

... Under some circumstances, proposed construction, extensive remodeling or conversion may create structures with physical characteristics which definitely and seriously affect the appeal and desirability of surrounding properties. Proposed new or remodeled properties, which are otherwise eligible but which will have a seriously adverse effect on surrounding properties, are, by reason of their effect on other properties not eligible for mortgage insurance. FHA MANUAL, Underwriting Home Mortgages, § 70309 [emphasis added].
nomenal growth of civic associations in suburban America is one of the institutional responses into which suburban fears and anxieties have been channeled.

Although exclusionary zoning which creates a barrier to federally subsidized, low income housing is often criticized by legal scholars,\(^29\) there are data which support the rationality of the opposition of single-family suburban homeowners to low cost housing. In a three-county study of the effect of low value housing units on county fiscal capacity, an ad hoc committee of the Georgia House of Representatives compared the actual costs of providing local public services to the tax revenues derived from persons occupying mobile homes, apartments and single family homes in subdivisions.\(^30\) The revenue generated from mobile homes and apartments and low-value homes fell far short of the costs of public services they require—costs which were underwritten by the skyrocketing property taxes of middle and upper income single-family homeowners.\(^31\)

The suburban resistance has a growing number of Congressional exponents. After touring the Pruitt-Igo housing project in St. Louis, Rep. Ben Blackburn (R-Ga), who represents a suburban district of Atlanta, Georgia, commented about his visit to

\[
\ldots \text{ various housing projects that have been built by the taxpayers of this country with every good intention, and at great public cost} \ldots \text{ housing projects that have been completed less}
\]


\(^31\) \textit{Id.} The committee's research revealed that

\[
\ldots \text{persons occupying low value apartments and mobile homes generally contribute less to the support of local government than do homeowners even though both may be otherwise alike as to family size and gross income level. A series deficit was found for mobile homes in the value of services provided per unit in excess of tax revenues derived per unit—a deficit of approximately $275 per year in suburban DeKalb County, Georgia. For medium-priced apartments in DeKalb County, the cost-revenue relationship reflected an average deficit of $116 per year. In contrast, there was a surplus of tax revenues over cost of government services on all but the lowest value single-family homes. Even high-rent, luxury apartments in DeKalb and Chatham Counties are found to have an assessed value approximating that of lower-priced subdivisions in both counties.}
\]
than 12 or 13 years that have been so vandalized by the occupants that today less than 10 percent of the units in those housing projects can be used, in fact, the rental on the projects doesn't even come close to paying the interest on the bonded indebtedness.\footnote{32. Hearings on HR9688, HR9331 and HR8853 Before the Subcommittee on Housing of the House Committee on Banking and Currency, 92d Cong., 1st Sess., pt. 3, at 1127 (1971).}

Mr. Blackburn observed that the cause of

\ldots this willful and wanton destruction has been the presence of large bands of completely undisciplined and undisciplinable children, whose parents exercise no control over them, and apparently do not try to exercise any control over them. \ldots [P]olice are unable to go into the [Pruitt-Igo] project because their automobiles would be destroyed if they left them without a guard.

I want to ask you, how do you suggest that we deal with this problem of these large gangs of children who are completely undisciplined? Do we take them away from the mothers? \emph{Do we just relocate the problem into the suburbs and hope that it will dissipate itself} \ldots \footnote{33. Id. at 1128.}

Mr. Blackburn espoused a commonly held opinion that the crime and wanton destruction of property in public housing projects like Pruitt-Igo in St. Louis is not due to

\ldots the density of the population. \ldots \footnote{34. Id. at 1128.}

It is the nature of the people you are putting in there. And just to gloss over and say, well, we don't have to deal with the very difficult problems that are being created by the individual children, the individual people who are not exercising responsibility, I don't think that is an exercise of responsibility [on our part] \ldots .

Mr. Blackburn suggested that

\ldots the reason the people in the suburbs don't want a public housing project next door to them is because they see the destruction that takes place in the public housing projects, and they say, well, I don't want that happening in my neighborhood.

Now, if you or I or any member of this committee can reassure the people in the suburban areas, well, look, this is not going to happen when a housing project is built in your neigh-
borhood, you won’t have the resistance, you won’t have the problem. But unless you can give them that reassurance, you are going to continue to have the resistance that you see today.  

Mr. Blackburn also suggested that deeply rooted social conflicts emerge when

... you start creating these special programs for people who are not really productive members of society, then you have marginally productive members of society that don’t qualify for these programs, they build up a great resentment and say, wait a minute, when do I get in on the act?  

It is sometimes contended that suburban exclusivity is based solely on economic and aesthetic grounds. The objection to federally subsidized housing for lower income families in suburban areas, it has been suggested,

... has not usually been on racial lines ... [T]ake the 235 housing for instance. It’s rather amazing the amount of protest that I have had from different areas where they say, “You are building this 235 housing in our community. It’s a lower priced housing, grey housing. It lowers the standards of the community ...” No racial overtones in it whatsoever. [The Chairman, Senator Sparkman]

Senator Javits: Completely economic.
The Chairman: Purely economic.
Senator Javits: No question about it.
The Chairman: Yes.
Senator Javits: I agree with the Chairman.
The Chairman: And I’m not sure we can ever cure people of that.
Senator Javits: This is true, but at the same time there are some guidelines which we can impose which represent the national conscience ... because nondiscrimination in housing does represent an overriding constitutional right.

However, racial apprehensions clearly play a role in suburban resistance to federally subsidized, lower income housing. In a survey of families occupying new homes financed under §235 in

35. Id.
36. Id. at 1123-29.
Knoxville, Tennessee, one white respondent in the Canby Hills subdivision which has one black family frankly admitted that he would hate to see any more black families move into the neighborhood although

\[\ldots\] he was not concerned about this one [resident, black] family and thought the area would remain in a suburban [i.e., white] condition.\(^{38}\)

The respondent’s apparent association of “suburban” with occupancy by white families is suggestive of the immense psychological barriers to stable, multi-racial suburban developments.

**II.**

**Entitlement Under §235**

The purpose of §235 was to assist lower income families in acquiring homeownership or membership in a cooperative association operating a housing project.\(^{39}\) In order to effectuate the legislative purpose of §235, the Secretary of Housing and Urban Development was authorized to make, and to contract to make, periodic assistance payments to mortgagees on behalf of lower income homeowners and cooperative members.\(^{40}\)

To qualify for assistance payments, families must satisfy eligibility requirements established by the Secretary of Housing and Urban Development.\(^{41}\)

The Subcommittee on Housing of the Committee on Banking and Currency held hearings on proposed housing legislation in March of 1968. Housing and Urban Development Secretary Robert Weaver opened the hearings with a statement that

\[\text{today, homeownership is out of reach for most low and moderate income families. Yet it remains the goal toward which many American families strive. To own one’s home is to have a sense of place and purpose. Homeownership creates a pride of possession, engenders responsibility and stability. Until now, however, Federal help to low and moderate income families to achieve homeownership has been very limited.}\]

Section 101 of the bill [which became the new §235 of the

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40. Id.
National Housing Act] would remedy this gap in our housing programs. It would enable the homebuilding industry to provide homes for almost 1 million families of low and moderate incomes over the next five years.  

It was proposed that direct federal payments be made to . . . the lender in an amount necessary to make up the difference between 20 percent of the family’s monthly income and the required monthly payment under a market interest rate mortgage for principal, interest, taxes, insurance and mortgage insurance premium. In no case, however, could the payment exceed the difference between the required payment under the mortgage for principal, interest and mortgage insurance premium, and the payment that would be required for principal and interest if the mortgage bore an interest rate of 1 percent.  

The intended beneficiaries of the §235 program were families in the $3,000 to $7,000 yearly income range. The portion of income which the homeowner is required to contribute toward his mortgage payments was set at 20 percent rather than the 25 percent required of tenants under the rent supplement program because the homeowner has to pay for such expenses as heat, utilities and maintenance which are generally included in the renter’s monthly rent. For low and moderate income families whose

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42. 1968 Hearings, supra note 4, pt. 1, at 62-3.

43. Id. at 63. This section was enacted without charge. Section 235(c), 82 Stat. 478 (1968), 12 U.S.C. § 1715z(c)(2) (1970). In screening applicants for § 235 eligibility, mortgagees compute mortgagee payments under (1) an income test (20% of the adjusted monthly income of the family) and (2) a maximum federal payment test (the difference between the required payment and the payment if the mortgage bore 1% interest). If the income test yields a mortgage payment at an interest rate in excess of 1%, the income test determines the amount of the mortgagor’s monthly payments. Otherwise, the maximum federal payment test is applied. Whenever the maximum federal payment test determines the amount of the mortgagor’s monthly payment, the payments, of course, are in excess of 20% of the adjusted monthly income of the mortgagor’s family. The amount of the federal subsidy varies according to the income of the mortgagor. 1968 Hearings, supra note 4, pt. 1, at 77. See also H.R. Res. No. 636, 90th Cong., 2d Sess. 7 (1968).

44. 1968 Hearings, supra note 4, pt. 1, at 77. It was predicted that . . . the income of most of these families will rise above the level it was when they purchased their home. Therefore, the bill provides for the families income to be recertified at least every two years and appropriate adjustments to be made in the assistance payments. . . . Many assisted homeowners will thus be able to ultimately afford the full monthly payment under their mortgages. Id.

45. Id. The average homeowner, paying 20 percent of his income toward payments required under a mortgage, will expend “in the neighborhood of 27 percent of [h]is [sic]
credit histories or irregular income make it difficult to qualify under FHA's various home mortgage programs, including §235, an experimental program (§237 of the National Housing Act) was designed to permit insurance of mortgages where it is determined that these families are

... reasonably satisfactory credit risks and capable of home ownership with the assistance of budget, debt management and related counseling.  

No homes were to be built under §235 which are "extravagantly designed or... clearly too large for the present or future needs of the family." In keeping with the principle that the homes insured under §235 be of "modest but adequate construction," mortgage limits were proposed. The present maximum mortgage amount is $18,000 for a single-family dwelling except for mortgages of a family of five or more persons in which a $21,000 mortgage maximum has been established. Increased mortgage maximums of $21,000 and $24,000 respectively were established for any geographical area designated as a "high cost area." The conference report on the Housing and Urban Development Act of 1968 established the following income limits for eligibility and continued assistance to families under the §235 homeownership program:

... For 80 percent of the funds authorized, the income limit is 135 percent of the public housing level in the area for initial occupancy plus $300 per minor child. For the remaining 20 percent of the funds authorized, the income limit is 90 percent of the maximum levels established in the area under the Below Market Interest Rate program, plus $300 per minor child.

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Income for housing expense when these other items [such as heat, utilities and maintenance] are considered." Id.

The National Federation of Settlements testified at the 1968 Hearings on housing that... the formulae requiring payment of 20 percent of income for mortgage debt service exclusive of maintenance, repairs and utility costs of housing, is too high, requiring of these families a payment for shelter too much above the national average for rent which is approximately 16 percent of income. 1968 Hearings, supra note 4, pt. 2, at 775.

46. 1968 Hearings, supra note 4, at 65.

47. Id. at 77.

48. Id.


50. Id. at § 235.30.

The Conference Committee accepted the Senate version of the deduction for children and allowed $300 per minor child from family income for purposes of determining both income eligibility and the family's monthly payment.\(^52\)

A $200 down payment is required for families receiving subsidy assistance whose incomes fall below the ceiling of 135 percent of public housing initial occupancy income levels; a three percent down payment is required for all others.\(^53\)

The conference report followed the Senate bill which generally limited eligibility to new and rehabilitated housing but made exceptions with respect to standard housing in favor of displaced families; families with five or more minors; families occupying public housing and for dwelling units in rent supplement or §236 [formerly §221 (d)(3) Below Market Interest Rate] projects.\(^54\)

Although the House bill contained a provision which would have provided a general preference for displaced families, families with five or more minors and families occupying public housing, neither the Senate bill nor the conference substitute contained such a provision.\(^55\) The Secretary may include an additional payment to "reimburse the mortgagee for its expense in handling the mortgage."\(^56\)

The Act required the Secretary to adopt procedures for recertification of the mortgagor's income at intervals of two years or less for the purpose of adjusting the amount of federal assistance payments within the limits of formulae of §235(c).\(^57\) During

The Senate bill limited eligibility for interest rate subsidies to families with incomes less than 70 percent of the $221(d)(3) below-market-interest rate program except that 20 percent of the funds could be used for families with higher incomes within limits prescribed by the Secretary of Housing and Urban Development. S. Rep. No. 1123, 90th Cong., 2d Sess. 7 (1968). The House version of the bill had limited eligibility to families with incomes less than 130 percent of income levels of continued occupancy in the area which can be established pursuant to the public housing law. H.R. Rep. No. 1585, 90th Cong., 2d Sess. (1968).

52. The House amendment had allowed a $200 deduction from family income in determining the monthly payment. H.R. Rep. No. 1785, supra note 51, at 150.

53. Id.

54. Id. However, assistance for standard existing housing including the above categories was limited to 25 percent of funds for fiscal year, 1969, 15 percent of funds for fiscal year 1970, subsequently amended to permit 30 percent of funds expended prior to July 1, 1972 to be spent on existing housing. 12 U.S.C. § 1715z(h)(3)(b) (1970).

55. Id. at 151.


57. Section 235(f), 82 Stat. 479 (1968), 12 U.S.C. § 1715z(f) (1970). Under this mandate, HUD has required mortgagees to obtain from homeowners a biennial recertification
the first year following the execution of the assistance payment contract or during the first year following a biennial recertification the mortgagor may request an "optional recertification" as to occupancy, employment, income and family composition. Adjustments in federal assistance payments and in the monthly payments by the mortgagor may be made following biennial or optional recertification. Adjustments can not be made retroactively.

The sales price or other consideration paid in connection with the purchase by a homeowner of the property with respect to which assistance payments are to be made may not exceed the appraised value on which the maximum mortgage which the Secretary will insure is computed.

The mortgage must be executed upon a form approved by the Commissioner for use in the jurisdiction in which the property is situated. The mortgage must be a first lien on the property. The property must conform with the property standards prescribed by the Commissioner. FHA minimum property standards have been promulgated in manual form.

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58. 24 C.F.R. § 235.355 (1971). In the case of an optional recertification, the federal assistance adjustment does not take effect until the beginning of the second year of biennial period. The adjustment in a biennial recertification applies only from the beginning of the next two year period. 24 C.F.R. § 235.360 (1971).


60. Id.


63. Id.

64. Id.

65. The minimum property standards are

. . . intended to provide a sound technical basis for FHA mortgage insurance by providing minimum standards which will assure well planned, safe, and soundly constructed homes. FEDERAL HOUSING ADMINISTRATION, MINIMUM PROPERTY STANDARDS FOR ONE AND TWO LIVING UNITS, FHA No. 300, at iii (1966).

The FHA MINIMUM PROPERTY STANDARDS manual covers, with considerable specificity and detail, criteria relating to general acceptability; plot planning; building planning; materials and products; construction; exterior and interior finishes; mechanical equipment; water supply and sewage disposal systems; lot improvements and structural design.

The minimum property standards define the "minimum level of quality acceptable to FHA." Id. at vii. Planning and construction which exceed the FHA minimums and increase marketability may result in increased FHA estimates of value. The FHA minimum qualities are intended to assure "utility, durability and desirability as well as compliance with basic safety and health requirements." The standards are not intended to
Mortgage payments come due on the first of the month and have an amortization period of either 10, 15, 20, 25, 30, 35 or 40 years by providing for either 120, 180, 240, 300, 360, 420 or 480 monthly amortization payments. The mortgage must provide for complete amortization within 30 years unless it is determined that the mortgagor is not able to make the required payments under a shorter amortization period and the dwelling was approved for mortgage insurance prior to construction and has been inspected and completed in compliance with the terms of the commitment. No mortgage may have a maturity exceeding three-quarters of the FHA estimate of the remaining economic life of the building improvements.

At the time the mortgage is insured, the mortgagor must have made a down payment of $200 if his adjusted annual income is not in excess of 135 percent of the maximum limits for initial occupancy in public housing. The mortgagor pays three percent of the cost of acquisition if his income exceeds 135 percent of maximum limits for initial occupancy in public housing. The mortgagor’s payment must be in cash or its equivalent. The mortgagor’s initial investment may be applied for the payment of closing costs, initial payments for taxes, hazard insurance premiums and other prepaid expenses.

Single-family dwellings upon which an application for insurance was approved prior to the beginning of construction or rehabilitation are eligible for the FHA §235 assistance and insur-

Compliance with FHA minimum property standards is verified by FHA compliance inspections. Id. ¶ 200-210, at 7-11. Compliance is a prerequisite to a commitment for insurance. Id. ¶ 200, at 7. A minimum of three FHA inspections are required. Id. ¶ 200, 202, 203, at 8-9. Reinspection may be requested by a compliance inspection report. Id. ¶ 208, at 10.

66. 24 C.F.R. § 235.22(c) (1971). Late charges may be collected by the mortgagee for each payment more than 15 days in arrears not exceeding two cents for each dollar of the mortgagor's share of the monthly payment. A late charge must be separately billed to and collected from the mortgagor and can not be deducted from any aggregate monthly payment. Id. at § 235.40.
67. Id. at § 235.22(d)(1).
68. Id. at § 235.22(d)(2).
69. Id. at § 235.35(a)(1).
70. Id. at § 235.35(a)(2).
71. Id. at § 235.35(b). Thus, the down payment could represent "sweat-equity."
72. Id.
Two-family dwellings, one-family units in condominium projects and existing single-family units may qualify upon certain conditions.

Family eligibility for §235 assistance as well as monthly payments established by optional or biennial recertifications are based upon the "adjusted annual income" of the family. "Adjusted annual income" means the annual family income after making the following exclusions from gross annual family income:

1. five percent of such gross annual income (in lieu of amounts withheld for social security, retirement and health insurance, etc.);
2. any unusual or temporary income;

73. Id. at § 235.15(a).
74. Id. at § 235.15(b). To qualify, one unit must be occupied by the owner and the dwelling must have been purchased with the assistance of a non-profit organization and approved by the FHA prior to substantial rehabilitation.
75. Id. at § 235.15(c). Such units must meet the additional requirements of § 235.20.
76. Id. at § 235.15(d), (e), (f) and (g). Existing single-family dwellings which meet FHA standards qualify provided the mortgagor is (1) a displaced family (Displaced families are families displaced from an urban renewal area or as a result of governmental action or as a result of a major disaster as determined by the President.) Id. at § 235.15(d)(1); or (2) a family that has been occupying low rent public housing. Id. at § 235.15(d)(2); or (3) a family with five or more minor persons. Id. at § 235.15(d)(3). A family project covered by FHA § 235 mortgage insurance or which has been released from a multifamily project in which the housing owner has been receiving rent supplements qualifies. Id. at § 235.15(e). Existing single-family dwellings in condominium projects in which FHA § 235 assistance payments have been made on behalf of a previous mortgagor are eligible. Id. at § 235.15(f). Existing single-family units for which an application was approved prior to July 1, 1971 also qualify. Id. at § 235.15(g).
77. The Secretary of Housing and Urban Development is required to report annually on the income level of families receiving assistance. "Family" means (1) two or more persons related by blood, marriage or operation of law who occupy the same dwelling or unit or (2) a handicapped person who has a physical impairment which is expected to be of long continued and indefinite duration which substantially impedes his ability to live independently and is of such a nature that his ability to live independently could be improved by more suitable housing conditions or (3) a single person, 62 years of age or older. 24 C.F.R. § 235.5(c) (1971).
78. Id. at § 235.5(a).
79. Gross annual family income means the total income before taxes and other deductions received by all members of the mortgagor's household. Total income includes all wages, social security payments, retirement benefits, military and veteran's disability payments, unemployment benefits, welfare benefits and interest and dividend payments. 24 C.F.R. § 235.5(d) (1971).
(3) the earnings of each minor\(^{80}\) living with the family plus the sum of $300 for each such minor.

The "assistance payment" is the portion of the homeowner's monthly mortgage payment which the FHA becomes obligated to pay under an assistance payment contract.\(^{81}\) The issuance of a mortgage insurance certificate also constitutes the execution of the assistance payment contract with respect to the mortgage being insured.\(^{82}\) To qualify for an assistance payment, the homeowner must at the time of application meet the established assets and adjusted annual income limitations.\(^{83}\)

The assistance payment contract must be terminated when any one of the following events occurs:\(^{84}\)

1. the contract of mortgage insurance is terminated except where the mortgage has been assigned to the commissioner;
2. the homeowner ceases to occupy the property unless the property is purchased by a homeowner who assumes the mortgage obligation and who meets FHA income and asset requirements;
3. the mortgagee determines that the homeowner ceases to qualify for assistance payments by reason of his income increasing to an amount enabling him to pay the full monthly mortgage payment by using 20 percent of his income;
4. foreclosure is instituted or the property is otherwise acquired by the mortgagee of the FHA.

Both the Senate\(^{85}\) and the House\(^{86}\) Committee's reports estimated the monthly federal subsidy per family based upon various levels of adjusted annual income and mortgage amounts. The following table\(^{87}\) shows the range of assistance payments assum-

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80. "Minor" means a person under the age of 21 other than the mortgagor or his spouse. 24 C.F.R. § 235.5(e).
81. Id. at § 235.301.
82. Id. at § 235.310(a).
83. Id. at § 235.320. The following asset limitations have been established: $2,000 plus $500 for each minor child plus mortgagor payments for one year. If a person is over 62 years, the asset limitation is $5,000 plus the other items. FHA Criteria and Tests for Section 235 (Knoxville, Tenn., Jan. 28, 1970).
84. Id. at § 235.375.
87. Hearings on Bills Relating to Housing and Urban Development by the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency, 91st Cong., 2d Sess., pt. 1, at 76 (1971). (The tables from the 1968 Senate and House reports were unrealistically based on the assumption of the availability of mortgage money at 6% percent.)
ing a $20,000 mortgage at 8½ percent, 35 year mortgage with a one-half-of-one-percent mortgage insurance premium:

<table>
<thead>
<tr>
<th>Annual Gross Income</th>
<th>$4,500</th>
<th>$5,000</th>
<th>$6,000</th>
<th>$7,000</th>
<th>$8,000</th>
<th>$9,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Homeowner’s Adjusted Annual Income¹</td>
<td>3675.00</td>
<td>4150.00</td>
<td>5100.00</td>
<td>6050.00</td>
<td>7000.00</td>
<td>7950.00</td>
</tr>
<tr>
<td>Homeowner’s Monthly Contribution²</td>
<td>61.25</td>
<td>69.17</td>
<td>85.00</td>
<td>100.83</td>
<td>116.67</td>
<td>132.50</td>
</tr>
<tr>
<td>Monthly Subsidy³</td>
<td>101.20</td>
<td>101.20</td>
<td>101.20</td>
<td>86.99</td>
<td>71.15</td>
<td>55.32</td>
</tr>
<tr>
<td>Homeowner’s Payment as % of Gross Income</td>
<td>32.7</td>
<td>29.4</td>
<td>24.5</td>
<td>23.5</td>
<td>22.9</td>
<td>22.5</td>
</tr>
</tbody>
</table>

Notes:

¹Adjusted by excluding 5% of gross income in lieu of social security payments and deducting $300 for each of two minors.

²20% of adjusted monthly income.

³The lesser of the difference between the homeowner’s monthly contribution and the monthly homeownership expense of the maximum available subsidy.

The original authorization for the §235 program was $75 million for fiscal 1968 to be increased by $100 million for fiscal 1969 and $125 million for fiscal 1970. However, the timing and amount of actual appropriations retarded the takeoff of the program.


89. In his Second Annual Report on National Housing Goals the President observed that the § 235 homeownership program

. . . although enacted in 1968, was granted a very limited contract authorization until the fiscal 1969 deficiency appropriation was enacted. The original production targets were predicated upon both the deficiency appropriation being enacted early in the congressional session so that available contract authority would be brought up to the fully authorized amount ($75 million) and the early enactment of the fiscal 1970 contract authorization of $100 million. Instead, a deficiency appropriation of $45 million in contract authorization ($5 million less than requested) was not enacted until midyear and the 1970 authorization of $90 million ($10 million less than requested) until November. Further, the impact of rising interest rates meant that the authorizations could produce a fewer number of units. Finally, increasing discounts on mortgages at the 7½ percent FHA interest rate ceiling caused problems in financing units with low maximum.
Under §235(h)(2) the Secretary of the HUD was directed . . . to accord a preference to those families whose incomes are within the lowest practicable limits for achieving homeownership with assistance under this section.\footnote{\textsuperscript{80}}

In keeping with the preference for assisting families within the lowest practicable limits for achieving homeownership, no more than 20 percent of authorized assistance payments can be made to families whose incomes exceed 135 percent of the maximum income limits for initial occupancy in low rent public housing; the

mortgage amounts. The rise in construction costs further squeezed participation in this program, since the cost limits set were and still are unrealistic in some of the largest metropolitan areas. Message from the President of the United States, \textit{Second Annual Report on National Housing Goals 49} (1970).

As a result of these fiscal problems, starts in fiscal year 1969 under the program totaled 2,700 and estimates for fiscal year 1970 were reduced from the target of 85,000 new starts to 47,500. The target § 235 production appears in the following table from the President’s Second Annual Housing Report, \textit{Id. at} 49-50:

\hspace{1cm}

\begin{center}

\begin{tabular}{lccc}

\hline
Fiscal year & Total & Starts & Rehabilitations \\
\hline
Previous targets: & & & \\
1969 & 9 & 7 & 2 \\
1970 & 93 & 85 & 8 \\
Present targets, total & 1,386 & 1,192 & 194 \\
1969\textsuperscript{1} & 3 & 3 & \\
1970 & 48 & 48 & (?) \\
1971 & 145 & 141 & 4 \\
1972 & 141 & 128 & 13 \\
1973 & 175 & 153 & 22 \\
1974 & 175 & 144 & 31 \\
1975 & 175 & 144 & 31 \\
1976 & 175 & 144 & 31 \\
1977 & 175 & 144 & 31 \\
1978 & 174 & 143 & 31 \\
\hline
\end{tabular}
\end{center}

\textsuperscript{1}Accomplished.

\textsuperscript{2}Rounds to less than 1,000 units.

The President’s Report stated that virtually all subsidy funds authorized for § 235 units have been allocated and that steps were being taken to see that the funds were being used. The President reported a “growing backlog of unsatisfied [§ 235] requests” and immediate need for $25 million in supplemental contract authority and pointed to “the crucial need” of the enactment of $140 million requested in the fiscal 1971 budget. \textit{Id. at} 51.

\footnote{\textsuperscript{90} Section 235(h)(2), 82 Stat. 479, (1968), 12 U.S.C. § 1715z(h)(2) (1970) [emphasis added].}
income of families with this 20 percent group can not exceed 90 percent of the limits for eligibility for the §221(d)(3) below market interest rate program. The percentage distributions on the income levels of families assisted under the §235 homeownership program were recently published. Despite the statutory preference for assisting the lowest income families, assisted families are skewed toward the upper (not the lower) eligible income levels. Moreover, the trend toward assisting moderate rather than lowest income families is increasing—a fact which is reflected in an increase in median income from $5,750 to $6,200 among assisted families during the three six month periods reported.

<table>
<thead>
<tr>
<th>Gross annual income</th>
<th>Percentage Distributions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under $3,000</td>
<td>1.1</td>
</tr>
<tr>
<td>$3,000 to $3,999</td>
<td>4.2</td>
</tr>
<tr>
<td>$4,000 to $4,999</td>
<td>14.7</td>
</tr>
<tr>
<td>$5,000 to $5,999</td>
<td>25.4</td>
</tr>
<tr>
<td>$6,000 to $6,999</td>
<td>25.0</td>
</tr>
<tr>
<td>$7,000 to $7,999</td>
<td>17.1</td>
</tr>
<tr>
<td>$8,000 to $8,999</td>
<td>7.7</td>
</tr>
<tr>
<td>$9,000 to $9,999</td>
<td>3.0</td>
</tr>
<tr>
<td>$10,000 or more</td>
<td>1.8</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
</tr>
<tr>
<td>Median</td>
<td>$6,200</td>
</tr>
</tbody>
</table>


In an addendum to the Senate Committee Report on the Housing and Urban Development Act of 1968, Senators Bennett, Tower and Hickenlooper contended that the government assisted housing program

91. Id.

92. Hearings on Proposed Housing and Urban Development Legislation for 1971, before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Urban Affairs, 92d Cong., 1st Sess., pt. 2, at 1355 (1971). The data was based on sampled data from approved applications for § 235 assistance. It should be recalled that family incomes can exceed initial eligibility levels after occupancy has commenced. The following table provides examples of upper income limits for eligibility for a five-person family under section 235 in representative cities and metropolitan areas.
... was conceived and enacted purportedly to benefit families at the lower income levels, where assistance is truly needed and justified, but which by experience has tended to accommodate those at the higher income eligibility levels, in effect by passing lower income families.

... Should [government assisted housing] programs reach out for families with higher incomes approaching or exceeding the national average instead of benefiting the lower income families most in need of housing assistance today, then the committee's efforts will have missed the target of our concern.93

Messrs. Bennett, Tower and Hickenlooper offered data which assist in giving meaning to the primary object of statutory concern: families within the "lowest practicable limits for achieving homeownership." The distribution of median family incomes for the 48.9 million families in the United States for 1966 was:94

<table>
<thead>
<tr>
<th>City</th>
<th>135 percent of public housing limit</th>
<th>90 percent of § 221 (d) (3) limit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlanta, Ga.</td>
<td>$6,480</td>
<td>$7,250</td>
</tr>
<tr>
<td>Austin, Tex.</td>
<td>5,400</td>
<td>7,550</td>
</tr>
<tr>
<td>Boston, Mass.</td>
<td>7,965</td>
<td>9,950</td>
</tr>
<tr>
<td>Bridgeport, Conn.</td>
<td>7,630</td>
<td>9,550</td>
</tr>
<tr>
<td>Chicago, Ill.</td>
<td>8,910</td>
<td>10,200</td>
</tr>
<tr>
<td>Cleveland, Ohio</td>
<td>8,100</td>
<td>9,900</td>
</tr>
<tr>
<td>Denver, Colo.</td>
<td>7,155</td>
<td>8,350</td>
</tr>
<tr>
<td>Little Rock, Ark.</td>
<td>6,615</td>
<td>6,950</td>
</tr>
<tr>
<td>Memphis, Tenn.</td>
<td>6,480</td>
<td>7,500</td>
</tr>
<tr>
<td>Milwaukee, Wis.</td>
<td>8,100</td>
<td>9,000</td>
</tr>
<tr>
<td>Philadelphia, Pa.</td>
<td>5,400</td>
<td>8,800</td>
</tr>
<tr>
<td>St. Louis, Mo.</td>
<td>6,750</td>
<td>9,300</td>
</tr>
<tr>
<td>San Diego, Calif.</td>
<td>6,750</td>
<td>10,450</td>
</tr>
<tr>
<td>San Francisco, Calif.</td>
<td>7,155</td>
<td>9,550</td>
</tr>
<tr>
<td>Seattle, Wash.</td>
<td>7,695</td>
<td>9,200</td>
</tr>
</tbody>
</table>


94. Id. at 181. Senators Bennett, Tower and Hickenlooper stated:
... if Government-assisted housing programs are confined to families with annual incomes of $5,000 and under, as we generally believe they should be, a maximum of 28 percent of our families would possibly be eligible for such assistance. However, if families making up to $7,000, or almost the national median income level, are allowed to receive such assistance, then it obviously is to be concluded that 46 percent of all American families, or almost half of all our families, are to be deemed potentially incapable of providing for their own housing needs without some degree of Government assistance. We cannot subscribe to any such conclusion. ...
Thus, more than 22 million families—48 percent of all families in the nation—would be eligible for §235 assistance if a $7,000 annual family income were the top limit. If family eligibility reached over the ten thousand dollar ($10,000) income level—and some families at that income level are eligible—well over half of the families in the United States would be eligible for §235 assistance. However, over 75 percent of substandard homes are occupied by families with incomes of four thousand dollars ($4,000) and less.96

Since it is generally conceded that most of this country's substandard dwelling units are located in the deteriorated slum neighborhoods of our major cities, some of which experienced riots during 1967 centered in such neighborhoods, it is significant that a survey of 20 such cities by the President's Commission on Civil Disorders showed the median family income in disturbance areas to be $5,335 for white families and $4,218 in the case of nonwhite families. Id. The minority opposition to the 1968 housing legislation in the House Banking and Currency Subcommittee on Housing was equally determined. See Minority Views, H.R. Rep. No. 585, 90th Cong., 2d Sess. 338-51 (1968).

However, the Senate Committee Report contemplated that "families with incomes in the general range of $3,000 to $7,000" would be able to buy homes under the §235 program and, thus, benefit by it. S. REP. No. 1123, supra note 87, at 8. At the hearings, testimony had been developed emphasizing that the homeownership program should have a moderate as well as low income constituency.

I want to stress also that this program is meant to serve moderate income as well as low income families. Volume results cannot be achieved if it should be restricted so as to make it impossible to provide good housing opportunities for families not now being sheltered by either the private market at market rates or the subsidized Government programs.

To assure the kind of massive building and marketing program envisioned by this section 235 program the income limits for assistance under this proposal should . . . [be] a function of the maximum permissible mortgage amounts and the formula for assistance. (Lloyd Clark, President of the National Association of Homebuilders). Id. at 836-37.

95. See note 92 supra.

96. S. REP. No. 1123, supra note 85, at 181.
<table>
<thead>
<tr>
<th>Annual Income</th>
<th>Standard Units</th>
<th>Substandard Units</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under $4,000</td>
<td>13,558,060</td>
<td>6,333,843</td>
</tr>
<tr>
<td>$4,000 to $8,000</td>
<td>18,991,396</td>
<td>1,827,169</td>
</tr>
<tr>
<td>$8,000 and over</td>
<td>12,000,715</td>
<td>312,683</td>
</tr>
</tbody>
</table>

Concern has been expressed that if the §235 program were not concentrated on those families occupying substandard housing whose incomes were generally under $5,000 the new housing

... will end up benefiting families who can reasonably be deemed capable of providing for their own housing needs to the detriment of those families who truly need such assistance.97

Under §235(j)98 of the National Housing Act private non-profit organizations and public bodies or agencies are authorized to purchase, rehabilitate and market housing to lower income families under FHA insured mortgages.99 Available financing covers

... the purchase of both standard and substandard housing, and the rehabilitation of such of the housing as is deteriorating or substandard.100

There are four major differences between the §235(j) and §221(h) programs:

1. Section 235(j) mortgages bear the market rate of interest

97. Id. at 182. The U.S. Commission on Civil Rights, conversely, concluded that the maximum income limits for § 235 eligibility

... provide sufficient flexibility to offer the opportunity for those other than low income families to receive benefits under the program. This presents the possibility of an economic cross section in projects or developments built under the program and potentially avoids the creation of additional isolated pockets of the poor. U.S. Com'n, supra note 14, at 5.

However, the Commission also observed that the maximum federal assistance payment which would result in a purchase price of a house at a one percent interest rate was not enough to reach "the hardcore poor" who thus would tend to be effectively excluded from the program." Id. at 5-6.


99. HUD HANDBOOK, HOMEOWNERSHIP ASSISTANCE FOR PURCHASE AND RESALE OF HOUSING TO LOWER INCOME FAMILIES UNDER SECTIONS 235(j) AND 221(h) FHA 4400.9 at 1 (1968).

100. Id. Pending sale of all the units the project mortgagor may obtain assistance payments representing the difference between the monthly mortgage payment and the amount such payment would be if the mortgage were to bear interest at one percent. Individual mortgages are available for purchasers under the same terms as in other § 235 loans. Id.
est; 221(h) mortgages bear a special below market interest rate, which can be as low as 1 percent for individual mortgages.

(2) The 235(j) subsidy is in the form of direct federal assistance payments to lenders in behalf of the mortgagors; 221(h) provides assistance through below-market interest rates made possible by Government National Mortgage Association purchase of the mortgages.

(3) Section 235(j) project mortgages may cover standard existing housing and rehabilitation cases; 221(h) project mortgages are limited to financing the purchase and rehabilitation of substandard or deteriorating housing.

(4) If the Section 235(j) individual mortgagor's income decreases, his mortgage payments will be decreased and assistance payments will be proportionately increased. There is no provision under 221(h) for decreasing the mortgage interest rate if a mortgagor's income decreases.101

Lenders and private nonprofit corporations must be approved by FHA prior to sponsoring projects under §§235(j) and 221(h).102 Sponsoring groups organized specifically for the purposes of the programs are welcome to participate but the nonprofit sponsor must unequivocally be organized for purposes other than making a profit for itself or for persons identified with it.103 Sponsors must show a capability for providing counseling and advisory services to new low income homeowners.104 Loans are available to nonprofit organizations for preconstruction expenses, for planning and obtaining federally insured financing for the construction and rehabilitation of low and moderate income housing.105 There is no requirement that projects be located in communities having approved urban renewal programs but

... the properties involved must be located in a neighborhood which is sufficiently stable and contains sufficient public facilities and amenities to support long-term values; or that the purchase or rehabilitation of the property and related activities carried out by the mortgagor plus the activities of other homeowners in the neighborhood, combined with actions to be taken

101. Id. at 3.
102. Id. at 5.
103. Id. at 5-6.
104. Id. at 6.
105. HUD HANDBOOK, FINANCIAL ASSISTANCE FOR NONPROFIT SPONSORS OF LOW AND MODERATE INCOME HOUSING FHA 4403.1 (1968).
by public authorities, will be of such scope and quality as to give
reasonable promise that a stable environment will be created in
the neighborhood.\footnote{106}

Mortgages financing relocated houses and FHA acquired homes
may be insured under these programs.\footnote{107} Families which do not
meet normal FHA credit requirements can purchase homes if
counseling and credit assistance is available.\footnote{108} A mortgagee's
guide has been issued which contains instructions for conforming
with HUD requirements for mortgagees.\footnote{109}

Some of the greatest problems in the administration of the
Housing and Urban Development Act of 1968 appear to have
arisen under the sale of existing properties. The application of
§223(e)\footnote{110} was "a source of confusion in [HUD] field offices."\footnote{111}

\footnotetext[106]{106. \textit{Hearings, supra} note 92, at 10. Special authorization for such units may be
obtained under § 223(e) of the National Housing Act which permits insurance of mort-
gages on property located in older, declining urban areas. 82 Stat. 476 (1968), 12
U.S.C. § 1715n(e) (1970).}

\footnotetext[107]{107. \textit{Id.} at 10-11.}

\footnotetext[108]{108. \textit{Id.} at 29-30.}

\footnotetext[109]{109. \textit{HUD HANDBOOK, MORTGAGEES' GUIDE ASSISTANCE PAYMENTS UNDER SECTION 235
AND INTEREST REDUCTION PAYMENTS UNDER SECTION 236 FHA 4400.8 (1968).}}

\footnotetext[110]{110. Section 223(e) of the National Housing Act, 82 Stat. 476 (1968), 12
U.S.C. § 1715n(e) provides:
Notwithstanding any of the provisions of this title except section 212, and with-
out regard to limitations upon eligibility contained in any section of this title,
the Secretary is authorized, upon application by the mortgagee, to insure under
any section of this title a mortgage executed in connection with the repair,
rehabilitation, construction, or purchase of property located in an older, declin-
ing urban area in which the conditions are such that one or more of the eligibility
requirements applicable to the section of this title under which insurance is
sought could not be met, if the Secretary finds that (1) the area is reasonably
viable, giving consideration to the need for providing adequate housing for fami-
lies of low and moderate income in such area, and (2) the property is an accepta-
able risk in view of such consideration. The insurance of a mortgage pursuant to
this subsection shall be the obligation of the Special Risk Insurance Fund.}

\footnotetext[111]{111. \textit{HUD Circular FHA 4400.26} (May 26, 1969) at 1. Section 223(e) can be used only
when a property is located in an older declining area and cannot meet the location eligi-
bility requirements under the section of the Act under which insurance is sought. \textit{Id.} The
property must be in an area otherwise rejected or producing an unreasonably short mort-
gage term due to the location factor before it can be processed pursuant to § 223(e). \textit{Id.}
An "older, declining urban area" can be in a large or small city. Rural areas . . .
(under 5,500 population) are not eligible. The test should be the degree of blight
rather than the size of the affected area. To justify processing pursuant to
Section 223(e), the location must so adversely affect the property as to preclude
a finding of economic soundness or acceptable risk . . . . The determination of
economic life is fundamental to a finding of economic soundness . . . . The
components of "acceptable risk" under 223(e) are a "reasonably viable area"
The relation between repair requirements and local code enforcement standards also created problems in older declining areas.\textsuperscript{112} By circular, the Department of Housing and Urban Development explained the FHA policy which requires as a condition for an FHA commitment assurance of

\textldots completion of repairs necessary to preserve the property and protect the health and safety of the occupants. \textit{This requirement reflects in a general way the intent of local housing codes, although FHA is not responsible for compliance with code requirements to the extent that local enforcement agencies are. In areas where codes are in effect and are being actively enforced, the FHA commitment should require code compliance, in which case the condition on the commitment will provide for evidence from the local code authority that the property is in compliance. In this way, FHA can protect the mortgagor of modest means from the burden of bringing a newly purchased property up to code levels. FHA appraisers in these areas should be sufficiently familiar with local code enforcement operations to reflect code-induced repairs in the property valuation. The appraiser will seldom have available a breakdown of work to be done to comply with a local code. When the appraiser cannot visualize the property as it will be after completion of code work, the case may be rejected and reopened after the code enforcement inspection and receipt of the statement of required repairs. It should be emphasized that the cost of code work does not necessarily affect value in a proportional amount and that FHA requirements and code requirements may be the same or they may differ in a particular case.}\textsuperscript{113}

The emphasized portion of HUD policy above is inconsistent on its face with the mandate of §221(d)(2) of the National Housing Act.\textsuperscript{114} How can it be said that HUD is "not responsible for compliance with code requirements to the extent that local enforce-

\textsuperscript{112} \textit{Id.} at 1.
\textsuperscript{113} \textit{Id.} at 2-3 [emphasis added]. The equivocal language used in the statement of HUD policy was an invitation to disaster.
\textsuperscript{114} Section 221(d)(2), 73 Stat. 659 (1959), 42 U.S.C. § 1715i(d)(2) (1970) provides:

\textquote{To be eligible for mortgage insurance . . . a mortgage shall . . . be secured by property upon which there is located a dwelling conforming to applicable standards prescribed by the Secretary . . . and meeting the requirements of all State laws or local ordinances or regulations, relating to the public health or...}
safety, zoning or otherwise, which may be applicable thereto . . . [emphasis added].

The legislative history of the provision of § 221(d)(2) of the National Housing Act which requires that insured mortgages comply with all state laws and local ordinances or regulations relating to health, safety or zoning clearly manifests a Congressional intent to secure benefits for housing consumers.

Section 221(d)(2) was made part of the National Housing Act by the Housing Act of 1959 which required that mortgages insured under § 221 meet

. . . the requirements of all State laws, or local ordinances or regulations relating to the public health or safety, zoning, or otherwise, which may be applicable thereto . . . . 73 Stat. 659 (1959), 12 U.S.C. 1715(l)(d)(2) (1970).

The provision requiring conformity with state laws and local ordinances and regulations first appeared in S.3064, 85th Cong., 2nd Sess. (1958), introduced by Senator Frederick Payne of Maine. Speaking on behalf of his bill before the Subcommittee on Housing during the Senate Hearings on the Housing Act of 1958, Senator Payne stated the purposes of S.3064:

We are dealing here today with a matter of utmost importance to any modern and progressive nation—the state of its housing. . . . Housing is, like food and water, a necessity of life . . . . For many years Congress has authorized appropriations to permit the Federal Government to share some of the burden and responsibility for adequate housing . . . in a nation which desires all of its population to enjoy a proper standard of living.

S. 3064 is designed to help meet the pressing relocation problem encountered in many medium size cities, such as Portland. This bill was, in fact, first recommended by officials of the Portland Slum Clearance and Redevelopment Authority . . . . Both of my proposals [S. 3064 and S.J. Res. 153] are aimed at perfecting the urban renewal program in order that it might more adequately accomplish the task of eliminating urban blight and slums throughout the nation. No nation with our resources should permit such conditions to exist. Their adverse social, psychological, and economic effects on our people cannot be tolerated in these times when with concerned effort something can be done to eliminate them. The need for sound housing legislation is still great . . . .


The Senate hearings in 1958 yield no objections to the code conformity provision of S. 3064, and the only question raised in the House hearings is that of Federal Housing Commissioner, Norman P. Mason, who expressed his uncertainty as to the necessity for the code conformity provision:

. . . FHA regulations under each mortgage insurance program already contain essentially this same requirement. Accordingly, we suggest deletion of this language from present legislation because stating the requirement in the statute at this time seems redundant, and because it might carry some implication, also, that the absence of such wording in other sections of the act might limit the Commissioner's authority to apply the same concepts under other programs . . . .


The fact that Congress saw fit to include the provision requiring conformity with State laws and local ordinances or regulations relating to the health, safety or zoning in spite of opposition by the Federal Housing Commissioner indicates Congressional awareness of the inadequacy of existing FHA regulations which were intended primarily to protect the government's financial interest in the security of the mortgage. Requiring insured mortgages to comply with all State laws and/or zoning was intended to protect the interests of
ment agencies are?"115 The language of §221(d)(2) is not permissive; it is mandatory. The unmistakable intent of §221(d)(2) is to require that all properties insured subject thereto conform to all state laws or local ordinances relating to public health, safety or zoning. Properties which do not conform to all state laws or local ordinances relating to the public health, safety or zoning indubitably do not meet the express mandate of §221(d)(2) and may not lawfully be insured. With regard to all insured properties, the obligation of the Department of Housing and Urban Development for assuring conformity with state laws or local ordinances relating to public health, safety, or zoning is coextensive with the obligation of state authorities. The mandate of such state laws and local ordinances upon federal officers is not contingent upon whether local code requirements are being "actively enforced" as

the housing consumer and was, as Congress recognized, more than a restatement of existing FHA regulations. This provision was included in the final form of the proposed Housing Act of 1958, which was not enacted, having failed in the House by six votes.

The code-conformity provision of S.3064 was carried over into S.57, 86th Cong., 1st Sess. (1959). The President vetoed S.57 on July 7, 1959. S. Res. No. 924, 86th Cong., 1st Sess. 2 (1959). On August 18, 1959 after extensive hearings and debates the Senate passed a compromise bill, S. 2539, 86th Cong., 1st Sess. (1959), which also included the code-conformity provision. On Sept. 4, 1959, the President vetoed S.2539. On Sept. 8, 1959, the Senate reported a third bill, S.2654, 86th Cong., 1st Sess. (1959), which include the code-conformity provision. The code-conformity requirement became law with the enactment of S. 2554 which became § 221(d)(2) of the National Housing Act.

Congress had previously recognized the importance of requiring enforcement of local housing codes in the Housing Act of 1954 which required that cities seeking federal assistance for urban renewal present adequate local housing codes. During consideration on the Housing Act of 1959, Mr. Robert A. Holloway, Chairman, Realtors' Washington Committee of the National Association of Real Estate Boards, testified on the importance of housing code enforcement in the rehabilitation of American cities under the urban renewal program:

. . . It has become clear that this approach [urban renewal] . . . must rest upon a foundation of firm enforcement of city ordinances that require property owners to meet adequate health and safety standards for structures to be used for human habitation. In qualifying for Federal Assistance in urban renewal programs cities are quite properly required to present workable programs committing themselves, among other things, to engage in this indispensable type of local government action. Hearings on the Housing Act of 1959 before the Subcommittee on Housing of the House Banking and Currency Committee, 86th Cong., 1st Sess. 274 (1959) [emphasis added].

Thus, Congressional approval of § 221(d)(2) indicated awareness of the inadequacy of existing FHA regulations and established a Congressional purpose to extend the protection of state laws and local ordinances and regulations relating to health or safety or zoning to the class of housing consumers whose mortgages were subject to the requirement of § 221(d)(2).

115. See the text accompanying note 113, supra.
the HUD circular of May 26, 1969 unlawfully and erroneously states.

In April, 1970, policies on the insurance of existing properties were completely revised.\textsuperscript{116} Appraisers were directed

\begin{quote}
. . . to determine whether repairs, alterations or additions are necessary . . . . Required repairs will be limited to those necessary to preserve the property and to protect the health and safety of the occupants.\textsuperscript{117}
\end{quote}

Appraisers were required "to inspect the entire structure including the attic, the crawl space or basement and all equipment."\textsuperscript{118}

In a circular of July 31, 1970, the Department of Housing and Urban Development again attempted to clarify its policies on the appraisal of existing dwellings.\textsuperscript{119} The circular acknowledged that the liberalized appraisal policy designed to increase FHA-insured mortgages in blighted central city areas

\begin{quote}
. . . has all too often resulted in insurance of mortgages the physical security for which is far below the stated objectives of the FHA Minimum Property Standards. Not only has this caused FHA to sustain increased losses in property dispositions, but also it has adversely affected the low-income purchasers involved in these transactions. Such homeowners when confronted with the necessity for costly repairs and replacement of
\end{quote}

\textsuperscript{116} 7 FHA Manual Book 1, at ¶ 71409.2.

\textsuperscript{117} Id. Does this policy clearly reflect requirement of § 221(d)(2), supra note 114, that insured properties conform to all state laws and local ordinances relating to public health, safety or zoning? To the extent that "repairs . . . to preserve the property and to protect the health and safety of the occupants" impliedly permits non-conformity with any requirement of any state law or local ordinance relating to public health safety or zoning, the policy is fatally under-inclusive of the mandate of § 221(d)(2).

\textsuperscript{118} 7 FHA Manual Book 1 at ¶ 71409.2.

If the appraiser cannot determine whether all mechanical equipment is in operating condition, he should make a commitment requirement that the mortgagee furnish evidence satisfactory to FHA that all mechanical equipment is in operating condition at the time of loan closing. A proper appraisal requires that the appraiser consider not only the condition of the property and its equipment but also the functional adequacy of the components under conditions typically expected. Inferior quality roofing, plumbing, heating equipment, undersize hot water heaters, bottom of the line appliances are items which must be of concern to the appraiser in estimating value. Careful inspection of the property being appraised and evaluation of the condition and adequacy of all its elements is an integral part of the appraiser's function without which he cannot make a proper appraisal. Id.

\textsuperscript{119} HUD Circular FHA 441.24 (July 31, 1970).
equipment find themselves in serious financial difficulty. In such cases FHA has done more harm than good.\textsuperscript{120}

In order to effectuate "immediate correction of a most undesirable situation," the Department of Housing and Urban Development declared that

\ldots [i]n blighted areas mortgage insurance pursuant to Section 223(e) shall not be interpreted to permit waiver of the requirement that the property in question meet the stated objectives of the FHA Minimum Property Standards. More specifically this means that a careful inspection be made of the building and premises, and that the appraiser shall list as conditions to mortgage insurance any repairs, alterations, or replacements necessary to bring the property up to the minimum standards.'\textsuperscript{121}

However, the circular warned that FHA "cannot warrant existing properties against defects and should make this position clear to all concerned."\textsuperscript{122} The intent of the circular was to correct the admitted "laxness with respect to appraisal policies" through stressing the requirement that insured property comply with FHA Minimum Property Standards. Surprisingly, the circular omitted any reference to the requirement of §221(d)(2) that mortgages must conform to all state laws and local ordinances relating to health, safety or zoning in addition to conforming to FHA Minimum Property Standards. The omission amounted to a misleading understatement of Congressional policy by the agency charged with enforcement of that policy.

On December 23, 1970, following the appearance by the Secretary before the House Banking and Currency Committee during the preceding week, the Department of Housing and Urban Development issued a circular requiring intensified valuation reviews in problem inner-city areas.\textsuperscript{123} This circular stated that a task force from the Department of Housing and Urban Development had

\ldots surveyed several cities to inspect inner-city properties recently insured and to interview purchasers and investigate their complaints. The survey indicated that many of the properties

\begin{itemize}
\item[120.] Id.
\item[121.] Id. at 1-2.
\item[122.] Id. at 2.
\item[123.] HUD Circular, HPMC-FHA 4035.6 (December 23, 1970).
\end{itemize}
were in poor physical condition and should have had extensive repairs prior to insurance. In some instances, the properties were found to be hardly habitable. The survey pointed out the urgent need for better quality appraisals and germane repair requirements as a part of the commitment. The procedures described in this Circular shall be implemented immediately to ensure an improvement in appraisal quality, and, hopefully, to reduce complaints.\textsuperscript{124}

The circular obligated chief appraisers to identify to all staff and fee appraisers all inner-city, transitional and problem areas where there is evidence of substantial speculator activity; to require sketch floor plans and photographs in appraisals of existing properties in such areas; to give desk review to all commitments in such areas prior to issuance of commitments and to implement field inspection by supervisory personnel on a minimum of 10 percent of all appraisals in such areas prior to issuance of commitments.\textsuperscript{125} In addition, fee appraisers who did not fully meet the qualifications for staff appraiser were to be immediately notified of the cancellation of their appointments.\textsuperscript{126}

On December 30, 1970, a circular\textsuperscript{127} was issued to implement criteria for acceptance of mortgage certifications regarding repair requirements on home mortgage cases;\textsuperscript{128} to standardize and clarify certifications relating to structural and mechanical equipment;\textsuperscript{129} and to require the addition of a statement warning the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{124} Id. at 1.
\item \textsuperscript{125} Id.
\item \textsuperscript{126} Id. at 2. Fee appraisers were required to undergo intensive training and submit sample appraisals which receive thorough field review prior to placement for routine assignment. \textit{Id.}
\item \textsuperscript{127} HUD Circular HPMC-FHA 4035.7 (December 30, 1970).
\item \textsuperscript{128} Id. at 1. The circular substantially restricted the use of mortgagee certifications of repairs.
\item An inspection of a member of the Architectural Section Staff is normally required to determine whether required repairs to an existing property have been satisfactorily completed pursuant to the FHA commitment. Only in those instances where minor repairs involving no technical or structural skills or knowledge are required can the field office waive the inspection and accept a mortgagee's certification of completion of such repairs. The use of a mortgagee's certification to confirm the completion of repairs required on a commitment must be restricted to instances where the items are minor and uncomplicated \ldots \textit{Id.}
\item \textsuperscript{129} Id. at 1-2. The circular was intended to enhance the integrity of the certification process.
\end{enumerate}
\end{footnotesize}
Buyer of his responsibilities regarding a supplementary purchase of an existing property. While the quality of some FHA appraisals explains why the Department of Housing and Urban Development may wish to avoid accountability for fraudulent or negligent appraisals, it is submitted that the disclaimer is inconsistent with the mandate of §221(d)(2) that approved mortgages must comply with all state laws and local ordinances relating to public health, safety, or zoning.

Another circular was issued December 30, 1970, to respond to the

. . . increasing number of applications for mortgage insurance being received involving inner-city and other problem areas dominated by speculators. . . .

Sellers who are not owner occupants must be identified in order to disclose straw parties and speculative activity.

A "modified cost approach" was adopted

. . . to facilitate more realistic appraisals of properties located in areas of extensive speculative activity. It must be emphasized that in appraising income properties the market approach is the most reliable indicator of value and must be utilized as the principal approach. In areas where speculators constitute the principal means by which properties are marketed . . . [a

ture, . . . have been accepted from non-existent companies and from persons having an interest in the property, mortgagee, broker or seller. In many cases, the certification is worthless because of ambiguous language or lack of positive statements. In an effort to authenticate and strengthen the effect of these qualifications, the use of the formats transmitted herewith is mandatory. When certifications concerning the condition of mechanical equipment or structure are required, only those from reputable, independent, licensed contractors, who have no identity of interest with the mortgagee, broker, contract owner, seller or any other party involved in the transaction, shall be accepted. The mortgagee shall deliver a copy of the certificate to the purchaser of the property and submit a copy to HUD with the closing documents. Upon receipt of a certification, the closing clerk will route it to the Architectural Section for review and a determination of its acceptance. Id.

130. Id. at 2. The circular required that the following statement shall be conspicuously stamped on the Form 2800-6 under "Advice to Homeowners" overlaid on the buildings warranty portion of the form:

FHA insurance applies only to losses resulting from failure of a homeowner to make payments on the mortgage and transfer of the property to the lender and then to FHA through foreclosure or assignment. The homeowner is responsible for any maintenance and any repairs that may be required after the loan is closed. Id.

131. HUD Circular HPMC-FHA 4035.8 (December 30, 1970).
"modified cost approach" can] help to prevent unreasonable disparities between net seller's prices plus typical costs and FHA values with the attendant implications of excessive speculator profits. This modification of the cost approach, which will be implemented immediately in the areas affected, will provide another limit upon value to supplement the market approach. The information concerning ownership, acquisition prices, repairs and other costs should be an invaluable source of data to implement this approach.132

Under the "modified cost approach,"

All mortgagees will be notified that where the seller of the property is not the occupant, the application must show the name and address of the owner and the date the property was acquired. If the date is less than two years prior to the date of application or if the field office for any pertinent reason deems such information essential on any particular application, the total itemized cost of acquisition and an itemization of the cost of any improvements made to the property by such seller must be furnished with the application. Falsification or other fraudulent information will be considered cause for prosecution.133

The "modified cost approach" was limited in application to areas dominated by speculator activity.134

Federal Housing Administration Commissioner Eugene A. Gulledge on December 30, 1970, sent a letter to all approved mortgagees outlining the new procedures concerning existing property repair inspections and criteria for certifications of mechanical equipment and dwelling structure.135 Certification forms which must be completed for heating,136 roofing,137 plumbing138 and electrical inspections139 were included. Any repairs must

132. Id. at 1.
133. Id. at 2.
134. Id.
135. FHA Letter 70-17 (December 30, 1970).
136. Id. Inspection of the heating system must be by a qualified mechanic who certifies that the "... inspection reveals that the heating system is functioning properly and is capable of furnishing adequate heat for this dwelling."
137. Id. Inspection of the roofing must be by a qualified roofer who certifies that the "... inspection reveals that it [the roof] is in satisfactory condition with no evidence of leaks."
138. Id. The inspection must be by a licensed, registered plumber who states that he has carefully inspected the plumbing system and certifies:
   (a) The plumbing system is consistent with the code enforcement standards applicable to this jurisdiction.
be "applied in a workmanlike manner" and a "written warranty (if appropriate) [must be] . . . furnished the mortgagee for delivery to the purchaser of . . . [the] property . . . ."

Persons making inspections are required to certify that they have "no interest, present or prospective in the property, contract owner, seller, broker, mortgagee or other party involved in the transaction." Written warranties from reputable skilled workers or businessmen on the roofing and on the heating, plumbing, and electrical systems of a house stating that they are in satisfactory condition, are consistent with code requirements or that any repairs have been made in a workmanlike manner, are consistent with the Congressional purpose of §221(d)(2) that insured properties conform to all state laws and local ordinances relating to health, safety or zoning. The right of an insured homeowner to proceed at law on the warranties against the makers is apparent. FHA requirement of warranties for the protection of the housing consumer is wholly consistent with the remedial policies of §221(d)(2). No less rigorous requirements should be imposed upon FHA appraisers with regard to other housing items relating to conformity with state laws or local ordinances on health, safety or zoning.

A circular providing guidelines and procedures to be followed in implementing criteria for accepting properties under §223(e) was distributed on December 31, 1970. The circular stated that

... [r]ecent surveys indicate that some field offices are accepting properties for mortgage insurance under section 223(e) regardless of the degree of blight or deterioration in an area. Section 223(e) is not intended as a complete abandonment of

(b) All fixtures drain properly.
(c) The piping appears to be in sound condition.
(d) The water heater functions satisfactorily, and is equipped with properly installed temperature and pressure relief valve.

139. Id. The inspection must be by a licensed, registered electrician who certifies that the "... inspection reveals that this system is consistent with the code enforcement standards applicable to this jurisdiction, that all visible wiring is properly installed and is in good condition; that the service is adequate for the connected load."

140. Id.
141. Id.
The circular emphasized that it "does not permit any arbitrary delineation of reject areas" and admonished that

... [c]are must be exercised to limit rejection only to the actual blocks which are affected and in which it is obvious that FHA Insurance would be a disservice to purchasers in encouraging them to enter areas which have no hope for improvement in the foreseeable future.

Current policy for approving properties pursuant to §223(e) was established May 14, 1971. For a location to be eligible under §223(e),

... the area must be reasonably viable, giving consideration to the need for providing housing for families of low and moderate income in such area. Viability means ability to live. In this context a reasonably viable area is one which can survive as a habitable area and perhaps be improved by FHA participation and the infusion of liberal financing.

However,

[environmental factors which render a property unacceptable because of conditions which constitute a danger to the health

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143. Id. at HUD Circular HPMC-FHA 4035.9.
144. Id. at 2.
145. Id. at 1.
146. HUD Circular HPMC-FHA 4005.16 (May 14, 1971). Properties insured under § 203(b) or § 221(d)(2) of the Housing Act must be free of hazards, noxious odors, grossly offensive sights or excessive noises. Some examples of conditions which would render a property unacceptable under the standard Title II sections include:

A. Hazards. Any physical condition such as unsafe construction, unusual topography, danger of subsidence, flooding, unstable soils, air or vehicular traffic hazards, danger from fire or explosion, inadequate water or sewerage facilities, inadequate police and fire protection in high crime locations radiation hazards and the like.

B. Noxious Odors. Smoke, chemical fumes, stagnant ponds and marshes may exist to a degree that the health of occupants may be affected.

C. Grossly Offensive Sights. These may include junk yards, truck warehouses, industrial plants, sewage disposal plants, or dilapidated abandoned properties.

D. Excessive Noises. Noises which may affect the health and peace of mind of the occupants might include heavy industrial activity, all night cafes, bars, gas stations, truck terminals, airport activity, kennels, and the like.

147. Id. at 2.
and safety of the occupants or to the preservation of the property
. . . are not subject to waiver under section 223(e).\(^{148}\)

Section 518(a) of the National Housing Act\(^{149}\) allows the Secretary to make expenditures to correct defects in new homes which he finds have structural defects, to pay the claims of owners arising from such defects, or to acquire title to the property. In 1970, §518(b) of the National Housing Act\(^{150}\) was enacted.

\(^{148}\) Id.

\(^{149}\) Section 518(a) of the National Housing Act provides:

The Secretary is authorized with respect to any property improved by a one-to four-family dwelling approved for mortgage insurance prior to the beginning of construction which he finds to have structural defects, to make expenditures for (1) correcting such defects, (2) paying the claims of the owner of the property arising from such defects, or (3) acquiring title to the property; Provided, That such authority of the Secretary shall exist only (A) if the owner has requested assistance from the Secretary not later than four years (or such shorter time as the Secretary may prescribe) after insurance of the mortgage, and (B) if the property is encumbered by a mortgage which is insured under this chapter after September 2, 1964. 78 Stat. 769 (1964), 12 U.S.C. § 1735b(a) (1970).

\(^{150}\) Section 518(b) of the National Housing Act provides:

The Secretary is authorized to make expenditures to correct, or to compensate the owner for, structural or other defects which seriously affect the use and livability of any single-family dwelling which is covered by a mortgage insured under section 1715z of this title and is more than one year old on the date of the issuance of the insurance commitment, if (1) the owner requests assistance from the Secretary not later than one year after the insurance of the mortgage, or in the case of a dwelling covered by a mortgage which was insured prior to December 31, 1970, one year after December 31, 1970, and (2) the defect is one that existed on the date of the issuance of the insurance commitment and is one that a proper inspection could reasonably be expected to disclose. The Secretary may require from the seller of any such dwelling an agreement to reimburse him for any payments made to this subsection with respect to such dwelling. 84 Stat. 1771 (1970), 12 U.S.C. § 1735b(b) (1970).

Legal Service Programs

. . . did much of the work leading to this prospective action, in particular the National Housing and Development Law Project of the Berkeley School of Law. David Bryson, an attorney for the Berkeley project, contacted legal aid societies in Seattle, Wash.; Oakland and Sacramento, Calif.; Kansas City, Kans. and Mo.; Flint, Mich.; and Austin, Tex. to exchange information on the condition of housing being sold to section 235 buyers. This information was forwarded to Senator Allan Cranston of California and served as a basis for enactment of section 104. U.S. COMM’N. ON CIVIL RIGHTS, HOME OWNERSHIP FOR LOWER INCOME FAMILIES 84, at n. 280 (1971).
Under §518(b) the low income consumer of existing housing subsidized under §235 is given substantial protection.\footnote{151} The Department of Housing and Urban Development now requires that every home mortgage conditional insurance commitment which is within the maximum limit available for mortgage insurance under §235 and which involves the financing of the purchase of an existing property contain the following special condition:

This commitment is issued on condition that if the mortgage is to be insured under Section 235, the seller will execute an agreement to reimburse HUD for expenses incurred in repairing structural or other defects with respect to the property being sold in the form prescribed by the Secretary and that a seller who is not the occupant of the property will also deposit 5 percent of the sales price in escrow with the mortgagee in accordance with the terms of the agreement.\footnote{152}

Section 518(b) of the National Housing Act has been imple-

\footnote{151} If there were any question about Congressional intent with regard to the rights of low income housing consumers subsidized under § 235, it was removed by legislative history of the Housing and Urban Development Act of 1970. Information received by the Committee indicates that some FHA appraisers have allowed blatantly defective homes to be sold to lower income families under the 235 program. Most purchasers of homes under 235 understandably believe that the Federal Government, which is providing a substantial subsidy to these families, is protecting their interests in the property. The Committee feels that HUD should bear the burden of correcting these defects or compensating the owner for them where HUD employees or agents have made an inadequate appraisal and inspection.

The Committee expects that HUD will review and tighten its appraisal procedures to require longer and more thorough physical inspections of properties by its appraisers and that it will clearly specify what items must be checked for defects. All too often, the FHA has viewed its role as a neutral middleman in a business transaction. As a government agency the FHA has an obligation to ensure that purchasers of section 235 homes are not misled into paying an exorbitant price or purchasing a seriously defective dwelling on the basis of the FHA appraised price and approval of subsidy payments. S. Rep. No. 91-1216, 91st Cong., 2d Sess. 6-7 (1970).

\footnote{152} FHA Letter 71-8 (April 9, 1971). In those cases where an escrow deposit is made the mortgagee will be required to be a party to the agreement as the escrow agent. FHA Letter 71-8, implemented a new “Seller’s Reimbursement Agreement.” FHA Form No. 2850, Under the Seller’s Reimbursement Agreement, the seller agrees

\(\ldots\) to reimburse the Secretary for any payments made by him to correct or compensate the buyer(s) for structural or other defects which seriously affect the use and livability of such dwelling, and hereby certifies that no such defect now exists. Id. at ¶ 1.

The seller must either state that he is the most recent occupant of the property being sold or deposit in escrow an amount equaling 5 percent of the sales price of the property covered by the agreement. Id. at ¶ 2. The seller authorizes
mented by regulation,\textsuperscript{153} circular,\textsuperscript{154} and letter.\textsuperscript{155} To qualify for assistance under §518(b), the FHA area or Insuring Office Director

. . . shall verify that the case meets the following requirements:

a. The mortgage shall have been insured under Section 235 of the National Housing Act and cover a single family dwelling.

b. The dwelling shall have been more than one year old on the date the conditional commitment was issued.

. . . the holder of this escrow to transfer to the Insurer all or such part of these funds as the Insurer, in its sole discretion, determines must be expended to correct or to compensate the purchaser for structural or other defects which seriously affect the use and livability of the premises. Seller(s) also hereby agree(s) to reimburse the Insurer above and beyond the amount escrowed to repair the structural or other defects covered by this agreement. Insurer's determination as to the necessity for, the reasonableness of the amount to be expended for, or the method to be used in performing such corrections or compensation shall be final and conclusive.

The Insurer and the seller agree that

. . . any unused escrow funds set aside pursuant to this agreement be returned to the Seller(s) by the escrow holder on the first day of the fourteenth month following the date of the insurance of the mortgage or at such earlier time as may be approved by the Insurer. \textit{Id. at ¶ 3.}

The following warning is made part of the contract:

\textbf{WARNING}

Section 1010 of Title 18, U.S.C., "Federal Housing Administration transactions," provides: "Whoever, for the purpose of . . . influencing in any way the action of such Administration . . . makes, passes, utters, or publishes any statement, knowing the same to be false . . . shall be fined not more than $5,000 or imprisoned not more than two years or both." \textit{Id. at 5.}

When a firm commitment is made to insure a mortgage on an existing property, FHA Letter No. \textit{M-71-1} must be delivered personally to the mortgagor at or before the time of closing.

FHA Letter No. \textit{M-71-1} advises the mortgagor that

. . . [i]f a serious defect appears during the first year after you move in, and you think it should have been noticed by the FHA before you moved in, the FHA may be able to help you. The defect must be one that seriously affects the use and livability of your house and must also be one that a proper inspection by the FHA should have disclosed.

153. In 36 Fed. Reg. 6896-97 (1971), Federal Housing Commissioner Gulledge stated: Because of the need to have these procedures available at the earliest possible date, I find that it is impracticable and contrary to public interest to engage in public rule making procedures and to postpone the effective date. These regulations will be effective immediately. However, all interested persons are invited to submit written comments or suggestions with respect to the regulations, which may be later revised in the light of comments received.


155. FHA Letter 71-11 (June 29, 1971).
c. The insured mortgage shall have been endorsed, as evidenced by issuance of a Mortgage Insurance Certificate, within one year of the application for assistance except that, with respect to any existing property on which a mortgage was insured under Section 235 prior to December 31, 1970, an application for assistance under Section 518(b) shall be filed no later than December 31, 1971.

d. The defect must be one that seriously affects the use and livability of the property.

e. The defect must be determined to have existed on the date the conditional commitment covering the property was issued by FHA and must be one that a proper inspection of the property could reasonably have been expected to reveal.\textsuperscript{155}

Since §518(b) could be effective only if as many mortgagors as possible were made aware of its availability, the Commissioner of the Federal Housing Administration required that written notice of the availability of §518(b) assistance be given all mortgagors whose houses were more than one year old at the time of the purchase.\textsuperscript{157}

\textsuperscript{155} HUD Circular, \textit{supra} note 154 at 3.

\textsuperscript{157} FHA Letter, \textit{supra} note 155. All mortgagors potentially eligible for § 518(b) assistance were to be notified in writing prior to July 31, 1971 that if your house was more than one year old when you bought it, and a serious defect appears within one year after you signed your final papers, the FHA may be able to help you pay for the repairs. The defect must be a serious one, and it must be one which should have been noticed by FHA before you moved in.

The following are examples of defects which may be eligible for assistance:

a. Termite infestation with evidence of damage to structural members or to exposed finish woodwork sufficient to require replacement.

b. Inoperative, defective or inadequate plumbing, heating or electrical systems.

c. Rotted or worn-out counter tops or floors. (Worn-out carpeting is not eligible unless it is the only finish floor). Defects such as burns, gouges, loosened hardware or doors of kitchen cabinets are not eligible.

d. Any structural failure in framing members or foundations visibly evident in an accessible attic or basement are is eligible.

e. A leaking or worn-out roof.

f. Drainage problems existing at time of purchase such as surface water in the crawl space or running against the house.

g. Rotted siding, window frames or other seriously deteriorated exterior surfaces are eligible.

Items which are \textit{not} eligible include:

a. Exterior paint failure.

b. Finish worn-off wood floors or other finish woodwork.

c. Cracked plaster or sheetrock, unless caused by structural failure eligible as described in (d) above.
The "primary objective" of the §235 program according to the Banking and Currency Committee was to

. . . facilitat[e] the addition to the housing stock of a substantial number of subsidized homes for lower income families, through the construction of new housing units and the substantial rehabilitation of older units. The program was intended to assume a major role in meeting the ten-year housing goals specified by the Congress in . . . 1968. These goals call for the construction and substantial rehabilitation of six million subsidized units for low and moderate income families by 1978.158

The Housing and Urban Development Act of 1970 extended the July 1, 1971, expiration date on the discretionary authority of the Secretary to use up to 30 percent of available contract funds with respect to existing non-rehabilitated units to July 1, 1972.159 The Senate Banking and Currency Committee

d. Interior paint wear.
e. Dead grass and shrubs.
f. Inoperative dishwasher, disposal, exhaust fans, window air-conditions, or other mechanical equipment not essential to the use and livability of the property, unless the complaint is received immediately after occupancy or evidence is furnished indicating that the condition existed at time of occupancy.
g. Broken glass and broken counterweight cords are not eligible. Inoperative windows are not eligible if one sash is operable in each room.
h. Defects in detached garages and other outbuildings are not eligible unless such buildings constitute a hazard in which case they are eligible for demolition and removal.

Even if there is something wrong with your house, you must continue to make your mortgage payments. If you cannot make the full payment for any reason, you should let your lender know before the payment is due. He will try to help you.

If a serious defect appears as described above, you should call or write the nearest HUD-FHA office listed on the enclosure of this letter. The Director of that office, or someone on his staff, will help you make a formal application for assistance. If you are eligible, your formal application must be received by the local HUD-FHA office within one year after you signed the final papers to buy your house or, if that was before January 1 of this year, by December 13, 1971.


While the major purpose of the Section 235 program was to add badly needed units to the housing stock and to make those units available to families in the lower income ranges, it was recognized that some level of eligibility to include existing housing units not requiring rehabilitation would give the program a useful flexibility . . . .

The Committee feels that by giving the Secretary the discretion to apply a maximum of 30 percent of 235 contract funds to existing housing would provide
. . . noted with increasing concern . . . that the 235 program is not assuming an adequate role in revitalizing housing in our central city areas. Both the 235 program generally and the 235(j) program, which is specifically designed to provide for the rehabilitation of deteriorating housing by nonprofit or public agencies for resale to lower income families, have not been utilized sufficiently to assist rehabilitation. If inner city areas are to be rebuilt, it is essential that housing subsidy programs, notably the 235 program, be directed toward encouraging rehabilitation.\(^{160}\)

In response to this concern, the Congress required that at least 10 percent of the total contracts for assistance payments authorized by appropriation acts to be made after June 30, 1971, shall be available for use "only with respect to dwellings . . . approved . . . prior to substantial rehabilitation."\(^{161}\)

Formalized complaint procedures are available to persons with complaints.\(^{162}\) Regulations have been promulgated implementing Section 518 of the National Housing Act.\(^{163}\) Applications for assistance in the correction of structural defects may be filed by mortgagors with the Field Office Director having jurisdiction over the area in which the property is located.\(^{164}\) The defect must "seriously affect the livability of the property."\(^{165}\) For new one to four family dwellings, the complainant must establish that the dwelling was approved for mortgage insurance prior to the beginning of construction and was inspected by the Federal Housing Administration or Veterans Administration.\(^{166}\) The complainant in new housing must also establish that he has made reasonable efforts to obtain a correction of a structural defect in his property by the builder or seller and that the defect has not been corrected.\(^{167}\) Complaints under §235(b) about insured dwellings which were more than one year old at the time of the mortgage insurance commitment may also be filed when the defect is of

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\(^{160}\) S. Rep. No. 91-1216, supra note 158.


\(^{162}\) Construction Complaint Handbook, FHA Manual at ¶ 5901, 5939.


\(^{164}\) Id. at §§ 200.502, 200.520.

\(^{165}\) Id. at §§ 200.505, 200.522(b).

\(^{166}\) Id. at 200.507(b).

\(^{167}\) Id. at § 200.507(c).
such a nature that a proper inspection could reasonably be expected to have disclosed it.168 On complaints about existing housing,

. . . [t]he Secretary, in determining whether to afford assistance, the amount thereof, its form, and when it will be afforded, will consider:

(a) The extent to which the defects represent a clear and present danger to the health and safety of the occupants;
(b) The availability of funds from which the Secretary is authorized to make expenditures hereunder; and
(c) such other matters as he deems material.169

Upon a finding by the Secretary that a mortgagor under §518(a) (new housing) is eligible for assistance, the Secretary may

(a) Pay expenses in connection with having the defect corrected.
(b) Pay the claim of the mortgagor for corrected damages to the property arising out of such defect.
(c) Acquire title to the property with the approval of the mortgagor and under such terms and conditions as are satisfactory to the mortgagor.170

Upon a finding by the Secretary that a mortgagor under §518(b) (existing housing) is eligible for assistance,

. . . the Secretary will, in his sole discretion, determine whether to afford assistance . . . by direct expenditures to correct defects . . . compensation of a mortgagor who has made such expenditures himself, or a combination of both direct expenditures and compensation of the mortgagor. . . .171

All decisions of the Secretary with respect to assistance are final and conclusive and shall not be subject to judicial review.172

168. Id. at § 200.522.
169. Id. at § 200.527.
170. Id. at § 200.510.
171. Id.
172. 12 U.S.C. § 1735(c) (1970) provides:
   The Secretary shall by regulations prescribe the terms and conditions under which expenditures and payments may be made under the provisions of this section, and his decisions regarding such expenditures or payments, and the terms and conditions under which the same are approved or disapproved, shall be final and conclusive and shall not be subject to judicial review.

Section 1735(c) of the code has been implemented by 24 C.F.R. §§ 200.515, 200.533 (1971). See note 163, supra.
III.

THE ADMINISTRATION OF SECTION 235 OF THE NATIONAL HOUSING ACT

It has long been argued that the law is not a neutral instrument but rather is oriented in favor of those groups or classes in society having the power to bend the legal order to their advantage.173 The poor generally obtain less protection from the law than the rich.174 But the need of the poor for such protection is no less great since they are often in market situations where illegal practices prevail.175 The poor often suffer because government agencies fail to fulfill their legal responsibilities.176

The Federal Housing Administration has traditionally defined its mission in exclusively financial terms: inspections and appraisals were made to provide financial security for government insured mortgages. The protection of the housing consumer was not an objective. Even when the federal law was amended to require that purchasers of homes be furnished copies of FHA appraisals, FHA maintained its traditional, disinterested role. FHA non-involvement reached its acme in United States v. Neustadt177 in which the Supreme Court held that a home buyer who relied upon an FHA statement of value did so at his own risk and that FHA was immune from liability under the Federal Tort Claims Act178 for negligent appraisals.

FHA passivity was based on the often erroneous presumption that upper- and middle-income housing consumers were capable of taking care of themselves on the real estate market. Upper and middle income families tended to be involved in transactions with the more reputable real estate firms. Upper and middle income families because of their higher educational level were better prepared to avoid falling prey to speculators and to identify

175. CAPLOVITZ, THE POOR PAY MORE, 142-45 (1963); WALD, LAW AND POVERTY 24 (1965).
fraudulent practices. When upper and middle income families were victimized, at least they usually had economic resources sufficient to cover their losses.

When the federal government began in the 1960's to extend opportunities for homeownership to lower income families, FHA was thrust into an entirely different type of market and was expected to assume a protective role on behalf of consumers wholly inconsistent with its traditional role. When the FHA maintained its traditional passivity in the lower income housing market, the lower income housing consumer was the loser. Disinterest by FHA in the lower income housing consumer often involved subversion of federal financial interests because of the ease with which the lower income family could "walk away" from its purchase and leave the FHA holding the bag. The crisis proportions of the controversy are suggested by the suspension in 1971 of the sale of existing houses under §235 in many parts of the country by the Secretary of Housing and Urban Development. Recent Congressional investigations on the administration of §235 suggest wide-scale abuses which confirm the hypothesis that the §235 program may have been administered in some areas of the country more to the benefit of speculators and unscrupulous builders than of the lower income families it was intended to serve.

The substantial federal inducement to homeownership for lower income families lacking either skill, experience or bargaining power in real estate transactions have made the traditional FHA role of passivity unconscionable. The federal inducement to home ownership was undertaken with knowledge that homeownership would be a novel experience for many of the participating families. The federal subsidy itself reflects awareness that the class of intended beneficiaries under the statute was largely incapable of achieving home ownership on their own. The inexperience and lack of sophistication of the statutory beneficiaries under §235 logically imply federal acceptance of a more exacting duty of federal care. Congressional recognition of the new federal responsibilities assumed under §235 is reflected in the requirement that §235 mortgages comply with all state laws and local ordinances relating to health, safety, or zoning as well as to certain minimum property standards prescribed by the FHA and is also implicit in 12 U.S.C. §1735b(b) (1970) establishing an administrative remedy for aggrieved families.
Congressional Investigations of Low-and-Moderate-Income Housing Programs and Home Financing Practices and Procedures

Hearings and staff investigations by the House Banking and Currency Committee on federally assisted low and moderate income housing programs\(^{179}\) and home financing practices and procedures,\(^{180}\) along with the Philadelphia hearings of the House Select Committee on Crime,\(^{181}\) have documented some of the abuses to which low income consumers are subjected in the housing market.

In December, 1970, the House Committee on Banking and Currency issued a Staff Report on abuses in low and moderate income housing programs.\(^{182}\) Incorporated into the report was a copy of a special executive hearing in which the Secretary of Housing and Urban Development, George Romney, appeared before the Committee and presented his views and comments on the questions and recommendations contained in the report.\(^{183}\)

The Staff Report of the House Committee on Banking and Currency charged that the

\[
\ldots \text{Department of Housing and Urban Development and its Federal Housing Administration may be well on its way toward insuring itself into a national housing scandal.} \ldots \\
\ldots \text{The Federal Housing Administration is insuring existing homes that are of such poor quality that there is little or no possibility that they can survive the life of the mortgage or even attempt to maintain only reasonable property value. FHA has}
\]


\(^{182}\) House Comm. on Banking and Currency, Investigation and Hearing of Abuses in Federal Low-and-Moderate-Income Housing Programs: Staff Report and Recommendations, 91st Cong., 2d Sess. (1970) [Committee Print] [Hereinafter 1970 Staff Report]. The 1970 Staff Report was based upon field investigations into the administration of the § 235 housing program in Patterson, N.J.; Everett and Spokane, Wash.; St. Louis and Elmwood, Mo.; and Pittsburgh, Pa. Committee files also contain letters from legal services attorneys and others recounting alleged abuses in Denver, Colorado; Kansas City, Kansas; St. Paul, Minn; and Rochester, N.Y., Id. at 71-97.

\(^{183}\) Id. at 133.
approved housing for the 235 program which, within months after purchase, has been condemned by municipal authorities. . . . FHA appraisers and inspectors have failed to live up to even the most basic agency requirements in inspecting or appraising houses.

FHA has allowed real estate speculation of the worst type to go on in the 235 program and has virtually turned its back on these practices.

In the area of new 235 construction, FHA has appraised houses for figures that are inflated several thousands of dollars above the true value of the home. The construction of these homes is of the cheapest type of building materials; and instead of buying a home, people purchasing these houses are buying a disaster. 184

The Staff Report observed that the §235 program was "carrying" the real estate market in many areas of the country. 185 In some areas, it was noted, §235 purchasers were "walking away" from their homes. The Staff Report expressed the fear that

. . . unless the 235 program undergoes a drastic remedial change the Federal government . . . may find itself owning thousands of substandard homes bearing inflated mortgages . . . [and] will either have to sell the property at a fraction of the mortgage balance or rehabilitate the property at a tremendous cost. . . . 186

In federal assistance contracts under 12 U.S.C. §1715z(h)(3), which authorizes a subsidy for the purchase of existing housing, the Staff Report revealed that the most common deficiencies are

. . . faulty plumbing, leaky basements, leaky roofs, cracked plaster, faulty or inadequate wiring, rotten wood in floors, staircases, ceilings, porches, lack of insulation, faulty heating units. 187

It was further alleged that where there was

. . . a price history, there were a disturbing number of situa-

184. Id. at 1.
185. Id. For example, in one county in the State of Washington, 80 percent of the real estate transactions in 1970 were made up of houses financed under § 235.
186. Id. at 1-2. The STAFF REPORT noted that one major nationwide mortgage company's foreclosure rate on houses financed under § 235 was already "around 5 percent . . . four times their normal foreclosure rate." 1970 STAFF REPORT, at 3.
187. Id. at 3.
tions where real estate speculators purchased properties at a minimal cost, and, after repairs which, if made, were cosmetic in nature, resold to the section 235 purchaser, with FHA approval, sometimes double in price within days or a few months after purchase by speculators. . . .

The 1970 Staff Report was critical of the role assumed by the FHA. FHA views itself, it was suggested,

. . . solely as a mortgage insurer whose interest is in the adequacy of the security for the loan rather than decent, safe and sanitary housing for people.

The Staff Report concluded, however, that the FHA had failed to meet even its own objective of assuring adequate security.

The Staff Report charged that excessive appraisals had been made. Excessive appraisals were attributed to the inadequate training of FHA appraisers; the heavy influence of the mortgage and real estate industries; the lack of disciplinary procedure to hold accountable appraisers who grossly over appraised; and the liberal use of outside appraisers. Real estate brokers told staff investigators that they were selling property under FHA §235 which they had "not been able to move in the last five or six years." The six percent realtors' fee on the sale of houses was

188. Id.
189. Id. at 4-5. The "condition of the property" is "the responsibility of the purchaser," according to the FHA Assistant Commissioner for Field Operations. 1970 STAFF REPORT, at 5. In a letter to a home buyer under § 235 who had complained to the FHA, the FHA director in Topeka, Kansas wrote:

. . . The FHA is not a party to your purchase contract nor does FHA insurance of the mortgage loan under its contract with the private lender constitute a guarantee of construction. Your purchase contract was a private undertaking between the seller and you, the buyer. The fact that construction may have been found acceptable by FHA does not constitute a warranty.

. . . [S]ince your home was purchased as an existing property, FHA cannot accept any liability nor require the seller of your home to correct any items of deficiency. Any further action, therefore, would be a matter for determination by you rather than the Federal Housing Administration. A.J. Dawson, Director, FHA, Topeka, Kan. to Mr. Robert E. Creek, Kansas City, Kan., Mar. 24, 1970.

190. Id. at 5-6.
191. Id. at 6.
192. Id. It was suggested that "many of the appraisers feel that their only future lies in the possibility of 'goods jobs' with the mortgagees or the real estate firms."

193. Id.
194. Id.
195. Id. at 8.
considered excessive when the properties are old, in "undesirable" neighborhoods, and salable only with the infusion of a federal subsidy and loan guarantee. The question was raised point-blank as to whether the §235 program "... is a program to subsidize the real estate broker or to subsidize the low income purchaser."

The staff field studies exposed the raw nerve of the Congressional policy to make the "fullest practicable utilization of the resources and capabilities of private enterprise" in the realization of national housing goals. In Paterson, New Jersey, for example, twenty properties were identified which were purchased and sold shortly thereafter to families under §235 with differentials between the purchase price and the sales price ranging from a low of $7,650 to a high of $18,200. In the 62 properties sold under §235 in Paterson, New Jersey, city building code inspections made subsequent to the sale disclosed "... a minimum of 28 violations [per house] and several houses had over 100 violations. City officials have expressed concern about the more than 100 FHA-owned houses which have been foreclosed in Paterson, New Jersey, which were standing vacant and were constantly subject to vandalism, fire and health hazards. It has been said that the vacant houses cause further deterioration of neighborhoods in which houses sold under §235 are located.

In Washington, D.C., the investigation revealed numerous

196. *Id.*
197. *Id.*
198. *Id.* at 11.
199. *Id.* The staff found that these houses, most of which were built prior to 1900, were located in
   ... rapidly deteriorating neighborhoods. One house visited by the staff ... had previously been a tavern. City records show that an order was issued by the city on October 6, 1969, to remove the refuse and board up the house. On November 18, 1969, the house was sold to a speculator for $1,800. A permit was obtained for electrical repairs at an estimated cost of $450. On March 24, 1970, the house was sold 235 for $20,000—an increase of over 1,100 percent. ... The tavern bar ... [in the] living room still remains. ... 1970 *STAFF REPORT* at 11-12.
Another house with a mortgage of $20,595 was foreclosed in January 1970 by the FHA which paid $4,784 for repairs before selling it in October 1970 for $16,000—a loss of over $10,000. Three days after the sale the city housing inspector found 122 building code violations and stated that the house could not be used for occupancy. *Id.*
200. *Id.* at 12.
201. *Id.* at 17.
housing code violations on houses sold under §235. In checking sales histories of over 120 houses in southeast Washington, it was found that the prices for which the houses sold were in excess of 40 to 150 percent of what the seller paid only a few months before. Not a single construction or repair permit had been issued by the city for the houses, which would indicate that "few if any of these homes had undergone the type of repair warranting the huge jump in price."  

An investigation in Berkeley and Oakland, California, "produced evidence of shockingly inflated prices for low income home buyers." Existing houses sold under §235 were estimated to be "overpriced, by at least a third or more" and some houses had "dangerous defects [which] had not been eliminated, despite promises by sellers to correct. . . ." The committee investigator was of the opinion that the houses were "incapable of passing honest FHA inspection and certainly in their present condition failed to meet minimum FHA standards." Sales prices of the houses were attributed to "speculators' activity" coupled with the purchaser's desperate need for housing. The conclusion was that value received was "lacking in all cases" and that the purchasers were paying "suburban prices for slum housing."

In Seattle, Washington, FHA inspection and appraisals presented one of the biggest problems:

. . . FHA officials told the staff that when the [§235] program

202. Staff memorandum to Hon. Wright Patman, Chairman, the House Committee on Banking and Currency, July 28, 1970, reprinted in 1970 Staff Report at 88. This memorandum alleged that many § 235 purchasers "have been victimized by unconscionable real estate speculators who have made fantastic profits in short periods." Staff members had made visual inspections of existing homes sold under § 235 in Washington and Philadelphia and concluded that they . . . are slums. Plaster is cracked and falling, wallpaper is peeling, wiring is faulty, wood is rotten, plumbing is corroded and leaking, furnaces have been condemned, ceilings have fallen in, roofs leak, hot water tanks are bad, [there are] rats . . . .

The Committee staff declared that unsuspecting low income purchasers in Washington and Philadelphia had been "bilked, cheated, defrauded." Significantly, the staff learned that in neither Philadelphia nor Washington had the sale of existing homes under § 235 involved "communication, liaison or cooperation with the local code enforcement authorities." Id. at 8. A list of properties visited by the staff which documented speculators' purchase prices of houses and subsequent sales prices under § 235 as well as the extensive housing code violations in the properties was attached to the Staff Memorandum of July 28, 1970. 1970 Staff Report at 88-98.

203. Id. at 17.
first went into operation, their appraiser, in appraising existing property would merely assign a valuation to a house, regardless of its condition. Thus, if the house was falling apart, the FHA appraiser would establish a low valuation on the house and the house could be sold for that amount under the 235 program. No attempt was made on the part of FHA to require any improvements so that the house could be brought up to local building code standards.\textsuperscript{204}

The flaws in the initial FHA practices were "quickly recognized by FHA" and FHA then changed its policy to require that repairs had to be made on substandard property and a compliance report filed with FHA.\textsuperscript{205} The change, however, did not prove too successful since compliance was to be determined by the mortgagee and mortgagees "certified that repairs had been made which, in fact, were not done."\textsuperscript{206} The committee staff believed that many of the problems in Seattle in the sale of existing housing under §235 could have been avoided had FHA "lived up to its requirement that 235 housing must pass the local building code in order to be accepted."\textsuperscript{207} The staff reported that it did not visit a single house that would meet the requirements of the Seattle building code.\textsuperscript{208}

In Everett, Washington, the staff visited Frontier Homes, a project with 57 new homes including townhouses and detached homes.\textsuperscript{209} Frontier Homes was built under

\begin{quote}
. . . The so-called choice plan under which certain local building requirements were overlooked (such as the width of streets and the size of building lots), in order to get the project underway.

While the initial concept of the development was to have it become a model community, it has, in fact, become an instant slum.\textsuperscript{210}
\end{quote}

\textsuperscript{204} Id. at 27.
\textsuperscript{205} Id.
\textsuperscript{206} Id. at 28. It was alleged by FHA officials that its inspectors do not like to work in the 235 program because of the type of homes and the areas in which these homes are located. Consequently, it is necessary for FHA to rotate the inspectors constantly. FHA was also faulted for its apparent inability to obtain the discharge of its inspectors for alcoholism or incompetence.
\textsuperscript{207} Id. at 30.
\textsuperscript{208} Id.
\textsuperscript{209} Id. at 31.
\textsuperscript{210} Id.
Complaints of homeowners were directed to faulty construction, false representation, health problems, and fire hazards. Twenty-seven buyers in the 57 home development either turned their homes back to FHA or "walked away." Since payments on the mortgages of the homes which were in the $13,000 to $18,500 range were less than $100 per month, it would appear that the homes were not abandoned due to lack of funds. Individuals who remained expressed fear that if they left their homes their credit would be damaged.\textsuperscript{211} The investigators reported that the homes were

\textbf{... constructed of the cheapest type of building materials imaginable, although FHA maintains that all of the materials meet the minimum building standards. The homes are extremely small, with some bedrooms no more than 8 by 10 feet. \textbf{...}}\textsuperscript{212}

Investigators found that there were "sagging floors" because there were no cross beams for support under the townhouses.\textsuperscript{213} Water leaked from bathroom fixtures into the ceiling below and into the light and electrical fixtures of the townhouses.\textsuperscript{214}

In Spokane, Washington, the committee staff observed a pattern in which the poorest of low income families vie for rehabilitated housing under §235 since the new homes in the $18,000 to $21,000 range are sold primarily to families in the upper range of eligibility.\textsuperscript{215} Abuses in the "buy back" aspects\textsuperscript{216} of the §235 program were alleged which are

\textbf{... numerous and shocking. In almost every case, the homeowner sells his home for a very small amount and repurchases after the rehabilitation work has been done for a figure that is in many cases twice as much as the selling price. \textbf{...} [t]he differential between the selling and the "buy-back" price is not}

\textsuperscript{211} Id.
\textsuperscript{212} Id. at 31-32.
\textsuperscript{213} Id. at 32.
\textsuperscript{214} Id. at 33.
\textsuperscript{215} Id. at 35.
\textsuperscript{216} Homeowners can not refinance their own homes under § 235 in order to make improvements. To take advantage of the rehabilitation program under § 235, the homeowner must sell his home either to a real estate firm, a contractor, a nonprofit group or other individual or group and then repurchase it after the rehabilitation work has been completed.
made up of home improvements. In short, the work that the homeowner pays for is not being done.\textsuperscript{217}

When FHA stated that there would be no more "buy-backs," another pattern emerged in which families are

\ldots sold a different home which is not that much better than the one they are living in. The house they have been living in and in which they invariably have a good deal of equity is bought from them by the same party—almost always a real estate company acting as both seller/buyer as well as agent. The low income family is told that they must sell the house for the balance owing or the house can not be sold. As in the "buy-backs" these families lose all equity and are in effect poorer than before they became involved in the program.\textsuperscript{218}

In St. Louis, Missouri, the committee staff spent three days inspecting houses which were the subject of homeowner complaints.\textsuperscript{219} The committee staff examined "a few very good houses being sold under the program" and others which could be classified as "hovels."\textsuperscript{220} Some of the purchasers of rehabilitated housing in St. Louis

\ldots are on welfare. Most of them have never owned homes before and have no idea of maintenance or utilities cost with no effort by FHA or anyone else to train them.

\ldots [There were] many female heads of the household with large numbers of children. Minor maintenance problems became major ones for these people. For example, in one house a kitchen ceiling fell down because of a leaking commode directly overhead. The woman did not have the money for a plumber nor did she have the competence to make the necessary repairs herself. \ldots \textsuperscript{221}

In Elmwood, Missouri, the committee staff visited a new

\begin{footnotesize}
\begin{enumerate}
\item Id. at 35. For example, one house in Spokane, Wash., was sold for $700 to a contractor. Approximately, two years later, following the rehabilitation work, the house was sold back to the original homeowner for $14,800 under § 235. Following an inspection of the house, it was estimated that "no more than several thousand dollars worth of work was performed on this house" and that much of the work was "cosmetic." Id. at 36.
\item Id. at 35.
\item Id. at 62.
\item Le Clercq: Entitlement under Section 235 of the National Housing Act
\item Printed by Scholar Commons, 1973
\end{enumerate}
\end{footnotesize}
§235 project of 32 units in the $14,000 to $16,500 price range.\textsuperscript{222} Homeowners, in Elmwood, had organized a grievance committee and were "attempting to obtain rectification of very serious construction faults."\textsuperscript{223} Drainage was deplorable and the builder had to furnish sump pumps for about ten of the houses.\textsuperscript{224} Light fixtures fell apart because of their poor quality. Cracks in the ceiling were common. There was no tile on the walls in the shower baths.\textsuperscript{225}

Most of the abuses revealed in the 1970 Staff Report related to the sale of existing houses under §235. The committee staff made three major recommendations:\textsuperscript{226}

(1) that there should be a joint effort by the Congress and HUD to review immediately all §235 commitments and, where substandard conditions are found, undertake rehabilitation or release the mortgagor from his contractual obligations under the mortgage;

(2) that prosecution and disciplinary action be taken against FHA personnel where warranted; and

(3) continued independent evaluation of FHA housing programs by the Government Accounting Office and the Congress.

In addition, the Staff Report made nine suggestions:\textsuperscript{227} (1) a thorough HUD review and evaluation of the §235 program; (2) and extensive training and retraining program of FHA appraisers; (3) the establish of FHA responsibility and liability to the homeowner; (4) a complete review of FHA minimum property standards; (5) more emphasis on previous price history before determining the fair market value of FHA-insured houses and required substantiation of the cost of repairs; (6) the establishment of an account for each approved sale to protect low income buyers from latent defects which are discovered or which occur after closing; (7) requiring that all deeds on federally insured property transactions show on their face the consideration paid and the interest of parties involved; (8) counseling for home buyers; and (9) the

\textsuperscript{222} Id. at 66.
\textsuperscript{223} Id.
\textsuperscript{224} Id. Maintenance of the sump pumps is the responsibility of the owner. The committee staff said that water in basements was common, percolating water is a problem and in one house the basement floor is separating from the basement wall.
\textsuperscript{225} Id. at 67.
\textsuperscript{226} Id. at 9.
\textsuperscript{227} Id. at 9-10.
posting of surety bonds by real estate brokers to which home purchasers may look in case of misrepresentation.

On December 16, 1970, the House Banking and Currency Committee invited the Secretary of Housing and Urban Development to testify relating to the Staff Report charging abuses in the low and moderate income housing programs. Mr. Romney opened with a caveat that since the Staff Report was not a "representative sample of experience, it is dangerous to generalize too sweepingly." Mr. Romney indicated that the §235 program represented a "massive federal leap into the field of subsidized home ownership for low and moderate income families." The Secretary stated that HUD responded to the worst credit crunch and housing shortage since World War II by pushing the 235 program and all our assisted housing programs to the limit in order to attempt to meet the ten-year housing goals set by Congress. Romney admitted some "serious . . . operational problems," but contended that "[o]n balance, I believe that we have done . . . [our job] well."

Mr. Romney admitted that the FHA

. . . had been identified with housing middle class America. Its standards had been developed to reflect middle class incomes and middle class response to the responsibilities of home ownership.

However, in response to Congressional policy FHA had attempted to facilitate the infusion of mortgage funds into older inner city areas. As a result, FHA involvement in blighted inner city mortgage financing by 1969 amounted to over 70,000 units—more than 17 percent of the 412,000 units insured on existing housing.

Mr. Romney recalled that in June of 1968

. . . in an effort to stimulate renovation and lower the cost of

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228. Id. at 135.
229. Id. at 136.
230. Id.
231. Id. Mr. Romney contrasted the nearly 102,000 homes subsidized under § 235 in less than 2 years time with the average of 35,000 public housing units constructed between 1937 and 1968. He observed that the § 235 workload had doubled in the past year with no increase in personnel.
232. Id. at 137.
233. Id.
234. Id. at 138. Approximately one-fourth of existing homes insured under § 235 were in blighted inner city areas.
home construction, FHA changed its standards to guides rather than absolute minimum requirements. Early this year complaints in new construction cases, particularly in the lower priced homes, indicated that this was an imprudent move. Accordingly in May of 1970, we issued a circular changing our construction guides back to minimum standards.235

Mr. Romney attempted to minimize the profits made by speculators and said that HUD was issuing insuring instructions which would require at least one conventional sale for sales comparison data with each appraisal.236 He pointed out that although the §235 buyer is “relatively less sophisticated, less knowledgeable and less experienced in home ownership” and, therefore, needs additional counseling and assistance, funding requests under §235 of the 1968 Housing Act in fiscal 1970 and 1971 for counseling were denied by the Congress.237

Mr. Romney’s initial response to the recommendations and suggestions of the 1970 Staff Report consisted of a rejoinder that FHA procedures were being reviewed but there were no funds for a “monumental undertaking” like reinspection. He welcomed review by GAO and Congress and indicated his willingness to refer to the FBI any case where fraud or criminal activity was suspected.238

In short, although Mr. Romney attempted to minimize the thrust of the 1970 Staff Report, he said that he would like to come back before the committee “after we have had a chance to investigate specifically the staff’s latest report.”239

On January 6, 1971, the House Banking and Currency Committee released its Staff Report along with Secretary Romney’s testimony.240 At the time Secretary Romney labeled the Committee Report “inaccurate, misleading and very incomplete” but eight days later admitted that apparently the abuses are more prevalent than had previously been evident.”241 Secretary Romney then announced suspension of the FHA §235 program as it related to existing housing and launched an investigation within

235. Id. at 141-42.
236. Id. at 144.
237. Id. at 146.
238. Id. at 148-49.
239. Id. at 159.
241. Id.
HUD. On March 31, 1971, a more contrite Secretary Romney made a second appearance before the House Banking and Currency Committee.

Secretary Romney acknowledged that the HUD examination of the alleged abuses disclosed in the 1970 Staff Report was "... not adequate and accurate and my previous testimony was based on that inadequate review." Secretary Romney admitted that upon more thorough examination of the alleged abuses the content of the committee report is "accurate and revealing." As a result, the Secretary launched an "extensive, coordinated program to analyze, investigate and audit the overall operation of the §235 Program." HUD reviewers reinspected 92 of the 102 occupied properties cited in the 1970 Staff Report and admitted overappraisals in 17 of them. In the 92 reinspected properties, reviewers found

... a total of 289 omissions of requirements which should have been made... including (a) 84 major defects in 39 units in structural, mechanical or finish items such as sagging floors, inoperable furnaces, rotted siding or fallen plaster; (b) 119 items requiring minor or deferred maintenance in 57 units such as leaky faucets and peeling paint. (c) 86 instances in 37 properties in which a certification should have been obtained concerning operability of plumbing, heating or electrical equipment, absence of termite infestation and weather tightness of the roof.

The HUD review corroborated the Banking and Currency Committee staff's allegations of speculator activity, admitted profits as great as 45 percent and concluded that the quality and sufficiency of repairs made by speculators "typically left a great deal to be desired." Secretary Romney admitted that HUD instruc-

242. Id. The suspension was limited to sales of existing housing and did not extend to substantially rehabilitated units. Following the suspension, two field meetings with the top housing production staff of every HUD field and regional office were held during which HUD "stressed the consumer protection aspects of their jobs." Id. at 7-8.

243. Id. at 5. The House Banking and Currency Committee submitted about 3,000 cases to HUD for examination. HUD prepared reports on the 102 properties in the December 1970 Staff Report which are retained in the committee files.

244. Id. at 6.

245. Id. at 8. The effort consisted of four separate in depth analyses, reviews, audits or investigations. These reports have not been made public. An unsuccessful effort was made to gain access to these reports for use in this article.

246. Id. at 9.

247. Id.
tions with respect to code enforcement were not carried out by the field offices involved and that improper mortgagee certifications of completions of required repairs had been made. HUD findings with regard to new construction in St. Louis, Missouri, and Everett, Washington, disclosed "obvious violations of the minimum property standards." HUD's internal investigation disclosed 41 matters which were identified

... as prima facia violations of section 1010, Title 18, U.S. Code, false statements to FHA. We referred these 41 cases to the Federal Bureau of Investigation.

Nine FHA staff appraisers were "involved in situations warranting referral to the FBI and an additional five appraisers were subjected to administrative action." Complementing all other HUD analyses and investigations was a study conducted by HUD's Audit Division at 52 major insuring and area offices. This study was based on a random sample of approximately 1,500 properties. On new construction under the §§235 and 223(e) programs, the internal auditors

... found that 25 percent of the homes inspected had conditions which should have been corrected before accepted for insurance. These conditions involved cases of poor workmanship, poor materials or poor design, or instances where there were significant defects affecting health, safety or liability.

On the existing houses, both sections 235 and 223(e), the latter being inner city houses, HUD found that about 44 percent of the houses inspected had conditions which should have been corrected before acceptance for insurance. These conditions involved significant defects that affected either health, safety or livability.

248. Id. Secretary Romney said that certifications of structural and mechanical elements by contractors were "sometimes false and the form often so vague as to be meaningless." As a result, HUD issued revised forms.

249. Id. at 10. Secretary Romney said that since the original inspection, considerable progress had been made in these cases.

250. Id.

251. Id. at 11.

252. Id.

253. Id. Baltas Birkle, Assistant Director of GAO testified that HUD's Internal Audit Divisions' "inspections were thorough and their inspection results were accurately and fairly tabulated." Id. at 17.

254. Id. at 17. One Spokane, Wash., woman complained that the workmen had sealed a cat in the floor. She tried unsuccessfully to get the cat out and asked for assistance from

In June 1971, the U.S. Commission on Civil Rights released a report upon the racial and ethnic impact of the §235 program in four metropolitan areas—Denver, Colo.; Philadelphia, Pa.; St. Louis, Mo. and Little Rock, Ark. A total of 286 cases were selected for examination as a sampling of §235 cases in the four metropolitan areas. Only 91 houses in the sample of 286 cases were new houses.

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<th>METROPOLITAN</th>
<th>NEW HOUSES</th>
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<td>St. Louis</td>
<td>0</td>
<td>79</td>
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<td>Philadelphia</td>
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<td>Little Rock</td>
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<td><strong>Total</strong></td>
<td><strong>91</strong></td>
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The buyers in the survey corresponded closely to the typical §235 buyer who, as of December 31, 1969, had an income of $5,579 and purchased a house costing $14,957. Overcrowding, however, was "far more common among minority §235 buyers than . . . among white buyers." The majority of houses purchased . . . were of good quality, usually superior to the housing . . . [§235 buyers] had previously lived in, and offered amenities that many of the buyers had not enjoyed before.

Of the sample of 286 houses, 214 were surveyed and identified by ethnic group.

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256. Id. at 12.
257. Id. at 29.
258. Id. at 31.
259. Id. at 33.
260. Id. at 12.
The Commission concluded that the program "is indeed contributing substantially to meeting the housing needs of minority group families." The report, however, disclosed a location pattern based upon "rigid racial lines."

In all four [metropolitan] areas, black families were overwhelmingly segregated. [B]lack 235 buyers purchased existing houses, most of them located in all-black or racially "changing" neighborhoods in the central city area. . . . More than three out of every four white buyers . . . purchased new 235 houses and nearly 9 out of every 10 white buyers located in suburban areas.

The Commission suggested that in some metropolitan areas not in the four city survey, the practice of constructing "separate but equal" federally assisted black and white subdivisions, reminiscent of past practices of constructing "separate but equal" schools and . . . public housing projects, may be occurring.

Although discrimination in the sale of housing is prohibited by law, the Commission charged that the "traditional segregated pattern is being repeated under the 235 program." The Commission placed the blame for discrimination upon the home finance industry—real estate brokers, builders and mortgage lenders; the tradition of separate housing markets and the experience, lack of knowledge and desperate need for housing of §235 buyers. The FHA and HUD were faulted for their "passive roles" and for their alleged failure to take "affirmative action" to

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261. Id.
262. Id. at 41.
263. Id. at 15.
264. Id. at 26.
265. See note 25 supra.
266. U.S. Comm'n, supra note 255, at 43.
267. Id. at 45-61.
further federal fair housing policies. The Commission concluded that the FHA had lived up to its "... past reputation ... of an anti-poor, anti-inner-city, anti-minority agency." Recent studies question some of the assumptions of the 1971 Report of the United States Commission on Civil Rights. However, it has long been assumed that racially integrated housing fosters more amicable relations between ethnic groups. The equal-status contact hypothesis of sociologists specifies that prejudice

... may be reduced by equal status contact between majority and minority groups in the pursuit of common goals. The effect is greatly enhanced if this contact is sanctioned by institutional supports (i.e., by law, custom or local atmosphere), and if it is of a sort that leads to the perception of common interests and common humanity between members of the two groups.

However, Cagle's critical review of the Deutsch and Wilner findings in comparison with a recent study of four integrated, low income public housing projects in Syracuse, raise substantial

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268. Id. at 77-87.
269. Id. at 87.
270. Deutsch & Collins, Interracial Housing: A Psychological Study of a Social Experiment (1951). Deutsch and Collins compared two segregated Newark public housing projects with two integrated projects in New York City. They found white housewives in integrated projects are more sociable than their counterparts in segregated projects. Consistent attitudinal differences between housewives in the two occupancy patterns were disclosed on a gamut of standardized measures of prejudice. Cf. Wilner & Cook, Human Relations in Interracial Housing (1955). In the Wilner study, a comparison of those living "near" or "far" from blacks in a project which combined building segregation and a small proportion of black families revealed that regardless of occupancy pattern, "nears" were more sociable with and less prejudiced toward blacks than were "fars".

271. Allport, The Nature of Prejudice 267 (1958). Equal status contacts in integrated housing are promoted by the proximity of the races. Cf. Festinger, Schachter & Back, Social Pressures in Informal Groups (1963), a study of married student housing projects, in which it was found that closeness in physical and "functional" distance increased the chances of "passive contacts" between residents.


See also, an expanded version of a paper by Laurence T. Cagel to the American Sociological Association, Denver, Colorado, Sept. 1971 in Education Resources Information Center Doc. No. 055138 at 9-15. Cagle found several inadequacies in the Deutsch and Wilner studies: for example, residents were not queried about how often they engaged in different activities with whites or blacks; the number of different activities tells nothing about which were most common; the frequency or superficiality of interaction at each level of neighborliness is not reported.
doubt about the intimacy of interracial contacts even in integrated projects. The Syracuse study of neighboring choices suggests that "over four-fifths of . . . neighboring relationships are racially homophilous." Most residents chose neighbors who were "both racially similar and live relatively close." Cagle concluded that the voluntaristic nature of neighboring in urban society, the competition for scarce resources among the poor of both races and the emergence of black consciousness inhibited interracial sociability and "may test the policy of integrated housing anew."

IV. Litigation Under Section 235

At least five cases have been filed asserting rights under the National Housing Act relating to the § 235 housing program. In Northwest Residents Association v. HUD plaintiffs alleged (a) that applications were being approved under 12 U.S.C.

273. Respondents were asked how many neighbors they knew "well enough to say hello to" and how many they felt "close to". A maximum of two friendship choices was ascertained and respondents were queried about the characteristics of the people they chose, including location, sex, marital status, race, religion, occupation, kinship and length of acquaintance. Id. at 16-17.

274. Id. at 18. In one project where blacks constituted only four percent of the population, two-thirds of the friendship choices of blacks involved other blacks.

275. Id. at 19.

276. Id. at 2.

277. Northwest Residents Ass'n v. HUD, 325 F. Supp. 65 (E.D. Wisc. 1971); Shannon v. HUD, 305 F. Supp. 205 (E.D. Pa. 1969) (The claim in Shannon v. HUD, involved only a peripheral inquiry into the permissible limits of HUD's discretion in choosing between alternative methods of achieving national housing objectives); Perry v. Romney, Civil No. 9347 (W.D. Wash. April 5, 1971), appeal docketed No. 71-2126, 9th Cir., (1971); Williams v. Gulledge, Civil No. KC-3346 (D. Kan. June 8, 1971); Brown v. Romney, Civil No. 18943-2 (W.D. Mo. January 22, 1971). In addition, two administrative complaints have been filed before the Secretary of Housing and Urban Development. Crigler v. Romney (Department of Housing and Urban Development, Aug. 10, 1971); Williams v. Gulledge (Department of Housing and Urban Development, undated). Discussion herein will be limited to Perry since Brown v. Romney, and Perry v. Romney, do not raise any additional questions of law. Neither administrative claim, Crigler v. Romney, or Williams v. Gulledge, raise additional issues. Copies of pleadings in some of the unreported cases, supra, may be obtained from the National Clearinghouse for Legal Services, 710 North Lakeshore Drive, Chicago, Ill., 60611.


279. Plaintiffs were six property owners and a non-profit organization which purports to represent them and certain other homeowners in the 18th ward of Milwaukee. Thus the first case decided involving rights allegedly protected under § 235 was apparently brought on behalf of homeowners opposed for social, aesthetic and economic reasons to the location of a § 235 development in proximity to them.
§1715z in which applicants were being made to pay more than the appraised value of the homes in violation of 12 U.S.C. §1715z(g) and that the defendants had failed to employ commonly accepted standards of real estate appraising and had made appraisals substantially in excess of the true economic value of properties; (b) that the defendants had approved applications for construction of housing in a saturation manner which seriously affected the desirability of surrounding properties in violation of FHA regulations; (c) that applications were approved without regard to the stability of the neighborhood, the possible overcrowding of schools, lack of proper recreational facilities, overtaxed local services which would deprive plaintiffs and the buyers of approved properties the amenities of life; (d) that the builders are realizing profits greater than allowed by law.\textsuperscript{280} Defendants moved to dismiss for lack of jurisdiction and lack of standing to sue. The court held that jurisdiction was conferred under the Administrative Procedure Act.\textsuperscript{281} The court reasoned that preclusion of judicial review requires a showing of clear evidence of legislative intent, that such intent should not be lightly inferred and that non-review would be unsound and unjust in the instant case.\textsuperscript{282} The court's holding on jurisdiction is consistent with the critical

\textsuperscript{280} 325 F. Supp. at 66. There is no limitation on profits on the construction or sale of housing under § 235.


need to increase the accountability of persons administering federal programs to the intended beneficiaries of those programs or others whose vital interests are affected.\textsuperscript{283} The court likewise resolved the question of standing in favor of plaintiffs\textsuperscript{284} and denied defendants motion to dismiss for failure to state a claim.\textsuperscript{285}

In \textit{Perry v. Romney},\textsuperscript{286} the district court dismissed the complaint for lack of jurisdiction in a brief two-page order after concluding that Congress enacted § 235 . . . to enable disadvantaged and low income people to purchase homes by virtue of the government’s loan of its credit, but did not provide for recourse against the government for mistakes or errors or omissions by the Secretary in the exercise of his

\begin{footnotesize}
\textsuperscript{283} The courts are “most reluctant to assume Congress has closed the avenue of effective review to those individuals most directly affected by the administration of its program.” Rosado v. Wyman, 397 U.S. 397, 420 (1970).

\textsuperscript{284} The court relied upon Ass’n of Data Processing Service Organization, Inc. v. Camp, 397 U.S. 150 (1970) and Barlow v. Collins, 397 U.S. 159 (1970). In these cases, the court formulated a two level test of standing: (1) whether the plaintiff has alleged that the challenged action has caused him injury in fact, economic or otherwise and (2) whether the interest asserted by the Plaintiff is arguably within the zones of interests sought to be protected or regulated by the statute in question. The court in \textit{Northwest Residents Ass’n} observed that plaintiffs clearly met the first test of standing upon the allegation of economic injury but thought that “[c]onsiderably more difficulty is posed by the second requirement for standing . . . .” 325 F. Supp. at 68. The court noted that no statute was cited by the plaintiffs under which it may be said that their special interests were recognized and protected. However, the court reasoned that the purpose of the National Housing Act of which § 235 was a part included the goal of a “suitable living environment for every American family.” 82 Stat. 476 (1968), 12 U.S.C. § 1701t (1970). Since defendants’ actions directly affected the suitability of plaintiffs’ living environment, plaintiffs had standing to sue. The court’s holding apparently would not be sufficient to confer standing with regard to their claim asserting excessive appraisals and sales prices. \textit{See} 325 F. Supp. at 66, n. 4 and note 277 \textit{supra}. The expansive application of standing was bottomed on Shannon v. HUD, 305 F. Supp. 205 (E.D. Pa. 1969) where plaintiff businessmen and civic associations in the vicinity of a proposed apartment project had standing to challenge HUD alteration of an urban renewal plan because plaintiffs . . . are those persons whose ‘living environment,’ 42 U.S.C. § 1451(c)(1) (Supp. 1969) is directly affected by the challenged amendment of the plan and, as such, they are the logical parties, indeed the only presently available ones, to challenge the alleged departure from the procedural process assertedly required under the Act.

\textsuperscript{285} The court believed that the pleadings left many questions unanswered and made no intimation of the likelihood of plaintiff’s ultimate success at trial on the merits but concluded that there were sufficient allegations in the complaint which if proved would tend to support their cause of action. \textit{Cf.} Izaak Walton League of America v. St. Clair, 313 F. Supp. 1312 (D. Minn. 1970).

\textsuperscript{286} Civil No. 9347 (W.D. Wash. April 5, 1971) \textit{appeal docketed} No. 71-2126, 9th Cir. (1971).
\end{footnotesize}
discretion concerning the properties that justified the guarantee of the mortgage indebtedness owed by the purchaser to the seller.287

Jurisdiction was asserted under Article III of the U.S. Constitution and four separate sections of the Code: 28 U.S.C. §1337 (on the theory that the National Housing Act is a statute regulating commerce); 28 U.S.C. §1346(a)(2) and (b) (authorizing civil actions in the nature of mandamus against federal officials) and 5 U.S.C. §1361 (authorizing judicial review of federal agency decisions).288 Plaintiff-appellants in Perry v. Romney purchased existing homes under §235(i) of the National Housing Act. Appellants alleged that they failed to notice or discover defects which seriously interfered with their use and enjoyment; upon taking possession, they were

... beset by a nightmare of leaking and stopped up plumbing, defective and inoperative electrical outlets and switches, flooded basements, inadequate heating systems, roaches, dangerous stairways and numerous other defects.289

Appellants alleged that they did not know whether an FHA inspector in fact inspected their property prior to the sale but asserted they were not furnished with a copy of any FHA Work Order.290 On June 10, 1970, the Housing Conservation Division of the Seattle, Washington, Building Department allegedly inspected plaintiffs premises and on July 8, 1970, sent them a notification that their houses were “substandard.”291 On August 4, 1970, plaintiffs sent a letter to the Area Director of the Seattle, Washington, Insuring Office of FHA asking that FHA correct their defects or allow them to get another §235 house without a

287. The plaintiff-appellants were

... inexperienced home buyers, none of whom had ever purchased a home before. All have had a limited educational background. Ms. Perry, in fact, does not read or write. Brief for Appellant at 4, Perry v. Romney.


289. Record at 14-16, in Brief for Appellant at 5, Perry v. Romney.

290. Brief for Appellant at 4, Perry v. Romney. Appellants contended that they “believed that FHA would not approve for insurance and subsidy any houses that contained substantial defects.” Complaint at ¶ IIIA. Perry v. Romney.

291. A building used for human habitation in Seattle, Wash., is “substandard” when there

... exists conditions or combinations thereof to an extent that endangers the health, safety, morals or general welfare of the public or occupants. Record at 16, in Brief for Appellant at 5, Perry v. Romney.
down payment. On September 1, 1970, the FHA Area Director responded that FHA did not make compliance inspections to assure that existing construction meets FHA minimum property standards and that existing property was appraised only in order to estimate its value. On October 20, 1970, plaintiffs' counsel met with FHA officials in Seattle, Washington, who offered to allow appellants "to deed their houses back to the mortgagee without harming their chances to participate in the §235 program in the future." The FHA offer was considered insufficient because

. . . plaintiffs will have to spend another $200.00 down payment for a second §235 house, they will have moving costs for two (2) moves (about $300), and they have spent money in repairs for the first §235 house. Most important, no §235 commitments are presently available.

The appellants asserted that they were recipients of public assistance and did not have sufficient funds to bring their houses up to housing code standards although they were subject to possible criminal and civil penalties under the Seattle Housing Code for failure to do so.

Appellants' complaint sought injunctive relief compelling federal officers to comply with the National Housing Act, damages and a declaratory judgment. The complaint asserted that the Seattle Insuring Office of the Federal Housing Administration had "engaged in a pattern and practice of placing families into sub-standard §235 housing." Appellants sought relief on behalf of themselves and all other similarly situated on the grounds


293. Appendix E, Complaint, Perry v. Romney. The statement of policy in the FHA letter of September 1, 1970, was based on the Seattle, Wash., FHA Insuring Office's Circular Letter No. 192 attached to the Complaint as Appendix F. The policy declared that FHA inspects only to make an estimate of value used in establishing the maximum insurable loan.

294. Complaint at ¶ 11, Perry v. Romney. Copies of FHA letters making that offer were incorporated into the Complaint and it was contended constituted "an admission of negligent error by defendants and their agents."

295. Complaint at ¶ 12, Perry v. Romney.

296. Id. at ¶ 13.

297. Id. at ¶ I.

298. Id. at ¶ IIIA.

299. Appellants purported to represent under Fed. R. Civ. P. 23(c)(4)(B) all present
that FHA practice violates §235(i)(2) of the National Housing Act which incorporates the requirement of §211(d)(2) limiting eligibility for FHA mortgage insurance to mortgages

. . . secured by property upon which there is located a dwelling conforming to applicable standards prescribed by the Secretary . . . and meeting the requirements of all State laws, or local ordinances or regulations relating to the public health or safety, zoning, or otherwise, which may be applicable thereto. . . .

Appellants sought injunctive relief to compel defendants to limit insurance of existing housing under §235(i) to housing which complies with local housing codes.

Appellants sought money damages from the United States in sufficient amount to correct the violations of the Seattle Housing Code which existed when FHA gave final approval to mortgage insurance and the §235 subsidy. Under the Federal Tort Claims Act appellants sought damages for defendants' negligent performance of their duties under §235. Alternatively, appellants sought injunctive relief to allow them to deed their present house to the mortgagee and purchase without any downpayment a §235 house providing decent, safe and sanitary housing under local housing code standards.

Recovery under the Federal Tort Claims Act would appear to be precluded by 28 U.S.C. §2680(h) which bars recovery under

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purchasers of existing substandard housing purchased under § 235(i) of the National Housing Act. Id. at ¶ VI 2.

300. 82 Stat. 480 (1968), 12 U.S.C. § 1715z(i)(2) (1970). Appellants contended that defendant's violation of this statutory duty was negligence per se entitling them to damages under the Tucker Act and the Federal Tort Claims Act, 28 U.S.C. §§ 1346(a)(2) and 1346(b), "in sufficient amount to enable them to bring their houses up to housing code standards." Complaint, at ¶ VIII C2, Perry v. Romney.

301. 12 U.S.C. § 1715z(i)(2) (1970). This section of the United States Code has been implemented by HUD HANDBOOK FHA 4441.1(3) which establishes that housing "... should provide decent, safe, sanitary conditions, as judged on the bases of FHA standards, local codes and regulations."

302. Complaint at ¶ IIB, Perry v. Romney. Appellants reasoned that §§ 235(i)(2) and 221(d)(2)

. . . place a clear duty upon the defendants to insure and subsidize under § 235 only that housing complying with local housing codes and plaintiffs are the class of persons intended to be benefited by the proper exercise of that duty. Complaint at ¶ IIC.2, Perry v. Romney.


304. Complaint at ¶ IIC.3, Perry v. Romney.

305. Id. at ¶ IIC.4.
the act upon “[a]ny claim arising out of . . . misrepresent-
...” In United States v. Neustadt,306 the court saw the
issue as

. . . whether the United States may be held liable, under the
Federal Tort Claims Act . . . to a purchaser of residential prop-
erty who has been furnished a statement reporting the results
of an inaccurate FHA inspection and appraisal, and who, in
reliance thereon, has been induced by the seller to pay a pur-
chase price in excess of the property’s fair market value.307

The court held that the claim was not actionable and that the
government “must be absolved from liability” since “§2680(h)
comprehends claims arising out of negligent, as well as willful,
misrepresentation.”308 The rationale for the decision was that the

. . . primary and predominant objective of the appraisal system
was the “protection of the Government and its insurance

306. 366 U.S. 696 (1961) (Douglas J., dissenting). In Neustadt, cracks developed in
the ceilings and walls of the house as a result of a condition existing in the subsoil beneath
the house. In failing to ascertain this defect the FHA report significantly overvalued the
property. Significantly, the defect was one which related to financial value—not to health
or safety.

307. Id. at 697-98.
308. Id. at 701-2. Accord, Jones v. U.S., 207 F.2d. 563 (2d Cir. 1953) (statement issued
to plaintiffs by the United States Geological Survey erroneously estimating the oil produc-
cing capacity of certain land); National Mfg. Co. v. U.S., 210 F.2d 263 (8th Cir. 1954)
negligent weather and flood information from the Departments of Commerce and Inter-
rior); Clark v. U.S., 218 F.2d 446 (9th Cir. 1954) (negligent maintenance of river embank-
ment by Army engineers); Miller Harness Co. v. U.S., 241 F.2d 781 (2d Cir. 1957) (ne-
gligent description of surplus property by U.S. Army); Anglo-American & Overseas Corp. v.
U.S., 242 F.2d 236 (2d Cir. 1957) (negligent inspection of imported tomato paste by Food
and Drug Administration officials); Hall v. U.S., 274 F.2d 69 (10th Cir. 1959) (negligent
inspection of plaintiff’s cattle by the Department of Agriculture); Social Security Admin-
(negligent audit of credit union by Federal examiner); United States v. Van Meter 149 F.

In United States v. Neustadt, 281 F.2d 596 (4th Cir. 1960), the Court of Appeals for
the Fourth Circuit had taken the opposite view and deemed § 2680(h) inapplicable be-
cause misrepresentation was “merely incidental” to the “gravamen” of the claim, i.e.,
“the careless making of an excessive appraisal so that [respondents were] . . . deceived
and suffered substantial loss.” Id., at 602. The Supreme Court considered that such a
finespun distinction ignored established tort definitions and

[c]ertainly there is no warrant for assuming that Congress was unaware of
established tort definitions when it enacted the Tort Claims Act in 1946, after
spending “some twenty-eight years of congressional drafting and redrafting,
amendment and counteramendment.” United States v. Neustadt, 366 U.S. 696,
funds"; that the mortgage insurance program was not designed to insure anything other than the repayment of loans made by lender-mortgagees; and that "there is no legal relationship between the FHA and the individual mortgagor." Never once was it intimated that, by an FHA appraisal, the Government would, in any sense, represent or guarantee to the purchaser that he was receiving a certain value for this money. 309

The court concluded that there was no indication that Congress intended by its 1954 addition of §226310

. . . to modify the legislation's fundamental design from a system of mortgage repayment insurance to one of guaranty or warranty to the purchaser of value received. . . . 311

The barrier of 28 U.S.C. §2680 is formidable, but Neustadt is not dispositive of Perry. The attempt of appellants to distinguish Neustadt on the ground that the gravamen of their claim is negligence rather than misrepresentation312 is neither more, nor less, persuasive on its face than the repudiated rationale of the Fourth Circuit in Neustadt. 313 Appellants' argument that Neustadt can be distinguished from Perry because of the "broader purpose of §235 . . . [and] the recognition that the FHA responsibilities to the intended beneficiaries were conceived

   The Commissioner is [hereby] authorized and directed to require that, in connection with any property . . . approved for mortgage insurance . . . the seller or builder . . . shall agree to deliver, prior to the sale of the property, to the person purchasing such dwelling for his own occupancy a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner . . . .
311. United States v. Neustadt, 366 U.S. 696, 709 (1961). The Court based its conclusion upon quoted excerpts from the Committee Hearings in both Houses of Congress which, it was said, made it "irrefutably clear" that
   . . . Congress did not . . . intend to convert the FHA appraisal into a warranty of value or otherwise to extend to the purchaser any actionable right of redress against the Government in the event of a faulty appraisal. Id. at 709.
   The Court regarded § 226 as
   . . . but one of numerous instances in which Congress has relegated to a governmental agency the duty either to disclose directly, or to require private persons to disclose, information for the assistance and guidance of other persons in the conduct of their economic and commercial affairs. Id. at 710.
312. Brief for Appellant at 61, Perry v. Romney.
to be greater than under the other FHA insurance programs". The primary concern of the Congress under §226 was the "protection of the government and its insurance funds." In contrast, the intent of the Congress under §235 was to increase substantially the

. . . existing supply of good, low cost housing [which] is entirely inadequate and shows little tendency to improve without the impetus a program such as this can give it.

In order to achieve the substantial increase in good low cost housing available to lower income families, the Senate bill contained a provision which limited assistance generally to new and rehabilitated housing. The House amendment placed no statutory restrictions on existing structures. The conference substitute conformed to the Senate bill except that it retained the provision of the House amendment extending eligibility for existing housing if assistance payments are made on behalf of a family who purchased the unit from a non-profit organization pursuant to §235(j) and for other standard housing aided under §235(j). The 1968 hearings illuminate this legislative history; at the hearings, the Congress was urged to authorize assistance payments for existing housing.

314. Brief for Appellant at 63, Perry v. Romney.
316. H.R. REP. No. 1585, 90th Cong., 2d Sess. 8 (1968). It was believed that a "substantial increase in the number of dwellings available to low and moderate income families . . . is sorely needed." Id. Accord, S. REP. No. 1123, 90th Cong., 2d Sess. 10 (1968).
317. S. REP. No. 1123, supra note 316, at 10. The Senate Bill made exceptions with respect to standard existing housing for (a) displaced families (b) families with five or more minors (c) families occupying public housing (d) a dwelling in a rent supplement project (e) a dwelling unit in § 236 project. However, assistance for standard existing housing included in the above categories was limited to 25% of funds for fiscal year 1969; 15% for fiscal year 1971. Both the Senate and the House expected that in areas where the housing market is tight and added demand for existing housing could inflate prices, the exception for existing housing will not be utilized. S. REP. No. 1123 supra note 316, at 10. H. REP. No. 1585 supra note 316, at 8.
318. H.R. REP. No. 1585, supra note 316, at 8.
Existing housing units . . . would be eligible under this program if the units meet standards prescribed by the Secretary. The committee expects that the Secretary will allocate contract funds between existing and new housing units in a manner which furthers the long range housing goal of providing a decent living environment for all American families.
. . . that otherwise meets the standards established under the programs. This would have at least two salutary effects. First, it would broaden the range of housing choice for low-income families. Second, it would permit the programs to have an immediate impact by housing many thousands of low income families who otherwise would have to wait two years or more after the bill's enactment until new housing could be constructed. As you know, the low rent public housing programs currently is [sic.] making use of existing housing under the section 23 leasing program. Adequate safeguards could be provided under the new programs similar to those provided under public housing. . . .

The most significant distinction between §226 of the National Housing Act under which Neustadt was decided and §235 is that the latter, but not the former, must conform to the requirements of 12 U.S.C. §1715f(d)(2). It is of great moment that 12 U.S.C. §1715f(d)(2) requires conformity of properties to both the standards prescribed by the Secretary and to the requirements of all State laws, or local ordinances, or regulations relating to the public health, or safety, zoning, or otherwise. It is clear that the purpose of the Minimum Property Standards is to set forth the minimum qualities considered necessary in the planning, construction and development of the property which is to serve as security for an insured mortgage.

320. 1968 Hearings, supra note 4, pt. 2, at 884 [emphasis added] (Wm. Taylor, Staff Dir., U.S. Comm’n on Civil Rights). Section 23 of the National Housing Act was added by 79 Stat. 451 (1965), as amended 42 U.S.C. § 1421(b) (1970). Section 23, like § 235, was remedial legislation. Its purpose was to provide a "supplementary form of low rent housing which will aid in assuring a decent place to live for every citizen." The "safeguards" of leased, low-rent housing in private accommodations were derived from their statutory limitation to dwelling units in an existing structure, leased from a private owner, which provide decent, safe, and sanitary dwelling accommodations. § 23(a)(1), 42 U.S.C. § 1421(b) (1970) [emphasis added].

The public housing agencies were required to conduct appropriate inspections of the units offered to be made available in any residential structure by the owner thereof in response to such invitation, and if—

(1) it finds that such units are, or may be made suitable for use as low rent housing . . . and

(2) the rentals to be charged for such units . . . are within the financial range of families of low income,

such agency may approve such units for use as low-rent housing in private accommodations. . . . § 28(c), 42 U.S.C. § 1421(b) (1970) [emphasis added].

321. FHA Minimum Property Standards, supra note 65, at vii.
As the FHA, Minimum Property Standards Manual acknowledges,

... building code[s] ... are primarily concerned with factors of health and safety and not the many other aspects of design and use which are included herein as essential for mortgage insurance determinations.\(^{322}\)

Had Congress been concerned only with the security of FHA insured mortgages, as is the case in §203 Neustadt situations, the Minimum Property Standards would be sufficient to satisfy Congressional policy. Congressional enactment of a two-level test for §235 mortgages unmistakably reflected a dual Congressional intent to assure the security of FHA mortgages and to secure additional, nonpecuniary benefits for the intended beneficiaries of §235 and others affected by its implementation.\(^{323}\) Since the purpose of public health and safety statutes, ordinances and regulations is to afford protection to occupants of housing and such ordinances are enforceable by occupants,\(^{324}\) it is readily apparent that Congress has not "closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program."\(^{325}\) The sale of housing which does not conform to state and local statutes, ordinances and regulations relating to public health, safety and zoning demonstrably does not further the Congressional purpose of §235 to effect a substantial increase in the sorely needed, entirely inadequate existing supply of good, low cost housing.

In Neustadt, the private property owners sought to have the government warrant the financial value of their purchase. Government appraisals of value under the Minimum Property Standards are intended only to provide security for government insured mortgages and, although the homebuyer may benefit (or be misled as in Neustadt) from such appraisals, he has no legal right to rely upon them.\(^{326}\) But FHA inspections to ascertain con-

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322. Id.
323. Required conformity to local zoning ordinances and regulations, for example, obviously brings property owners within proximity to § 235 development commitments within the zone of interests protected by the statute.
formity with state and local health, safety and zoning measures are just as surely intended to safeguard the health and safety of the housing consumer as §226 appraisals are intended to protect the government against financial loss. Were the only government objective that of financial security, the code conformity requirement of 42 U.S.C. §1715l(d)(2) would be a redundancy. It is irrefutably clear that the Congressional purpose under 42 U.S.C. §1715l(d)(2) was broader and more solicitous of the housing consumer than elsewhere in the National Housing Act. The Congressional purpose under 42 U.S.C. §1715l(d)(2) partakes of the purposes of the state and local health and safety legislation which was made part of the federal standard. The remedial and beneficent purposes of state and local health and safety legislation can not be lightly ignored.327 By incorporating state and local health and safety norms into its standard, the Congress unmistakably indicated concern for the health and safety of the housing consumer. Congress obviously recognized that the only way to increase the existing supply of good housing available to low income families was to bring certain existing properties into conformity with the exacting, nonpecuniary requirements of state and local health and safety legislation, the purpose of which is to assure decent, safe and sanitary housing. Recovery under the Tort Claims Act is highly dubious, unless Neustadt is reversed and the

While your committee has included a number of tightening amendments and safeguards against possible abuses and irregularities in the administration of the various housing programs, it feels that there is a need for a change in the approach or philosophy of administration that the Federal Housing Administration appears to have manifested thus far. While naturally and properly the FHA should be concerned with protecting its insurance fund, the builder and the mortgagee against loss and encouraging profitable programs of construction, and while your committee fully appreciates, as it has stated in the opening paragraphs, of this report, the importance of maintaining a high level of housing production, these objectives should not obscure the fact that the first responsibility of Congress, and that of any agency administering part of all of the housing program, is to protect and preserve the public interest, in general, and the rights of homeowners, in particular. It is your committee’s considered opinion, and unless contrary views are expressed or amendments are offered, that it is the intent of Congress that the HHFA and its constituent agencies in their administration of the program which they are authorized to carry out shall at all times regard as a primary responsibility their duty to act in the interest of the individual home purchaser and in so doing to protect his interest to the extent feasible.

rationale of the Fourth Circuit in *Neustadt* is approved. However, in the face of clear Congressional intent that the sale of existing housing under §235(i) comply with all state and local health, safety and zoning measures, dismissal of *Perry* by the district court is reversible error because of its inconsistency with he Congressional purpose of 42 U.S.C. § 1715l(d)(2) (1970).

Jurisdiction in *Perry* can be found upon §10 of the Administrative Procedure Act. The Administrative Procedure Act applies

... except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by the law.

The United States contended that judicial review in *Perry* was precluded by §518(c) of the National Housing Act, that appellants have an adequate administrative remedy and that as a matter of discretion the court should require exhaustion of that remedy.

A substantial literature exists on the concept of reviewability under the Administrative Procedure Act. Although judicial re-

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328. Section 10 provides:
A person suffering legal wrong because of Agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. 80 Stat. 392 (1966), 42 U.S.C. § 702 (1970).


331. Defendants' Memorandum of Authorities on Jurisdiction at 12, Perry v. Romney.


view of some questions has been precluded by §518(c), there remains the task of delineating the questions Congress did not intend to include within the nonreviewability clause of §518(c) and the questions which may yet be subject to review.

It has been suggested that the question of reviewability should be based upon a delicate balancing of the individual and institutional interests involved.334 Berger contends that section 10 of the APA explicitly directs the courts to review all claims of abuse of discretion; he would read the phrase “committed to agency discretion” as “committed to a reasonably exercised discretion” and thus avoid the jurisdictional problem it so often raises. Berger believes that an individual’s interest in having a claim adjudicated outweighs any of the institutional interests in effective, speedy and economical enforcement of Congressional programs. Under Berger’s analysis, it would appear that a claim of abuse of discretion always has constitutional dimensions.335 The Berger approach has been criticized336 for alleged inconsistency with the legislative history of the APA;337 misallocation of

334. See Berger articles supra, note 333. This balancing process is similar to the balancing process courts undertake in the delineation of constitutional rights. See GUNTHER & DOWLING, INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 400-466 (1970) and the cases cited therein.

335. See Berger articles supra note 333.

336. Saferstein, supra note 333, at 374-77.

337. Id. at 374 n.33.
the resources of administrative agencies and the federal judicial system, and promotion of frivolous claims. Judge Friendly's suggestion that the review of abuse of discretion situations should be confined to instances in which "no reasonable man would take the opposite view," has some appeal but the examples Friendly gives "would almost certainly be heard under the established exceptions to nonreviewability" and, more importantly,

... to use abuse of discretion, narrowly defined, as a de facto jurisdictional test is either to foreclose any chance that claims meeting only a broader definition of abuse of discretion could be reviewed, or to court a great deal of unwarranted judicial interference and inefficiency.

Saferstein attempted to develop a rational structure for analyzing the doctrine of nonreviewability under which courts can reach an equitable adjustment of the interests of institutions and affected individuals. Saferstein's approach is broader than Friendly's, more narrow than Berger's.

Federal jurisdiction in Perry should be considered within the

338. Saferstein contends that "an increased protection for an allegedly aggrieved minority may result in a disproportionate decrease in badly needed services for the majority." Id. at 375. Nor, in his opinion, can it be "assumed that the scope of review can be so limited that agencies will remain free to administer their programs creatively." Id.

339. Saferstein insists that

... for Berger's argument to be seriously considered on policy grounds, it must be assumed that abuses of discretion leap from the pleadings, and that all a court need do to remedy an abuse is to reverse summarily. Even assuming that courts have the prestige and power to remedy all such abuses... the well intentioned court may find it impossible to review agency actions without expending an inordinate amount of time analyzing its functions, or without somewhat constricting valid agency discretion... Id.

340. See Wong Wing Hang v. Immigration & Naturalization Serv., 360 F.2d 715, 718 (2d Cir. 1966), quoting Delno v. Market St. Ry, 124 F.2d 965, 987 (9th Cir. 1942). Judge Friendly illustrates his narrow standard thusly:

Without essaying comprehensive definition, we think the denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or, in Judge Learned Hand's words, on other "considerations that Congress could not have intended to make relevant." 360 F.2d at 719.

341. Saferstein, supra note 333, at 376 n.38.

342. Id. at 376.

343. Id. Although Saferstein's analysis was developed to meet the problem of the "committed to agency discretion" doctrine it is useful in approaching the entire question of nonreviewability.
context of standards relevant to the question of reviewability. Two basic sources of information should

. . . help a court decide whether and to what extent review is consistent with a particular agency's functions. First, is any specific language in the statutory delegation that speaks to the role of the judiciary. Second is the general congressional scheme entrusted to the agency—its subject matter, purpose, background, legislative history and practice.344

Section 518(c) must be read in conjunction with §§ 518(a) and (b) for which it was intended to provide remedies. Certainly, a failure on the part of the Secretary to promulgate any regulations prescribing the terms and conditions under which expenditures and payments may be made would be subject to judicial review. The statute speaks in mandatory language: "The Secretary shall by regulations prescribe. . . ."345 The Supreme Court recently held that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."346 It is equally clear that the Congress did not intend to preclude judicial review of arbitrary regulations. It could not be seriously contended that judicial relief would be unavailable if the Secretary excluded recovery under such patently arbitrary classifications as race,347 sex,348 economic status,349 national origin,350 or durational residency.351 Judicial review would surely lie to redress discrimination in the administration of regulations applied with an "evil eye and an unequal hand."352 An award which was denied without rational basis or which inexplicably departed from established policies would provide a base for judicial relief.353 Moreover, the non-reviewability clause of § 518(c) applies only to expenditures and payments made under §§ 518(a) or 518(b). Section 518(c) was not intended to im-

344. Id. at 377.
345. 12 U.S.C. § 1735b(b) (1970) [emphasis added].
348. See Reed v. Reed, 400 U.S. 818 (1971).
353. See note 340, supra.
munize the Secretary for non-compliance with the National Housing Act. Appellants in Perry contended that the defendants had established "policies and local regulations which ignore the . . . requirements [of §221(d)(2)]" and have "failed to establish any new inspection policies or regulations which will insure that all future §235(i) existing' housing complies with local housing codes." This clearly states a substantial claim upon which relief can be granted under the APA. A holding that the APA confers jurisdiction obviates the jurisdictional amount requirement, which has "no place in actions against federal officials. . ." The court should order the Secretary to comply strictly with the requirements of §221(d)(2) of the National Housing Act.

The finality of administrative awards under §518(c) has no bearing upon the specific enforceability of §221(d)(2) or other sections of the National Housing Act. Section 518(c) on its face does no more than establish administrative finality regarding "expenditures or payments and the terms and conditions under which the same are approved or disapproved." The processing of such claims, once suitable regulations have been prescribed, is likely to be resolved on a routinized basis. Such claims could not be expected to raise questions of sufficient importance to warrant the attention of federal courts. For reasons of economy, it is preferable to delegate the routine processing of minor claims exclusively to administrative agencies. To allow judicial review without regard to the amount in controversy under section 10 of the APA would result in a frivolous waste of the time, experience and skill of the federal judiciary since no legitimate interest would be served by the involvement of the federal courts in the routinized processing of small claims. But the federal courts should remain open to insure the procedural integrity of the administrative process and to compel compliance with federal statutes. The intention of §518(c) was to confine the determination of issues of fact to the Department of Housing and Urban Development. That Congressional purpose is complemented by judicial review of substantial claims asserting individual rights under federal law.

or the Constitution. On such subjects the expertise and authoritativeness of the federal courts is decisive. Administrative accountability on important matters of federal and constitutional policy is enhanced by judicial review. Where administrative nonconformity with federal housing policies or constitutional rights has been asserted, the federal courts have generally accepted jurisdiction. The low level of legality of the HUD administrative process relating to the §235 program—the nonconformity of administrative regulations with federal statutes; the excessive frequency of administrative revisions of policy; the uneven and unequal enforcement of administrative policy—furnish additional justifications for the exercise of judicial review. The significance of the asserted individual claims—the right to housing conforming to all state and local health, safety and zoning requirements secured by federal statute likewise points to the need for judicial review.


The controlling factor in the establishment of jurisdiction in the housing cases cited above is the need for uniform, federally secured delineation of individual rights secured under federal housing legislation and the Constitution. As the court observed in Norwalk Core, federal jurisdiction depends upon “whether Congress' purpose in enacting it [a section of the National Housing Act for which plaintiffs sought enforcement] was to protect their [plaintiff's] interest.” 395 F.2d at 933. The legislative history plainly discloses that § 221(d)(2) was precisely the same type of safeguard for federally subsidized mortgagors as the adequate relocation requirement was for displaced families in Norwalk Core.


360. The United States argues that

. . . . HUD never undertook to guarantee that purchasers of HUD-insured homes would meet local building code standards . . . . HUD is not in privity with Plaintiffs and owe them no duty to inspect premises for proper construction.

Any inspection by the administration is for the protection of the administration.

. . . . Defendants' Memorandum of Authorities on Jurisdiction, supra note 277 at 7.

Appellants in *Perry* also asserted jurisdiction under 28 U.S.C. §1337. It would appear that federal jurisdiction is appropriate since the National Housing Act is an "act regulating commerce." The commerce power "is to be applied to all . . . those internal concerns which affect the States generally." The National Housing Act stands in the line of those affirmative exercises of the commerce power which with the enactment in 1887 of the Interstate Commerce Act

... began to exert positive influence in American law and life [and] ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise of Congress of its power thereunder.

The commerce power reaches areas as diverse as the regulation of labor disputes and the maintenance of racial amity. A brief review of the purposes of the National Housing act unmistakably establishes the Act's symbiotic relationship to the commerce power. The establishment of the FHA in 1934 grew out of two overwhelming problems affecting commerce:

... We do not think that this language [5 U.S.C. § 702] is to be construed as limiting judicial review to those situations where Congress has explicitly referred to persons "adversely affected" or "aggrieved" by agency action. That would not be a " hospitable" interpretation of the Act's "generous" review provisions . . . . We will in accordance with what the Supreme Court has said in *Hardin v. Kentucky Utilities Company* . . . consider any person attempting to assert an interest, personal to him, which the relevant statute was specifically designed to protect, and which he claims is not being protected, as "adversely affected or aggrieved" within the meaning of that statute.

361. Section 1337 provides:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. 36 Stat. 1092 (1911), as amended 28 U.S.C. §1337 (1970).


... with a breadth never yet exceeded . . . . He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes. Wickard v. Filburn, 317 U.S. 111, 120 (1942).


366. Section 2 of the National Housing Act, 63 Stat. 413 (1949), as amended 42
(1) the collapse of mortgage credit and the system of home finance which had been in use and
(2) the need to generate jobs.\textsuperscript{367}

Many other purposes of the National Housing Act are equally within the purview of the commerce power.\textsuperscript{368}

In \textit{Murphy v. Colonial Federal Savings and Loan Assn.},\textsuperscript{369} Judge Friendly upheld jurisdiction under 28 U.S.C. § 1337 over claims arising out of an unfair election of a federal savings and loan association.\textsuperscript{370} As authority for the holding Judge Friendly relied upon a “unanimously approved . . . liberal construction” of the commerce power.\textsuperscript{371} It was recognized by the court that

\begin{quote}
U.S.C. § 1441 (1970), contains a “Declaration of National Housing Policy” which enumerates numerous purposes related to the commerce power: the stimulation of “housing production . . . to remedy the serious housing shortage;” the “elimination of substandard and other inadequate housing through the clearance of slums and blighted areas;” “contributing to the development and redevelopment of communities and to the advancement of the growth, wealth and security of the Nation” through the “realization as soon as feasible of the goal or the goal of a decent home and a suitable living environment for every American family . . . to enable the housing industry to make its full contribution toward an economy of maximum employment production and purchasing power.”

The Department of Housing and Urban Development Act of 1965, 79 Stat. 667 (1965), 5 U.S.C. § 624 (1970) established a separate executive department to administer the federal housing programs “in recognition of the increasing importance of housing and urban development in our national life.” One of the purposes for which the department was established was

. . . . to provide for full and appropriate consideration, at the national level, of the needs and interests of the Nation’s communities and of the people who live and work in them. \textit{Id.}

The Housing and Urban Development Act of 1968 further amended the National Housing Act to reflect policies relating to commerce as well as to social welfare.

367. \textsc{The President’s Committee on Urban Housing, A Decent Home (1968)} in \textsc{Levy, Lewis and Martin, Social Welfare and the Individual} 1137 (1971).

368. Most of the 15 enumerated policies to be followed in attaining the national housing objective either arise out of or affect commerce. See 42 U.S.C. § 1441 (1970).

369. 388 F.2d 609 (2d Cir. 1967).

370. \textit{Id.} at 610-14.

371. \textit{Id.} at 615. The words, “acts regulating commerce” have come to mean “all acts whose constitutional basis is in the commerce clause.” \textsc{Bunn, Jurisdiction and Practice of the Courts of the United States} 71-72 (1949). \textit{See} \textsc{Inn. v. Union R.R. Co.}, 289 F.2d 858, 860 n.3 (3d Cir. 1961) for many of the decisions of the past several decades. \textsc{Accord, ALI, Study of the Division of Jurisdiction Between State and Federal Courts} 200-203 (4th tent. draft 1969); \textsc{Wright, Federal Courts} 92 (1963); \textsc{Friedenthal, New Limitations on Federal Jurisdiction}, 11 \textsc{Stan. L. Rev.} 213, 217-218 (1959); \textsc{Wechsler, Federal Jurisdiction and the Revision of the Judicial Code}, 13 \textsc{Law & Contemp. Prob.} 216, 225-26 (1948).

Judge Friendly observed that the “broad construction that had been given to § 1337 was inferentially approved by the 1958 Congress that raised the jurisdictional amount in federal question and diversity cases to $10,000 . . . .”
"federal regulation of finance is not grounded in the commerce power alone" but

. . . to found jurisdiction upon §1337, it is not requisite that the commerce clause be the exclusive source of Federal power; it suffices that it be a significant one. . . . here the federal law asserted as the basis for jurisdiction is a regulation adopted by a government agency under authority of an "Act of Congress."372

The Court’s holding in Murphy is sound and it would therefore appear that jurisdiction in Perry could be grounded on 28 U.S.C. §1337.

Jurisdiction in Perry is likewise asserted under 28 U.S.C. §1361 (1970).373 Section 1361 does not create any new substantive right but merely extends venue by authorizing federal district courts to issue writs of mandamus theretofore granted by District Courts in the District of Columbia.374 It would appear that the district court in the state of Washington has jurisdiction over Secretary Romney under 28 U.S.C. §1361. Whether mandamus will lie depends upon whether the Secretary has failed to perform a duty owed to appellants.375 That such a duty is owed by the Secretary to appellants under 12 U.S.C. 1715l(d)(2) is readily apparent from the legislative history.376

While this bill applied the $10,000 minimum limitation to cases involving Federal questions, its effect will be greater on diversity cases since many of the so-called Federal question cases will be exempt from its provisions. This is for the reason that Federal courts are expressly given original jurisdiction without limitation as to the amount claimed in a great many areas of Federal law. * * * When all of these types of cases are eliminated, the only significant categories of ‘federal question’ cases subject to the jurisdictional amount are suits under the Jones Act and suits contesting the constitutionality of State statutes. In both of these types of cases the amount claimed usually exceeds $10,000. S. Rep. No. 1830, 85th Cong., 2d Sess. (1958).

Many suits contesting the constitutionality of state statutes can be brought under 28 U.S.C. § 1343 which has no jurisdictional amount.

373. Section 1361 provides:
   The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any public agency thereof to perform a duty owed to the plaintiff.
376. See note 114 supra.
While a Tucker Act\(^{377}\) claim upon tort\(^{378}\) or contract theory may have prevailed in the absence of 12 U.S.C. §1735(b), it would appear that the administration remedy under §1735(b) was intended by the Congress to be exclusive.\(^{379}\)

**CONCLUSION**

Homeownership in the United States because of its significant tax, equity and other advantages is a goal of most American families. The §235 mortgage subsidy was intended to make homeownership financially possible for families with incomes of $3,000 to $7,000 per year. Most assisted families have incomes approaching or above the $7,000 level so that the program has not realization of the goal of providing homeownership to families with the lowest incomes practicable.

In many parts of the country, speculators quickly took advantage of §235 to reap windfall profits at the expense of lower income families and the federal treasury. The FHA often failed to protect either the lower income purchasers or the federal treasury.

Suburban home owners are apprehensive about the economic, aesthetic and social effects of §235 sales in proximity to them. FHA minimum standards on lot size and aesthetics afford little basis for assuaging these fears. What is there to prevent developers intent on making a fast dollar from mass producing complexes of look-alike boxes with cheap materials on tiny lots? It is questionable whether some of the houses which have been financed under §235 will survive the life of the mortgage.

There are adequate remedies to prohibit racial discrimination in the sale of housing under § 235.\(^{380}\) The FHA passivity

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377. 24 Stat. 505 (1898), as amended 28 U.S.C. § 1346(a)(2) (1970) provides: The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: ... (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.


379. See text accompanying notes 72-77 supra.

380. Although patterns of segregation in housing are apparently being perpetuated under the § 235 housing program, effective remedies do exist against FHA and the builders. Under Section 808(e)(5) of the Civil Rights Act of 1968, 82 Stat. 73, 18 U.S.C. § 245 (1970) the Secretary of HUD is required to "administer the programs and activities relat-
coupled with the failure of developers to take affirmative action in favor of interracial housing have contributed to racially homophilous subdivisions. Recent research suggests that racially homophilous subdivisions may also result from voluntaristic endogamous neighboring choices of purchasers.

Despite the problems which have arisen, §235 offers significant opportunities for homeownership for lower income families. Purchasers now have substantial remedies available to assure that housing financed under §235 is decent, safe, sanitary and in conformity with all state and local laws relating to housing or zoning. The writer has contended that federal courts are available to assure conformity of FHA policies with individual rights derived from the Constitution or federal law. There remains a great unmet need to develop effective counseling programs to


The U.S. Commission on Civil Rights has recommended that the Department of Housing and Urban Development should:

. . . make use of the racial and ethnic data it now collects on participation in its various housing programs to determine the effect the programs are having on racial and ethnic concentrations . . .

a. Where overt practices of discrimination are found, such as refusal by builders to sell to minority purchasers or racial steering by brokers, appropriate sanctions should be imposed, including disqualification of discriminatory builders and notification to FHA-approved mortgagees that they may no longer deal with the discriminatory brokers under FHA programs.

b. Where it is found that such concentrations result from policies and practices which has [sic] the effect of creating or perpetuating segregation, such as site selection by builders or sponsors, HUD should take remedial action to prevent these concentrations. Such action should include the refusal to approve additional applications for housing under its programs which will further intensify such concentrations and the utilization of uniform site selection criteria which will serve to avoid such concentrations in the future. U.S. COMMISSION ON CIVIL RIGHTS, HOME OWNERSHIP FOR LOWER INCOME FAMILIES 91-93 (1972).
increase consciousness among lower income families of alternative housing opportunities, including those under §235.381

381. Counseling services were authorized by 82 Stat. 485 (1968), 12 U.S.C. 1715z(d)(2) (1970). However, despite specific appropriation requests by HUD in 1970 and 1971, the § 237 counseling program was not funded. It remains unfunded. 1971 Investigation, supra note 179, at 14. Secretary Romney recognized that HUD has 

... an exceedingly difficult and complex responsibility. Determining the exact condition of a house and its components is not always possible, as most people with homeownership experience know. This is particularly true of the oldest housing. There is also the added difficulty that buyers expect the Government involvement to mean that the house is sound and free from all major maintenance problems.

The complete lack of homeownership and maintenance experience of most low-income families adds to the magnitude and complexity of the Department's responsibilities. Such families are particularly vulnerable to unscrupulous real estate operators. Id. at 11.

At the time of the 1971 Hearings, supra note 197, at 14, the task force on homeownership counseling had made the following recommendations:

1. All applicants applying for section 235 housing would be screened to determine whether or not they need counseling.

2. All applicants needing counseling would be referred to a counseling agency within the community for appropriate action. This agency could act as a catalytic agent to bring together community resources for an effective counseling program.

3. The program could be funded by paying the counseling agency for each applicant counseled, a fee which would be allowed to be included in the closing costs. Another alternative is for the local community to be responsible for funding such an agency.

4. The counseling agency would counsel potential buyers in many areas, including:
   (a) the costs of buying and maintaining a home, budget management and other aspects of assuming financial responsibility;
   (b) the availability of housing in the area and housing values;
   (c) purchase procedures, contracts, mortgage agreements, and legal considerations;
   (d) property maintenance; and
   (e) home economics and management.

However, HUD funding for counseling has not materialized. HUD officials in Knoxville, Tennessee say that they plan to encourage different community groups to provide counseling voluntarily. To date, no program has been implemented although one employee has been assigned to the task. Telephone Interview with J.M. McCarter, Director Housing Programs, Management Branch, Knoxville, Tenn., February 18, 1972.

The U.S. Commission on Civil Rights has recommended the establishment of neighborhood advisory offices in lower income communities to counsel persons regarding:

a. Which programs are being operated in the particular metropolitan area.

b. The location of the housing being provided under each program and the identity of the builder or sponsor.

c. The price or rental range of housing in each subdivision or project.

d. The qualifications necessary for eligibility to obtain housing in each such subdivision or project.
The §235 program can accomplish the purposes for which it was intended only when the FHA abandons its traditional passive role in favor of an activist, consumer-protective role. Where FHA standards are not sufficient to protect the consumer, they must be revised. Greater emphasis should be placed on aesthetic interests to remove legitimate dissatisfactions of both lower income purchasers and other property owners. A successful §235 program requires quality workmanship, durable materials and aesthetically distinctive design. It also will require families who are aware of or have been counseled to assume the myriad financial and other responsibilities of homeownership.

e. An analysis of each individual family's needs and resources and advice as to the kind of program and housing that would best meet its needs.
f. Advice as to the nature and amount of the subsidy available in each program for which the family is eligible, so as to assure that the family will be in a position to obtain the full benefit of the assistance that exists.
g. Advice on the rights and responsibilities of homeownership, including equity rights, income tax advantages and physical upkeep of the property.
h. A description of the procedures and steps that the family must follow to obtain the housing.
i. Advice on their rights in the event families should encounter racial, ethnic, or economic discrimination on the part of builders or sponsors.
j. In those areas where there are families which have difficulty communicating in English, the neighborhood offices should provide staff members who are fluent in languages other than English. U.S. Comm'n on Civil Rights, Homeownership for Lower Income Families 90-91 (1971).

Until adequate funding for counseling can be obtained through HUD, the counseling of lower income families on alternate housing opportunities must be the responsibility of legal services attorneys, law teachers, law students' bar associations and concerned members of the private bar, and the staff of public and private social service programs.

A modest attempt to develop counseling on alternative housing opportunities for lower income families has been undertaken in Knoxville, Tennessee during the past year under a grant to the Tennessee College of Law from the State Agency for Title I, Higher Education Act of 1965. This program has been aimed at increasing awareness of the legal rights of lower income persons, including housing rights, through a series of community seminars.

Another counseling program has been implemented in Spokane, Washington. Lambarth and Barbieri, The §235 Hassle: Counseling and Preventive Law, 5 Clearinghouse Rev. No. 1 at 1 (1971). The Spokane program is based upon a memorandum agreement between the FHA, the Spokane Community and Catholic Family Services and a provision has been

. . . inserted in all earnest money agreements for existing and rehabilitated 235 houses . . . [to require] not only that the potential purchaser receive counseling, but also . . . that the purchaser has a ten day grace period after receiving counseling in which he may cancel the earnest money agreement without penalty or forfeiture. Id. at 20.