Richard W. Bartke

The Organized Bar in Housing and urban Development*

I. Intrcduction

A NATIONAL SEMINAR on the role of the lawyer in housing and urban development was conducted, on April 21 and 22. 1971, under the auspices of the American Bar Association . This seminar, which was attended by practitioners and law teachers from all over the country, was a heart — warming event. It culminated several years of dedicated effort by the ABA Special Committee on Housing and Urban Development Law. [1]

The seminar provided an opportunity for both No' formal and informal exchanges of opinions, dissemination of information and for a well desrved opportunity to congratulate and thank those whose efforts have brought it about. Some of the presentations, particularly those from St. Louis and Houston, [2] were very valuable by themselves and contributed consideraable substantive knowledge to the paticipants. Nevertheless, throughout the seminar. both in formal sessions and during informal occasions, I detected a considerable amount of malaise among those present.

This uneasiness could be sensed in the question which was

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asked several times: Could lawyers help low and moderate income housing by cutting their fees? The answer, and a proper one in the context, was that the fees were so infinitesimal as compared with the total cost of a project that their complete elimination would not really mâke a difference. The answer was correct, but the fact that the quetion was asked reflected a shortcoming of the seminar – some important snbjects were omitted.

Speakers who occupied the rostrum for two days repeated over and over again that the field is so complex as to require specialization. The spectre of involved govenment forms was paraded before those present and it was made clear that only a new kind of specialist can venture into the jungle. This warning was certainly justified: however, the issue which should have been debated i. e., whether the jungle was necesary in the first place, was never explored.

Finally, Bruce Lane, of the Washington, D. C., bar, the luncheon speaker on Thursday, discussed opportunities open to lawyers. During his excellent remarks Mr. Lane stated that the area offered to a lawyer the opportunity to "do good and do well all at the same time." Again the remark was well taken, and, of course, the continuing economic well-being of the profession is a worthwhile goal. However. the nagging uncertainty remained whether the organized bar had not launched an enterprise which would result in a vested interest being created in continued complexities.

Since the involvement of the organized bar is recent and since a true class of specialists has not yet developed, it would seem appropriate to ask a few questions, make a few tentative suggestions and hopefully start a more farreaching discussion.

II. Real Property Law and Conveyancing

Low and moderate income housing, besides being lumber, bricks, concrete and reinforcing steel, is also real estate in the legal sense of the word. This, of course, is selfevident to any lawyer, but it needs to be repeated before the preoccupation with specialized aspects obscures this obvious fact. Therefore, from the moment of the location and acqusition of the site, to the final closing and occupancy, any transaction concerning such housing must of necessity operate in the realm of real property and conveyancing law. Any and all imperfections of the system and additional costs resulting therefrom will be reflected in the cost of housing.

The shortcomings and imperfections of the law are many and have been stressed repeatedly.[3] In truth they are not nearly so glaring as some would have us believe[4] but nevertheless there is room for tremendous improvements. Many of these improvements are already taking place[5] or are being actively worked on.[6]

Facile comparisons to the purchase and sale of appliances simply will not do.[7] Few appliances in use today can boast of a one or two hundred year history. The very immobility. relative permanence and indestructibility of land make it a class by itself and insure that the barnacles of history will attach to it and cause lesser or greater problems.[8] At the same, time. it is true that the means of coping with this historical ballast have not kept pace with technical developments and the increased tempo of land transactions.[9] The valiant attempt of private industry to provide a remedy in the form of title insurance has bailed out the recording system and prevented it from total collapse.[10] However, the very fact that a system of public records can continue to function only because it is supported by a multi-billion dollar private industry is a testimony to its failure.[11]

The continued occurrence of cases dealing with boundary disputes and similar problems attests to the fact that the question of the location of a parcel of land on the ground is still very imperfect.[12] Despite the tremendous advance in technology, e. g.. aerial and even satellite photography and mapmaking, we have lagged behind in this field. Again, improvements can and should be made.[13]

Let us also not forget that in most instances the legal tools themselves are neutral; they can be used properly or they can be misused. The phenomenon of exclusionary zoning,[14] by artificially reducing the amount of available land,[15] increases the cost of all housing. The same is true of invidious discrimination in municipal services. Needless to say, the most severe impact is felt in the field of low and moderate income housing. The courts are slowly beginning to address themselves to these problems.[16]

All those concerns are important and work on them has already been undertaken by the organized bar and otherwise, However, they are peripheral rather than central to the theme of the conference and of this article. What we are concerned with here is the question of the most appropriate and efficient societal response to the need of the poor and those of moderate means for housing.

III. The Federal Scene

In the field of housing, as in any other field, the participants are faced with a number of constraints. Some of these constraints are technical in nature, others are political, some are financial and still others are the result of geography and topography. Last, but not least, the constraints with lawyers, are most closely connected are legal ones. In the final analysis the the art of the successful practitioner consists of being able to fit his project into the pattern of constraints and come up with an acceptable product.

These various constraints although distinct are, of course, interrelated. They are all in a state of flux and changes in one call for appropriate adjustment in some or all of the others. At the same time, the legal constraints are the most pervasive. While they themselves respond to external stimuli, once adopted they have a profound and lasting influence on most other developments.

As far as legal constraints are concerned, there are at least two levels on which they can and should be contemplated. From the point of view of the practitioner who is working on a particular project, the legal constraints of the moment are a premise with which he has to contend and over which he has a minimum of control. His job is to obtain the maximum returns from the existing state of affairs. This seminar, just as other seminars of similar nature throughout the country,[17] was concerned essentially with the practitioner level.[18] This is not to denigrate either the conference or the practitioner. The first and highest duty of a lawyer is to represent his client.

However, from the perspective of the organized bar, legal constraints are not or should not be an accepted premise. The legal system is not an unalterable, brooding omnipresence, but on the contrary, a man-made phenomenon. Rules are changed and adopted and readopted all the time. Therefore, from the perspective of the organized bar, particularly of a national organization such as the ABA, the legal constraints should be viewed as working hypotheses used to increase and test our effectiveness. Just as a scientist postulates a hypothesis and determines its value by whether it enhances or retards research, the legal constraint of federal housing legislation should be viewed as either promoting or inhibiting national housing goals. If it inhibits or even fails to promote such goals, then it is faulty and should be amended. It is in this area, I believe, that the organized bar has a duty of affirmative action. With a national committe working in the field

and with direct feedback from the various regional projects, the organized bar should be in an ideal position to evaluate existing legal tools, find out their shortcomings and suggest corrections. However, an extensive reading of hearings before congressional committees in connection with national housing laws, covering a period of some twenty-five years, fails to disclose any particpation by the bar as such.

The federal housing laws as we know them today have their origins in the National Housing Act of 1934,[19] although some would trace the active involvement of the federal government in housing to 1933 legislation.[20] Once enacted, those housing laws grew like Topsy.[21] There has been an almost annual tinkering by Congress with various programs and, from time to time in responding to various pressure groups, additional sections were piled on top of the existing ones.[22]

Originally, the National Housing Act was enacted as an emergency measure for the purpose of stimulating lender confidence and thus revitalizing construction and employment.[23] Traces of this "emergency nature" are still with us, since various constituent agencies of the Department of Housing and Urban Development (HUD), such as FHA, continue to be "temporary" and FHA's authority to insure loans is being extended periodically for two or three year periods.[24]

After the end of World War II the emphasis shifted. First, the main concern was with the overcoming of the backlog created by the depression and the war years and with the housing of returning veterans.[25] Thereafter, the attention of Congress was focused on problems of lower-middle income and low income families and on the blight of central cities.[26] The result is a crazy-quilt of subsidized, partly subsidized and unsubsidized programs, each with its own market structure.[27] In this connection, of course, there is not even a consensus as to the meaning of the term "subsidized."[28]

Writing two years ago Mr. Coan listed three pillars of federal support for housing, namely, FHA, Fannie Mae and the vast system of federally chartered savings and loan associations, all three of which are the direct descendants of the legislation of the 1930's.[28] He also noted some of their achievements, many of which are undeniable. However, I believe that we are entitled to pause a little bit longer and ask a few additional questions.

The basic philosophy of FHA has not changed since 1934. It is premised on the proposition that if an agency of the federal government will insure certain kinds of mortgage paper, deemed by Congress to be entitled to such insurance, this will increase lender confidence and therefore facilitate the financing of home purchases by designated segments of the population. In the original version the main emphasis was not so much on home ownership as on overcoming lender reluctance in the depth of the depression, thereby increasing the availability of mortgage funds: which, in turn, it was hoped would stimulate employment in the economy. A by-product of this, as correctly pointed out by Mr. Coan.[30] was a quiet revolution in home mortgage financing consisting of the substitution of a log, term fully amortized, high loan-to-value ratio mortgage for the one customarily used before—a short period of time, low loan-to-value ratio mortgage, without amortization provisions, which contributed vastly to the woes of the 1930's, [31]However, the level payment, fully amortized mortgage has in turn come under criticism.[32] It is pointed out that it does not take into account the individualized needs of specific borrowers. Responding to these suggestions, the Federal Home Loan Bank Board has proposed amendments to its regulations which would permit savings and loan associations to vary the provisions of loans.[33]

Mr. Coan's article does not point out, however, that one element of the Congressional scheme has not worked. Ever since the enactment of the National Housing Act of 1934, Congress has

imposed a limit on the amount of interest which may be charged on FHA-insured mortgages. The available evidence seems to be conclusive that the experiment is a total failure.[34] In the years immediately following World War II, when lending institutions were very liquid and interest rates were low, mortgage originators wrote FHA mortgages at the then maximum statutory rate, which was above the going market rate, and sold such papar at a premium to institutional investors, particularly life insurance companies. Thus, the benefits of the statute were not passed to the consumer but in effect were reaped by the middlemen who equated maximum statutory rates with charges to be borne by the homeowner.

When interest rates started exceeding the FHA ceiling, particularly after the so-called Federal Reserve-Treasury accord,[35] FHA mortgages were written with points charged; that is to say, the amount actually disbursed by the lender was less than the amount stated in the mortgage, which then brought the effective interest rate to the market level or above. There is no doubt that such points are actually more burdensome to the borrower than high stated interest rates,[36] and highly lucrative to the lender.[37] But, nevertheless, the fiction of protecting the consumer through artificial interest limits is still maintained.

In the past, whenever points became too steep, Congress has, in a series of enactments, increased the maximum interest rate[38] and eventually gave some leeway to the Secretary of HUD in the matter.[39] When interest rates started going down in the national money markets in late 1970, and early 1971, the press from time to time announced in headlines that the Secretary of HUD had reduced the maximum interest rates which may be charged on FHA mortgages.[40] However, from the text of these announcements, it is quite clear that the Secretary was following,

rather than leading, the market and was simply recognizing a fact which had already taken place. Therefore, the whole thing amounted to no more than a display of HUD's administrative self-deception.[41]

When first enacted, FHA insurance was available for the purchase of one to four unit structures under section 203[42] of the Act and for multiple unit structures under section 207.[43] Over the years additional programs were grafted upon the National Housing Act, dealing with cooperatives, condominiums, homes for the aged, group practice clinics and others.[44] Furthermore, increasingly the new programs were of the subsidy type, involving the federal treasury directly or indirectly in underwriting part of the cost of the housing. Nevertheless, the question has never been really asked whether government insurance of such paper is the most efficient and appropriate means to the end.[45] An attempt was made to recast this crazy-quilt of separate programs by the Housing and Urban Development Act of 1970.[46] However, although useful in the sense of eliminating duplication and inconsistent provisions, the proposed statutory framework is still essentially the same and the more basic Question outlined above have not yet been asked.

The second of the three pillars mentioned by Mr. Coan is the system of federally chartered savings and loan associations. There is no question but that this industry played an important role in the financing of residential housing since World War II, particularly in the area of conventional mortgages.[47] However, the stresses of the financial "crises" of 1966 and 1969-70 have shown that not all is well with the industry. The curse of borrowing short and lending long has become obvious in times of rising interest rates and stringent monetary measures[48] and structural changes and improvments are urgently needed, some of which

have been made or are being proposed.[49]

Up to now federally chartered savings and loan associations had to be mutuals.[50] At present the Federal Home Loan Bank Board champions legislation pending before Congress which would permit fedral S&Ls to convert to stock status as one of tha means of improving the picture.[51] In view of this ferment and of the pending legislation, the inquiry should be broadened to include a reexamination of the role of savings and loan associations. as well as that of other intermediaries in the money markets. The questions asked should be: Does the continued existence of different organizations with their own supervisory agencies, operating under different statutes passed at different times. achieve the end ascribed to them? This is particularly timely in view of the fact that certain members of congress, such as Representative Wright Patman of Texas, urge that S&Ls be permitted to offer checking accounts[51] If this comes to pass, the S&Ls will become indistinguishable from commercial banks, at which point there is at least a very serious question in my mind whether a separate system and organization with different insuring agencies for their accounts and with different supervisory boards is still in order. The further question, of course, is whether the introduction of demand deposits would not aggravate the borrowing short, lending long problem.

Finally. the third pillar mentioned, by Mr. Coan is Fannie Mae[53] (Federal National Mortgage Association) which has been joined by her twin sister, Ginnie Mae[54] (Government National Mortgage Association) and since late August, 1970, by the Federal Home Loan Mortgage Corporation.[55] Fannie Mae originally envisaged as a means of creatiog a secondary market for FHA—insured mortgages, has gone through many changes and mutations until in 1968 it was converted into a quasi-private corporation which is at present the largest single institutionol investor in FHA — insured and VA-guaranted paper.[56] Fannie Mae has over the years suffered ma-

ny legislative ills. One of the most important of those, and the one which has not been resolved to date, is the existence of inconsistent statutory mandates[57] which have forced those in charge of its operations to walk a tight rope and try as best they can to accommodate and obey the statutory commands thrust upon them.[58] This problem, important in itself, is but an introduction io the broader question of market structure. The increasing fragmentation of mortgage markets into submarkets, both geographical and functional, is a cause for grave concern.

The focus of the committe and of the St. Louis conference is primarily on subsidized housing for low and lower-middle income families, that is to say, on sections 235 and 236[59] projects and the various turnkeys.[60] These projects directly and admittedly involve the national treasury pursuant to a Congessional determination that the welfare of the country requires that federal funds be used. Assuming that the premise of some expenditure of federal funds is valid, and I wholeheartedly agree that federal involvement is indispensable, the immediate question arises as to the most efficient and economical way of doing it. The philosophy of sections 235 and 236 is initially to keep increases in the federal budget as small as possible.[61] Keeping federal budgets down by eliminating nonessential services and readjutsing priorities is very laudable. However, in the case of programs such as 235 and 236 this amounts to a sleight of hand.[62]

The shortcomings of the scheme envisaged by sections 235 and 236, that is, the insurance by FHA of mortgages on which the federal government was going to pay an interest subsidy with a ceiling on the permissible stated interest vate, became further obvious in 1969 and 1970. The only way in which HUD managed to get any of this housing built was through the use of the "tandem approach."[63] This amounted to a double subsidy, one of them hidden, and to a circumvention of the statutory mandate.[64]

The social cost involved, once the decision has been made

to proceed with this kind of housing is there. The motives behind this approach are primarily political and although, obviously, anybody working in the field has to be cognizant of political realities and proceed on the premise that half a loaf may be considerably better than no loaf at all, the question may still legitimately be asked whether the budgetary tail should wag the policy dog. The eternal search for the cheap and easy solution never ends.[65]

Putting together a large real estate project is at best a complicated affair. This is true whether the project involves subsidized housing under one of the federal programs, or a commercial venture such as an office building or shoppingcenter. On the other hand the terrors of FHA forms, which were so eloquently described to the participants by the speakers,[66] are at least in part traceable to the fact that the sponsors of a project have to deal, not only with local government units and with FHA, but also with private lenders, with Fannie Mae and possibly others. Anything which could be done to simplify the process would not only reduce the final cost of the units produced, but, more significantly, would increase production by cutting down the lead time presently necessary. Furthermore, a rationalization of the process might make it possible finally to determine who bears the burden of these schemes.

Since the passage of the Emergency Home Finance Act of 1970, Fannie Mae has been authorized to deal in conventional mortgages in a limited way.[67] The same statute also created a new entity, namely, the Federal Home Loan Mortgage Corporation,[68] which is supposed to deal primarily in conventional mortgages, although it has already entered the market and purchased FHA-insured and Va-guaranteed paper.[69] In connection with this and preparatory to the creation of the new submarket, drafts of uniform mortgage forms to be used nationally have been prepared.[70] These proposed forms have come under strong attack, primarily by Ralph Nader and by Sanator

William Proxmire of Wisconsin.[71] The criticism concerns several areas, particularly those of prepayment penalties, right to accelerate loan payments for mortgages which are delinquent for more than thirty days, requirement that borrowers make monthly payments to a reserve account for insurance and taxes and a prohibition against lender payment of interest on escrow accounts.[72] Again, the organized bar seems to stand aloof from this controversy, although its voice should be heard and its expertise should prove of great help to all concerned.

I, for one, believe that some of this criticism is justified but that other parts of it would not benefit the consumer, but would further inhibit the flow of funds into home mortgages. Thus, lenders have a legitimate claim to reserve accounts—unpaid taxes universally become liens superior to mortgages and lack of insurance protection may jeopardize the entire security. Therefore, a prohibition against such reserve accounts may undermine the security of mortgages and further weaken their already precarious position in the nation's money markets. Having said that, however, it does not follow that lenders should be in a position to collect such payments and the money without paying any return to the borrowers. Moreover, while reputable lenders, and they are in the majority, are scrupulous in their regard for such trust funds and keep them down to the necessary minimum, anyone who has practiced for any length of time in the field knows very well that in many cases such funds are misused, not accounted for, interest and penalty charges are imposed on the borrower for late payments, and finally, excessive balances are kept, increasing the return to the lender at the expense of the borrower. The question of whether or not payment of interest on such escrow accounts should be equal to the interest paid on passbook accounts or similar instruments would have to be established on the basis of an appropriate study.[73] Interest payments would take care of some,

but by no means all of these abuses. Therefore, it seems to me that a much more appropriate response is a contractual provision in the mortgage itself that if tax and insurance payments are not made on time and result in interest and penalties or other losses to the borrower, the lender must pay twice the amount of such losses, plus a reasonable attorney's fee and costs of any litigation necessary to collect. Again, the voice of the organized bar with its expertise in the field and its acquaintance with the day-to-day operation of the borrowing and lending process would be exceedingly helpful.

We are now concerned, and properly so, with the rights of the consumer, who in the past was the forgotten man.[74] However, we cannot forget that residential mortgages are competing for investment funds in the national money markets.Unless they are attractive enough to investors, our efforts to channel additional funds into housing will be greatly impeded.[75] The organized bar, composed as it is of practitioners representing various participants in the mortgage transaction, should be in an excellent position to help strike the right balance.

IV. Conclusion

The above neither is, nor purports to be, an exhaustive discussion. It is simply a suggestion of some of the areas of immediate concern for all those of us interested in housing and in the revitalization and survival of our cities. No one acquainted with the field can or will underestimate the importance of federal involvement. As lawyers we must be concerned with the quality of federal legislation and with the question of whether it enhances or impedes the national goals in the area. We should bear in mind that despite all congressional efforts, the percentage of the gross national product invested in housing has been declining. [76]

For far too long have the voices of special interest groups been heard loud and clear during the pendency of housing legislation before Congress, while the voice of the bar was muted or nonexistent. The bar, as distinguished from individual members who represent particular clients, has in my opinion an important and constructive role to play. The ABA Committee on Housing and Urban Development, with its permanent staff in Chicago and with the feedback from the field should be in an ideal position to act as a clearing house of information and ideas and as a source of suggested improvements.[77] At the same time, those of us in the legal teaching profession have a duty to contribute our share and to cooperate as closely with the committee as we can. Vested interests in the status quo, caused by the mastery of existing rules and techniques, cannot be permitted to choke off the free flow of ideas. It is for the purpose of precipitating the discussion and reevaluation of our collective role in the field that this article has been written.

1. For the background of history of the committee *see*, Morris. *Lawyer's Mobilize for Housing and Urban Renewal*. 57 A.B.A.J. 158 (1971)

2. These presentations, by M. Peter Fischer, Director, St. Louis Lawyers for Housing, and Perry Rowan Smith, Director of Houston Project Home, are included in the materials distributed to the participants at the seminar and are also reprinted in this issue of THE URBAN LAWYER.

3. *E.g.*, W. LEACH, PROPERTY LAW INDICTED (1967).

4. *E.g.*, Roberts, *Book Review*, 53 CORNELL L. REV. 163 (1967)

5. *E.g.*, the trend towards enactment of statutes limiting the duration or possibilities of reverter and rights of reentry. *See*, Comment, *Right of Reentry and Possibilities of Reverter—The Perpetual Title Cloud—A Need for Legislative Limitation*, 71 DICK. L. REV. 349 (1967).

In another field, see the trend toward implying a warranty of fitness in the sale of homes: Avner v. Longridge Estates, 272 Cal. App. 3d 607, 77 Cal. Rptr. 633 (1969); Crawley v. Terhune, 437 S.W.2d 743 (Ky.1969); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); House v. Thornton, 76 Wn. 2d 428, 457 P.2d 199 (1969). *See also* discussion in Comment, *Caveat Emptor in Sales of Real Property—Time for a Reappraisal*, 10 ARIZ. L. REV. 484 (1968).

6. The Commissioners on uniform state laws have appointed a committee on the real estate transactions code under the able chairmanship of Harold E. Reid of the Hartford, Connecticut, Bar

7. *E.g.*, E. ROBERTS, LAND-USE PLANNING, 4-277 (1971).

8. *E.g.*, for cases concerned with location of the shoreline of Lake St. Clair, in the Detroit Metropolitan area, prior to Michigan's statehood in 1835, *see* Klais v. Danowski, 373 Mich. 262, 265-71, 129 N.W.2d 414, 416-19 (1964); Mcknight v. Broedell, 212 F. Supp. 45, 47-52 (E.D. Mich. 1962)

9. For a discussion of the deficiencies of the recording system, *see, e.g.*, Cross, *Weakness of the Present Recording System*, 47 IOWA L. REV. 245 (1962); Cross, *The Record "Chain of Title" Hypocrisy*, 57 COLUM. L. REV. 788 (1957); Straw, *Off-Record Risks for Bona Fide Purchasers of Interest in Real Property*, 72 DICK. L. REV. 35 (1967)

10. For a discussion of title insurance *see, e.g.*, Johnstone, *Title Insurance*, 66 YALE L.J. 492 (1957); Payne, *Title Insurance, The Legislatures and the Constitution*, 21 ALA. L. REV. 25 (1968); Payne, *Title Insurance and the Unauthorized Practice of Law Controversy*, 53 MINN. L. REV. 423 (1969).

11. See the excellent discussion in Fiflis, *Security and Economy in Land Transactions, Some Suggestions from Scotland and England*, 20 HASTINGS L.J. 171 (1968)

12. For an excellent discussion *see* Browder, *The Practical Location of Boundaries*, 56 MICH. L. REV. 487 (1958). For a discussion of recent advances in the fields of surveying, map-making and data retrieval systems, *see* Cook, *Land Law Reform: A Modern Computerized System of Land Records*, 38 U. Cin. L. Rev. 385 (1969).

13. Many states have adopted marketable title acts and several bar associations have instituted lawyers' title guaranty funds. For a discussion, *see* Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45 (1967)

The suggestion that the best solution is to allow title insurers to merge into huge combines and then "strictly" regulate them flies in the face of all available evidence and experience. For such a suggestion, *see* Roberts, *A Eulogy for the Old Property*, 20 ME. L. REV. 14, 45 (1968).

In my opinion the future belongs to a revitalized and modernized Torrens system employing electronic data retrieval systems and combined with an official system of accurate maps based on the latest available techniques including aerial surveys.

14. *E.g.*, Sager, *Tight Little Islands: Exclusionary Zoning; Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Aloi, Goldberg & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1 U. TOLEDO L. REV. 65 (1969); Williams & Wacks, *Segregation of Residential Areas Along Economic Lines; Lyonshead Lake Revisited*, 1969 WIS. L. REV. 827; Jackson, *Attacking the Affluent Islands; A Legal Strategy for the 70's*, 1971 URBAN L. ANN. 3.

15. *See, e.g.*, the excellent discussion of the economic impact of minimal acreage standards in Note, *Large Lot Zoning*, 78 YALE L.J. 1418 (1969).

16. *E.g.*, Gautreaux v. Housing Authority, 296 F.Supp. 907, 304 F.Supp. 736 (N.D. Ill. 1969) (question of selection and location of public housing). For a discussion of some of the implications of Gautreaux and of the problems posed for HUD, see the excellent recent article, Lefcoe, *HUD's Authority to Mandate Tenants' Rights in Public Housing*, 80 YALE L.J. 463, 507-13 (1971).

In the recent case of Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), the court ordered a city to proceed with a plan for equal provision of municipal services. For a comment on the case of its implications, *see* Fessler & Haar, *Beyond the Wrong Side of the tracks: Municipal Services in the Interstices of Procedure*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 441 (1971).

In Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2nd Cir. 1970), the court adressed itself both to the question of zoning and the refusal to provide municipal services. *Cf.*, Westwood Forest Estates v. Village of South Nyack, 23 N.Y.2d 424,244 N.E.2d 700, 297 N.Y.S.2d 129 (1969).

17. *E.g.*, The Practicing Law Institute has just announced a seminar entitled, "New Developments in Low and Moderate Income Housing." A persual of the schedule of the seminar indicates that it deals essentially with the same problems.

18. For an excellent and eloquent presentation of the role of the lawyer, as contrasted with that of the organized bar, see Lashly, *The Role of the Lawyer in Urban Housing*, 1 URBAN LAW. 330 (1969).

19. Pub. L. No. 73-479, 48 Stat. 1246 (1934).

20. *E.g.*, Coan, *The Housing and Urban Development Act of 1968: Landmark Legislation for the Urban Crisis*, 1 URBAN LAW. 1 (1969). Mr. Coan includes in his catalog, the creation of the Home Owners Loan Corporation (Pub. L. No. 73-43, 48 Stat. 128 (1933)), and the National Industrial Recovery Act (Pub. L. No. 73-67, 48 Stat. 195 (1933)).

21. The expression neither is, nor purports to be, original. It was used recently in the pages of this journal. Edson, *From Capitol Hill: The Housing and Urban Development Act of 1970*, 3 URBAN LAW. 142, 143 (1971).

22. For a discussion of the proliferation of FHA programs through 1967, *see, e.g.*, Bartke, *The Federal Housing Administration: Its History and Operations*, 13 WAYNE L. REV. 651, 664-75 (1967).

23. For a statement of purpose of the Act, *see* H. R. REP. No. 1922, 73d Cong., 2d Sess. 1 (1934). For a discussion of the background of the statute *see, e.g.*, S. REP. No. 1, 84th Cong., 1st Sess. 14 (1955), pursuant to S. Res. 229, 83d Cong., 2d Sess., 100 CONG. REC. 5088-89 (1954).

24. *E.g.*, the latest extension, this time to October 1, 1972, has been made by the Housing and Urban Development Act of 1970, § 101, Pub. L. No. 91-609, 84 Stat. 1770 (1970).

25. Congress tried to meet the housing needs of returning veterans just prior to the end of World War II with the enactment of the Servicemen's Readjustment Act of 1944, § 501, ch. 268, 58 Stat. 292, *as amended* 38 U.S.C. § 1810 (1964). *See also*, Housing and Rent Act of 1947, ch. 163, 61 Stat. 193; Veterans' Emergency Housing Act of 1946, ch. 268, 60 Stat. 207.

26. The more important enactments are: Housing Act of 1949, ch. 338, 63 Stat. 413; Housing Act of 1954, ch. 649, 68 Stat. 590; Housing Act of 1961, Pub. L. No. 87-70, 75 Stat. 149; Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451; Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476.

27. *See, e.g.*, Bartke, *Fannie Mae and the Secondary Mortgage Market*, 66 NW. U. L. REV. 1, 65-69 (1971).

28. *E.g.*, the discussion still persists whether programs such as § 203 of the National Housing Act, 12 U.S.C. § 1709 (Supp. V., 1965–70), do or do not constitute a subsidy. For a discussion *see, e.g.*, testimony of Charles Abrams at a *Hearing Before a Subcomm. of the Sen. Comm. on Banking and Currency*, 86th Cong., 1st. Sess. 32 (1959); S. GREER, URBAN RENEWAL AND AMERICAN CITIES 134–35, 150–51 (1965).

Similarly, there is a lively discussion as to whether the deductibility of mortgage interest under INT. REV. CODE of 1954, § 163, and the deductibility of real estate taxes under *id.* § 164, are or are not a subsidy. In this connection see the stimulating debate: Bittker, *A "Comprehensive Tax Basis" as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925 (1967); Musgrave, *In Defense of an Income Concept*, 81 HARV. L. REV. 44 (1967); Pechman, *Comprehensive Income Taxation: A Comment*, 81 HARV. L. REV. 63 (1967); Galvin, *More on Boris Bittker and the Comprehensive Tax Base; The Practicalities of Tax Reform and the ABA's CSTR*, 81 HARV. L. REV. 1016 (1968); Bittker, *Comprehensive Income Taxation: A Response*, 81 HARV. L. REV. 1032 (1968). *See also* a more recent discussion, Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

29. Coan, *supra* note 20, at 2.

30. *Id.*

31. *See, e.g.*, statement of John B. Blanford, in *Hearing on Sen. Res. 102, Before the Subcomm. on Housing and Urban Redevelopment of the Sen. Special Comm. on Post-War Economic Policy and Planning*, 78th Cong., 1st Sess. 1283-84 (1945); M. COLEAN, THE IMPACT OF GOVERNMENT ON REAL ESTATE FINANCE IN THE UNITED STATES (1950).

32. *E.g.*, Guttentag, *Changes in the Structure of the Residential Mortgage Market: Analysis and Proposals*, in 4 STUDY OF THE SAVINGS AND LOAN INDUSTRY 1479, 1540-43 (I. Friend ed. 1969); L. PEARSON, A THEORETICAL APPROACH TO HOME MORTGAGE TERMS, 59-101 (unpublished doctoral dissertation on file in the library of Indiana University, 1969, available through University Microfilms, Ann Arbor, Michigan).

33. Proposed amendment of 12 C.F.R. parts 541 and 545; 36 Fed. Reg. 20311 (Oct. 20, 1971).

34. *See, e.g.*, S. KLAMAN, THE POST-WAR RESIDENTIAL MORTGAGE MARKET 84 (1961); *Mortgage Credit and Construction* 44 FED. RES. BULL. 887 (1958). A congressional commission, studying mortgage interest rates, also hesitatingly faced the issue, REPORT OF THE COMMISION ON MORTGAGE INTEREST RATES 63-73 (1969)

35. This so-called accord of March 4, 1951, terminated the Federal Reserve's support of interest rates on United States Government obligations at coupon rate. *Treasury and Federal Reserve Statements*, 37 FED. RES. BULL. 267 (1951).

36. For a discussion *see, Mortgage Credit and Construction*, 44 FED. RES. BULL. 887, 889 (1958); *A Study of Mortgage Credit, Subcomm. on Housing of the Sen. Comm. on Banking and Currency*, 86th Cong., 2d Sess. 302 (1960).

37. When less than the face amount of the mortgage is actually disbursed, the sooner the principal is repaid the higher the effective rate of return. While FHA mortgages are generally written with thirty year maturities, the actual average life of such mortgages is 10.7 years. HUD STATISTICAL YEARBOOK (1969).

38. *E.g.*, Housing Act of 1948 § 101(i)(3), 62 Stat. 1272; Housing Act of 1954 § 106, 68 Stat. 591.

39. 12 U.S.C. § 1709-1 (Supp. V 1969).

40. *Wall Street J.*, Dec. 2, 1970, at 4, col. 3 (reduction from 8 1/2% to 8%); *id.*, Jan. 13, 1971, at 2, col. 3 (reduction from 8% to 7 1/2%); *id.*, Feb. 18, 1971, at 3, col. 1 (reduction from 7 1/2% to 7%). Interest rates started rising again in the spring and there was pressure on the Secretary to raise the ceiling again; *e.g.*, *id.*, May 26, 1971, at 2, col. 3; Mandala, *FHA Mortgage Market Tumbles Into Dissarray as Pressures Build on all Sides*, HOUSE & HOME, July 1971, at 8.

41. On Friday, August 6, 1971, the Secretary of HUD announced a policy of keeping the

line on the 7% limit on FHA mortgages. At the same time he announced a new subsidy for a subclass of mortgages under Sections 203(b), 207, 213, 221(d)(4) and 220 of the National Housing Act (12 U.S.C. §§ 1709(b), 1713, 1715e, 1715l(d)(4) and 1715k. *Wall Street J.*, Aug. 10, 1971, at 8, col. 2. Besides creating a new subsidy, the announcement amounts to an indirect admission of the failure of the scheme.

42. 12 U.S.C. § 1709 (Supp. V 1969).

43. 12 U.S.C. § 1713 (Supp. V.1969).

44. 12 U.S.C. § 1715e (Supp. V 1969) (cooperatives); *id.* § 1715y (condoniniums); *id.* § 1715v (housing for the aged); *id.* §§ 1749aaa- 1749aaa-5 (group practice facilities).

45. For an extended discussion of this question *see, e.g.*, Bartke, *supra* note 27, at 67-70.

46. S. 3639, H.R. 16643, 91st Cong., 2d Sess. §§ 401, 402, 501, 502, 503, 504, & 505 (1970). Congress decided that such recasting was premature without further deliberation and, therefore, eliminated it from the form of the act as passed; S. REP. No. 1216, 91st Cong., 2d Sess. 2 (1970). For further discussion *see*, Edson, *supra* note 21, at 142-44. A new attempt is being made in 1971 with the introduction of the "Housing Consolidation and Simplification Act of 1971," S. 2049, 92d Cong., 1st Sess. (1971).

47. Savings and Loan Associations have traditionally specialized in conventional mortgages. For a table showing the composition of the industry's mortgage portfolio for the years 1961-1969 see, Bartke, *supra* note 27, at 13 n. 43. During this period the ratio of conventional to all mortgages ranged from a high of 90.03% in 1967, to a low of 83.5% in 1961. In 1970 S&L's provided 70.2% of conventional residential mortgages written in the country. Leibold, *The Secondary Market—An Idea Whose Time Has Come*, FHLBB JOUR. (May, 1971, at 12, 14.

48. For a discussion of the borrowing short, lending long syndrome *see, e.g.*, Friend, *Summary and Recommendations*, in 1 STUDY OF THE SAVINGS AND LOAN INDUSTRY 1, 3-4 (I. Friend ed. 1969); Klaman, *Public /Private Approaches to Urban Mortgage and Housing Problems*, 32 LAW & CONTEMP. PROB. 250 (1967); Sametz, *Overall Analysis*, in CYCLICAL AND GROWTH PROBLEMS FACING THE SAVINGS AND LOAN INDUSTRY 46-47 (A. Sametz ed. 1968).

49. E.g., The Emergency Home Finance Act of 1970 § 706, Pub. L. No. 91-351 § 706, 84 Stat. 464, *amended* 12 U.S.C. § 1464c (Supp. V 1969), by permitting for the first time statewide lending by federally chartered savings and loan associations. Further liberalization of geographic restrictions on the lending by federally chartered savings and loan associations was made on January 21, 1971, by an amendment of 12 C.F.R. § 563.9, found in 36 Fed. Reg. 902 (1971).

There is at present pending before Congress a bill entitled the "Housing Institutions Modernization Act of 1971," S. 1671, H.R. 7740, 92d Cong., 1st Sess. (1971), which would result in many structural changes in federally chartered savings and loan associations. Among them would be the authorization to invest up to 3% of assets directly in real property located within 100 miles of their office, § 104; the authorization to "warehouse" land for development purposes, § 105; permission to combine construction financing with loans for land development and acquisition, § 105; permission to make varied urban renewal loans, § 102; and many others.

50. 12 U.S.C. § 1464b (Supp. V 1969). *See also*, 12 C.F.R. § 544.1(a) Charter N § 4 (Jan. 1, 1970).

51. S. 1671 92d Cong., 1st Sess. § 101 (1971). For a statement of the position of the Federal Home Loan Bank Board, *see Board Unveils 1971 Legislative Package*, FHLBB JOUR., May, 1971, at 4.

52. *Wall Street, J.*, Nov. 13, 1970 at 5, col. 3; Borroughs Clearing House, Feb., 1971, at 35, 36. For a scholarly discussion of this issue, *see* Friend, *Changes in the Asset and Liabilities Structure of the Savings and Loan Industry*, in 3 STUDY OF THE SAVINGS AND LOAN INDUSTRY 1353, 1423-27 (I. Friend ed. 1969).

53. For a history of Fannie Mae, see Bartke, *supra* note 27, at 16-29. The present quasi-private Fannie Mae, as a result of the passage of Title VIII of the Housing and Urban Development Act of 1968, 12 U.S.C. §§ 1716-1723c (Supp. V 1969), took over the secondary market functions of the old Fannie Mae.

54. Ginnie Mae, which took over the management and liquidation function and the special

assistant function of the old Fannie Mae, was created by Title VIII of the Housing and Urban Development Act of 1968, *supra* note 53.

55. The Federal Home Loan Mortgage Corporation was established by the provisions of the Federal Home Loan Mortgage Corporation Act, being Title III of the Emergency Home Finance Act of 1970, 12 U.S.C. §§ 1451-1459 (1971).

56. For a discussion, citation of sources, and statistical data, see Bartke, *supra* note 27, at 50-51 nn. 208-209, 68-69 nn. 294-295. For developments as of mid-1971, see Mandala, *FHA Market Tumbles into Disarray as Pressures Build on All Sides*, HOUSE & HOME, July, 1971, at 8; SAVINGS AND LOAN NEWS, July, 1971, at 10.

57. *Compare* 12 U.S.C. § 1719a(1) (Supp. V. 1969), *with id.* § 1723a(h).

58. For a discussion of the inconsistencies and difficulties experienced by Fannie Mae, see Bartke, *supra* note 27, at 28-29, 55-57, 78.

59. 12 U.S.C. §§ 1714z, 1715z(1) (Supp. V 1969).

60. 24 C.F.R. § 1520.6(b) Jan. 1, 1970) adopted pursuant to the language of 42 U.S.C. §§ 1402(5) & (8), 1409 & 1410b (1964). For a discussion of the background, *see* Burstein, *New Techniques in Public Housing*, 32 LAW & CONTEMP. PROB. 528 (1967).

61. Testimony of HUD Secretary Romney in *Hearings on S. 2958, S. 3503, S. 3508, & S. 3442 Before the Subcomm. on Housing and Urban Affairs of the Sen. Comm. on Banking and Currency*, 91st Cong., 2d Sess. 146 (1970).

62. The chickens may be coming home to roost, as the cumulative effect of these subsidies is beginning to be felt. HUD Secretary Romney has recently sounded a warning; HOUSE & HOME, Sept. 1971, at 4. For computation of the present capitalized value of §§ 235 and 236 subsidies for the units supported in fiscal year 1970, *see* THE ECONOMICS OF FEDERAL SUBSIDY PROGRAMS, JOINT ECON. COMM., 92 Cong., 1st Sess. 159-60 (1972), a recently published staff study.

63. For a description of the tandem approach, see testimony of Fannie Mae President Hunter and HUD's Secretary Romney, in *Hearing on S. 2958, S. 3503, S. 3508, & S. 3442 Before the Subcomm. on Housing and Urban Affairs of the Sen. Comm. on Banking and currency*, 91st Cong., 2d Sess. 84, 129 (1970).

64. For a further discussion, see Bartke, *supra* note 27, at 69-70.

65. *See* critique of some of the present housing policies in Stegman, *The New Mythology of Housing*, TRANS/ACTION, Jan. 1970, at 55.

66. For a description of some of the administrative problems and delays, see, e.g., testimony of Rev. Channing E. Phillips in *Hearings on H. R. 13694, H. R. 14639, H. R. 15402 and H. R. 11, Before the House Comm. on Banking and Currency*, 91st Cong., 2d Sess. 128-33 (1970).

67. 12 U.S.C. § 1717b(2) (1971).

68. The new corporation was created by the Federal Home Loan Mortgage Corporation Act, being Title III of the Emergency Home Finance Act of 1970, 12 U.S.C. §§1451-59 (1971).

69. *See, e.g.*, HOUSE & HOME, Nov. 1970, at 12; *id.*, Sept. 1970, at 16; SAVINGS AND LOAN NEWS, Oct. 1970, at 9.

70. For many months Fannie Mae and the Federal Home Loan Mortgage Corporation tried to agree on a uniform set of forms acceptable to both. These efforts proved fruitless and the two entities adopted forms of their own; the main differences concerning prepayment penalties and due-on-sale clauses. Wall Street J., Dec. 16, 1971, at 7, col. 1.

71. *See, e.g., Associations Confront the Critical Consumer*, SAVINGS AND LOAN NEWS, June 1971, at 28. *See also*, *Wall Street J.*, Oct. 26, 1971, at 32, col. 1.

72. *Id.*, at 28-9.

73. *See, e.g.*, discussion in *Wall Street J.*, Oct. 26, 1971, at 32, col. 1, of the claims of expenses incurred in administering such escrow accounts.

74. After this article was written the Supreme Court of California decided a very important case dealing with consumer protection in mortgage situations. La Sala v. American Savings & Loan Ass., Cal.3d 97 Cal. Rptr. 849, 489 P.2d 1113 (1971). These case significantly expands the availability of class actions and severely restricts the use of due-on-encumbrance provisions.

75. *See, e.g.*, Leibold, *supra* note 47, at 14.

76. *See* REPORT OF THE COMMISSION ON MORTGAGE INTEREST RATES, 15, Figure 1 (1969).

77. After this article was written the ABA has made a modest beginning in the direction suggested here. At its October meeting in Chicago, the Board of Governors adopted three resolutions recommended by the Special Committee on Housing and Urban Development. LAW. AM. BAR NEWS, Oct. 1971, at 1.