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ATTACKING THE RENT SUPPLEMENT PROGRAM: HUD'S ATTEMPT TO ACHIEVE ECONOMIC MIXTURE AMONG TENANTS

Housing programs in the United States attempt to provide “a decent home and a suitable living environment for every American family.”¹ Beginning with the Housing Act of 1937, Congress hoped to ensure that tenants of diverse incomes live in public housing projects.² Attempting to achieve these dual housing goals, Congress

1. 42 U.S.C. § 1441 (1976). Section One of the Housing Act of 1937 further defines this goal as an attempt “to promote the general welfare of the Nation by employing its funds . . . to assist the several States . . . to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income. . . .” *Id.* § 1437.

In 1968, Congress found that the housing supply was not expanding quickly enough to achieve “the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family” and aimed to substantially meet this goal within 10 years. 42 U.S.C. § 1441(a) (1976). American housing programs were designed specifically to “assist families with incomes so low that they could not otherwise decently house themselves” with “the highest priority . . . given to meeting the housing needs of those families for which the national goal has not become a reality.” 12 U.S.C. § 1701(t) (1976).

In 1974, 42 U.S.C. § 1441(a), (b) and (c) (1976) shifted the emphasis of these goals away from new construction by encouraging preservation and rehabilitation of present housing and improvements in management, maintenance, and services. *City of Cleveland v. United States*, 323 U.S. 329 (1945), upheld the constitutionality of the National Housing Act. Appellants, local taxing officials, contended that the Act was unconstitutional because Congress has no power under the Constitution to establish low-cost housing projects. The Court held that since the policy expressed in Section One of the Act is “to promote the general welfare of the Nation” by improving housing, Congress had exerted power within constitutional bounds.

2. Congress knew in 1937 that the program of federal aid it had established to provide decent housing for those who could not afford it probably would not include the extremely poor. In Senate debate, Mr. Wagner stated, “There are some people whom we cannot possibly reach; I mean those who have no means to pay the rent minus the subsidy . . . [O]bviously this bill cannot provide housing for those who cannot pay the rent minus the subsidy allowed.” 81 CONG. REC. 8099 (1937).

Since 1937, Congress has attempted to extend public housing to all who need it. See note 1 *supra*. The Housing and Community Development Act of 1974, 88 Stat. 633 (codified in scattered sections of 12, 42 U.S.C.), for example, specifically mandates that its programs provide services to people of diverse economic means. See

in 1965 introduced a Rent Supplement Program³ designed to aid spe-

also 12 U.S.C. § 1715z-1(f)(2) (1976) (in 20% of the units in any project, HUD is required to make extra payments for tenants whose incomes are too low to pay even the program's minimum rent with one-fourth of their income); 42 U.S.C. § 1437a(1) (1976) (at least 20% of the units in any project benefitting under this section shall be occupied by very low-income families); *id.* § 1437d(c)(4)(A) (local public housing agencies must establish tenant selection criteria to assure that, within a reasonable period of time, every project assisted under this section will include families with a broad range of incomes, avoiding concentrations of low-income families); *id.* § 1437f(a) and (c)(7) (to promote economically mixed housing, at least 30% of the families receiving aid under this section shall be very low-income families). The 1974 Act defines "very low" income families as families who earn no more than 50% of the area's medium income. *Id.* § 1437(a); *id.* § 1437f(f); 24 C.F.R. § 889.102 (1979); S. REP. NO. 93-693, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. AND AD. NEWS 4277, 4311, 4315.

When Congress considered the Housing and Community Development Act of 1974, it determined that occupancy by people of varying incomes was an essential ingredient to create economically viable housing and a healthy social environment. The concentration of very poor families should be avoided. S. REP. NO. 93-693, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. AND AD. NEWS 4273, 4311.

The "economic integration" could also be used, according to some, to "expose" low-income families to moderate-income families, thus "destructuring" the poverty stricken. Smith, *The Implementation of the Rent Supplement Program - A Staff View*, 32 L. & CONTEMP. PROB. 482, 485 (1967) [hereinafter cited as Smith].

Another reason to strive for an income range among tenants is to minimize the costs of programs in which tenants contribute a specified percentage of their income toward the operation of the project. For example, National Housing Act § 236, 12 U.S.C. § 1715z-1 (1976), is a program in which HUD makes periodic interest reduction payments for landlords. As a result of HUD's payments, the owner pays the equivalent of a 1% mortgage. For each unit, HUD determines a basic rental charge on the basis of operating the project with a 1% mortgage. Next, HUD computes a fair market rental charge, based on the actual mortgage. Rent for each unit is the basic rental charge or such greater amount, not exceeding the fair market rental charge, as represents 25% of the tenant's income. If all the tenants earn a low income, each pays only the basic rental charge. On the other hand, a mixture including people who can pay an amount closer to the fair market rental results in more income to cover the building's operating costs. Attempting to keep such programs solvent, HUD issued an "advisory circular" providing that local public housing agencies could establish rent ranges. *Crawford v. Metropolitan Dev. and Hous. Agency*, 415 F. Supp. 41 (M.D. Tenn. 1976). In *Crawford*, the court stated that "[t]he purpose of such rent ranges was to avoid the financial result of low-cost public housing being principally occupied by persons paying very little or no rent and to contribute to restoring financial solvency in local public agencies." 415 F. Supp. at 44.

Of course, if all the tenants enjoyed a high enough income, each one would pay the fair market rate, thus ensuring the viability of the project. Congress has expressed its concern that low incomes will deny families occupancy. S. REP. NO. 93-693, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. AND AD. NEWS 4273, 4311. By specifying the required percentage of very low-income families in the statutes cited in this note *supra*, Congress ensures that the poorest will not be squeezed out of the programs because of HUD's drive for economic viability.

cific groups of low-income families.⁴ The Department of Housing and Urban Development's (HUD) efforts to achieve economic integration through this program have failed. In *Griffin v. Harris*,⁵ the

3. Housing and Urban Development Act of 1965, § 101, 12 U.S.C. § 1701s (1976 & Supp. I 1977). The Rent Supplement Program was the major new feature of the 1965 Act. It was designed to use the private market to provide housing. *Id.* § 1701s(b). The advantages of the program, from President Johnson's viewpoint, included the program's flexibility in helping people over a broad income range; the keying of payments to the family income; the reduction in assistance as tenants' income increases; the ability of families to stay in their homes even when their rising incomes raise them above the program's criteria; and the integration of incomes within projects. H.R. DOC. NO. 99, 89th Cong., 1st Sess., 111 CONG. REC. 3910 (1965) [hereinafter cited as *Hearings on H.R. 5840*]. See also H.R. REP. NO. 365, 89th Cong., 1st Sess., reprinted in [1965] U.S. CODE CONG. AND AD. NEWS 2614-20.

The public housing program, existing when the Rent Supplement Program began, established a 20% gap between the maximum income limit for the program and the income necessary for families to acquire their own housing. 42 U.S.C. § 1415(7)(b)(ii) (1970) (omitted in 1974 by Pub. L. No. 93-383, tit. I, § 201(a), 88 Stat. 653). This gap was required to assure that the market would not be adversely affected. See *Hearings on H.R. 5840, supra*, at 178 (statement of Robert C. Weaver). The Rent Supplement Program was originally geared to assist people in this gap, but was later expanded. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, HOUSING IN THE SEVENTIES: A REPORT OF THE NATIONAL HOUSING POLICY REVIEW 15 (1974) [hereinafter cited as HOUSING IN THE SEVENTIES].

The program never has been adequately funded. Congress provided no program funds in 1966 but appropriated a small amount for preparation of plans to implement the program. In subsequent years, Congress allocated meager levels of funding for Rent Supplements. See Welfeld, *Rent Supplements and the Subsidy Dilemma: The Equity of a Selective Subsidy System*, 32 L. & CONTEMP. PROB. 465, 470-71 (1967); [1977] 2 HOUS. & DEV. REP. (BNA) 20:0941. For a discussion of how the funds for preparation were used, see Smith, *supra* note 2, at 482-88. Rent supplements are most commonly used in conjunction with other subsidy programs, such as 12 U.S.C. § 1715z-1 (1976). See also note 20 *infra*.

Some have viewed the Rent Supplement Program as very successful, resulting in few defaults and low vacancy. *Hearings Before a Subcomm. of the House Comm. on Appropriations: Part Four*, 93d Cong., 1st Sess. 405, 480, 522 (1974) (comments of William Schweikert, Harry J. Byrne, and Robert W. Maffin). In contrast, HUD reports point out inequities and high costs of the program. Rent Supplement serves fewer than 1% of all households earning less than \$4,000 annually. HUD holds that comparable subsidy benefits are not provided for all those similarly situated. The programs reportedly cost the federal government more than they would if provided by the private sector. See HOUSING IN THE SEVENTIES, *supra*, at 2, 93, 119.

4. 12 U.S.C. § 1701s(c)(1), (2) (1976 and Supp. I 1977) defines a "qualified tenant" as a family or individual whose income is low and who is either displaced by government action, elderly, physically handicapped, occupying substandard housing, a disaster victim, or a member of the Armed Forces.

5. 571 F.2d 767 (3d Cir. 1978).

Third Circuit invalidated HUD rules designed to establish mixed-income housing in the Rent Supplement Program.

In *Griffin*, HUD attempted to achieve an income mix in the Rent Supplement Program through its handbook rules.⁶ In a class-action suit, eligible low-income tenants in a multifamily complex approved for rent supplement contracts alleged that HUD's handbook rules arbitrarily denied them benefits.⁷ HUD allocated full supplementation to some tenants while limiting petitioners.⁸ Petitioners sought a judgment requiring HUD to make rent supplement payments up to seventy percent of the unit's approved rent when necessary to limit the petitioners' rent payments to one-fourth of their income.⁹

The Third Circuit¹⁰ held invalid the handbook rule that allowed a full seventy percent supplementation to one-fourth of the tenants while arbitrarily limiting the remaining tenants to a sixty percent supplement.¹¹ The court rejected HUD's claim that the handbook im-

6. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, RENT SUPPLEMENT HANDBOOK 4520.1, 3-6(a) (insert dated 2/74), as cited in *Griffin*, 571 F.2d at 770, provides for a restrictive clause to be added to the rent supplement contract: "Only twenty-five percent of the tenants may receive more than sixty percent supplement. This restriction may be waived by the Regional Administrator where it can be demonstrated that by imposing this requirement, it will be difficult to secure eligible tenants for the units affected." The court did not consider this handbook rule in the same light as the regulations. After listing several "fundamentals of administrative law"—such as "[v]alidly promulgated regulations have the force and effect of law; [g]overnment agencies must follow their own published regulations. . . : [a]gencies may not publish regulations . . . while at the same time producing *ad hoc*, unpublished decisions. . . ."—the court held the handbook rule unlawful. 571 F.2d at 972.

7. *Id.* at 768.

8. *Id.* at 771.

9. The court agreed that such payments "would seem to be the correct formula under the regulations." *Id.* at 769. The statute specifies that the annual payment for any unit shall not exceed the amount by which the fair market rental for such unit exceeds one-fourth of the tenant's income. 12 U.S.C. § 1701s(d) (1976). HUD Rent Supplement Payments, 24 C.F.R. § 215.45(a) (1979) orders that the full amount of the difference between one-fourth of a tenant's income and the approved rent shall be contracted. "Thus, although 12 U.S.C. § 1701s(d) says that the supplement shall not exceed the difference between one-quarter of the tenant's income and the approved rent, the . . . regulation specifies that the full amount of that difference shall be contracted for." 571 F.2d at 169. HUD Rent Supplement Payments 24 C.F.R. § 215.25(a) (1979) limits the supplement to 70% of the approved rent for a unit. HUD's Rent Supplement handbook, however, provides that only 25% of the tenants may receive more than a 60% supplement. See note 7 *supra* and note 42 *infra*.

10. The United States District Court for the Eastern District of Pennsylvania granted summary judgment in favor of HUD. 571 F.2d at 768.

11. 571 F.2d at 771-72. The court of appeals also found prospective injunctive

plements congressional intent to achieve a mix of tenants from different socioeconomic levels.¹²

The United States Housing Act of 1937¹³ established public housing as a federally financed, locally operated¹⁴ program.¹⁵ In the Act, Congress expressly encouraged participation by people from a range

relief appropriate. Since the court found the handbook rule unlawful, HUD will not be allowed to use this provision in the future. For retrospective adjustment of withheld benefits, the court remanded the case to the district court for an exploration of the ramifications of such relief. The court noted that such remedy was granted in *Carter v. Butz*, 479 F.2d 1084 (3d Cir. 1973), *cert. denied*, 414 U.S. 1103 (1973) (retrospective relief granted to families deprived of food stamps as a result of administrative errors).

12. 571 F.2d at 770-71. The court reasoned that the handbook rule did not affect the owners' selection of tenants. Once the units are occupied, landlords are not required to evict tenants when a change in circumstances causes the mix to become unbalanced. Limiting full supplementation to 25% of the tenants did not insure that tenants with smaller supplements were less needy. In fact, the court found that similarly situated tenants were treated differently. Thus, the handbook rule did not result in an income mix. So the court held the handbook rule had no reasonable relationship to the justification HUD offered. *Id.*

13. 42 U.S.C. § 14 (1976) For a history of the Act, see note 1 *supra*.

14. States have formed local public housing authorities to engage or assist in the development and operation of low-income housing. 42 U.S.C. § 1437a(6) (1976). For example, the Secretary of HUD may make loans to public housing agencies to help finance development, acquisition, or operation of low-income housing projects by such agencies. 42 U.S.C. § 1437b(a) (1976). There currently are more than 3,000 public housing agencies operating about 1.3 million units, with a total population in excess of three million units. About three-fourths of the public housing agencies are in metropolitan areas. [1977] Hous. & Dev. Rep. (BNA) 30:2011.

15. Several projects have been introduced over the years, including loans, 42 U.S.C. § 1437b(a) (1976), and grants, *id.* § 1437c(a) and (b) (1976). HUD may make annual contributions to public housing agencies to help them achieve and maintain the low-income character of their projects. The amount of the contribution is based on cost, location, size, and rent-paying ability of prospective tenants. This type of HUD financing, which local public housing authorities use to build or restore housing for the poor, constitutes traditional public housing.

Legislation also authorizes HUD to make annual contribution contracts with public housing authorities or private owners to make assistance payments on behalf of low-income tenants. These assistance contracts include HUD's determination of the fair market rental the owner is entitled to receive for each unit. The amount of the assistance payment is usually the difference between the fair market rental and one-fourth of the tenant's income. 42 U.S.C. § 1437f (1976 and Supp. I 1977).

Another HUD program provides mortgage assistance to low-income homeowners in the form of periodic payments to the mortgagees. 12 U.S.C. § 1715z (1976 and Supp. I 1977). Under subsection (m) of this section, however, no mortgage shall be insured after September 30, 1978.

Another program involves periodic interest reduction payments on behalf of the owners of apartment complexes occupied by low-income families. These payments

of economic levels in each project.¹⁶ Since programs prior to the Housing and Community Development Act of 1974 "were not structured with an economic mix in mind,"¹⁷ and many projects depended on a percentage of tenant income to meet operating costs, administrators often favored more affluent applicants to the disadvantage of the very poor.¹⁸

The Rent Supplement Program, adopted in 1965, strove to achieve income differentiation among tenants.¹⁹ Under the program, rents

effectively lower the owner's mortgage interest rate to 1% per annum. *Id.* § 1715Z-1. For a description of the program, see note 2 *supra*.

16. See note 2 and accompanying text *supra*. For example 42 U.S.C. § 1421b (1970 and Supp. IV 1974) (omitted by Pub. L. No. 93-383, § 201(a), 88 Stat. 653 (1974)) provided for low-rent housing in private accommodations. The public housing authorities were authorized to invite private landlords to make no more than 10% of their units available to the public housing authority. Also, 42 U.S.C. § 1402 (1970 and Supp. IV 1974) (omitted by Pub. L. No. 93-383, § 201(a), 88 Stat. 653 (1974)) allowed public housing authorities to consider economic factors affecting the solvency of their projects when fixing income limits for occupancy. Thus, economic integration was to be encouraged.

17. Whitman, *Federal Housing Assistance for the Poor: Old Problems and New Directions*, 9 URB. LAW. 1, 29 (1977) (a discussion of housing programs from 1937 through 1974). A mandate for varied incomes was specified in the Housing and Community Development Act of 1974. Examples of specific changes with respect to income mix in that act can be found in 12 U.S.C. § 1715z-1(f)(2) (1976); 42 U.S.C. § 1437a(1) (1976); and 42 U.S.C. § 1437d(c)(4)(A) (1976). See also note 26 *infra*.

18. Obviously, tension exists between the goal of providing housing for people who cannot afford it and the administrative interest in keeping programs solvent. This tension is especially apparent in the subsidized programs such as 12 U.S.C. § 1701s (1976 and Supp. I 1977), 12 U.S.C. § 1715z-1 (1976 and Supp. I 1977), and 42 U.S.C. § 1437f (1976 and Supp. I 1977). Since tenants in these programs contribute a fixed percentage of their income, HUD can generate more rental income by seeking more affluent tenants. See also Blumenthal, *Housing the Poor Under the Section 8 New Construction Program*, 15 URBAN L. ANN. 281, 304-05 (1978).

The same tension exists in conventional public housing, due to the requirement that the "rental for any dwelling unit shall not exceed one-fourth of the family's income." 42 U.S.C. § 1437a(1) (1976). For examples of the tension in conventional public housing, see *Fletcher v. Housing Auth. of Louisville*, 525 F.2d 532 (6th Cir. 1975); *Crawford v. Metropolitan Dev. and Hous. Agency*, 415 F. Supp. 41 (M.D. Tenn. 1976). Congress recognized the existence of this tension. S. REP. NO. 93-693, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. AND AD. NEWS 4273, 4303, 4311.

19. "[S]ince the supplement is flexible it will permit us to encourage housing in which families of different incomes . . . can live together." Address by President Johnson (March 2, 1965), H.R. DOC. NO. 99, 89th Cong., 1st Sess., reprinted in 111 CONG. REC. 3910 (1965). Congress indicated that a mixture of income levels within projects would be a positive achievement under the Rent Supplement Program. H.R. REP. NO. 365, 89th Cong., 1st Sess. 2620, reprinted in [1965] U.S. CODE CONG. AND

are set at one-fourth of tenant income. HUD then contracts with the landlord to supplement the tenant's share so that total rent payment equals fair market rental.²⁰ The statute does not require integration of tenants from different socioeconomic levels.²¹

In *Fletcher v. Housing Authority of Louisville*,²² the Housing Authority of Louisville (HAL), in response to a HUD circular,²³ applied

AD. NEWS 2614, 2620. See generally Smith, *supra* note 2, at 484-85; Welfeld, *Rent Supplements and the Subsidy Dilemma: The Equity of a Selective Subsidy System*, 32 L. & CONTEMP. PROB. 465, 476 (1967).

HUD's handbook rule emanates from this income mix intention. See note 3 *supra*.

20. 12 U.S.C. § 1701s(a), (d) (1976). The statute states that the supplement shall not exceed the difference between one-fourth of the tenant's income and the approved rent. Yet, the regulations affirmatively specify that the full amount of that difference shall be provided. 24 C.F.R. § 215.45 (1979).

The building owner must be a private nonprofit corporation, a limited dividend corporation, or a cooperative housing corporation. 12 U.S.C. § 1701s(b) (1976).

The Rent Supplement Program usually is considered to be "piggy-backed" onto (used in conjunction with) the § 236 program of the National Housing Act, 12 U.S.C. § 1715z-1 (1976), wherein HUD pays interest reduction payments on behalf of owners so that the owners effectively pay only a one percent interest rate on their mortgage. See note 2 *supra*. Rent Supplements have been used to admit people unable to pay even the basic rent with one-fourth of their income. See also Tatar, *The Investor and the Section 236 Housing Program*, 8 HOUS. L. REV. 876, 878 (1971); *Low Income Housing: Section 236 of the National Housing Act and the Tax Reform Act of 1969*, 31 U. OF PITT. L. REV. 443, 449 (1970).

21. 12 U.S.C. § 1701s (1976 and Supp. I 1977). Notably, the Rent Supplement Program has been without contract authority since President Nixon declared a moratorium on several housing programs in 1973. *Commonwealth v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974) upheld the Secretary's authority to suspend the 12 U.S.C. § 1715z, 12 U.S.C. § 1715z-1, and 12 U.S.C. § 1701s programs. The Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974) (codified in scattered sections of 12, 42 U.S.C.), reinstated 12 U.S.C. § 1715z and 12 U.S.C. § 1715z-1, but not 12 U.S.C. § 1701s. For a discussion of the reaction to and aftermath of the moratorium, see HOUSING IN THE SEVENTIES, *supra* note 3; *Hearings Before a Subcommittee of the House Comm. on Appropriations: Part Four*, 93d Cong., 1st Sess., *supra* note 3. Thus, the direct impact of *Griffin* may prove to be quite small, affecting only those people receiving rent supplements at the time of the moratorium. *Contra Sicuro v. Hills*, 415 F. Supp. 553 (C.D. Cal. 1976), which ordered that HUD provide rent supplement benefits to the plaintiff class, who had not been receiving such benefits at the time of the moratorium. The court reasoned that the restriction against new contract authority applied only to new construction. HUD was ordered to provide rent supplement benefits to tenants in already existing housing units who were eligible for such benefits under the statute and regulations.

22. 491 F.2d 793 (6th Cir. 1974).

23. HUD Circular No. 7465.12 provided that local public agencies could establish rent ranges from no dollars per month rent to the maximum rent allowed in public housing. *Id.* at 796. "To advance our objective of socially and financially sound local programs, increased efforts must be made by Local Authorities to achieve and main-

a rent-range formula to its public housing programs. The formula allocated available apartments among eligible applicants to ensure accelerated entry of tenants who could afford higher rents.²⁴ The Louisville Authority designed this formula pursuant to pressure from HUD to increase rental income to restore the solvency of the local housing projects.²⁵ The *Fletcher* court refused to uphold the formula, finding it to be highly discriminatory and inconsistent with the National Housing Act of 1937 and therefore outside the powers of HAL and HUD.²⁶

While further appeal of *Fletcher* was pending, Congress passed the Housing and Community Development Act of 1974.²⁷ Committee reports,²⁸ the Act,²⁹ and regulations pursuant to the Act³⁰ are replete

tain . . . a cross-section of the low income families in their localities." The circular is reproduced as Appendix A, 491 F.2d at 808-09.

24. 491 F.2d at 795. The formula established that the following ranges of rents be maintained: for rents from \$0 - \$30, 30% of the units shall be available; for rents from \$31 - \$45, 20% of the units; for rents from \$46 - \$60, 20% of the units; and for rents \$61 and over, 30% of the units. Thus, "HAL made prospective tenants' ability to pay rent a key factor in determining which eligible applicants would receive Louisville's federally aided public housing and in what order." *Id.* at 796.

25. Housing Authority of Louisville's Resolution No. 51-72 is reproduced in 491 F.2d at 796. One justification HAL offered for instituting the formula dealt with the financial solvency of the Louisville Authority. The court found that HAL's resolution "was the result of HUD's deliberate and steady pressure. . . ." This pressure was apparent when HAL's original budget request for fiscal year 1972 was disapproved by HUD. *Id.* at 799-800.

26. The court reasoned that it could uphold HAL's resolution only if it were reasonable and consistent with the National Housing Act. The court found the resolution an abuse of discretion under the Act because it was not in accord with the legislation due to the resolution's unjustified discrimination against applicants because of their poverty. *Id.* at 800-05.

27. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974) (codified in scattered sections of 12, 42 U.S.C.).

28. S. REP. NO. 93-693, 93d Cong., 2d Sess. reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4273, 4277, 4303, 4310, 4311, & 4315 (references to sections of the Act which "bear specifically upon the desirability of securing a mix of incomes within projects," to the expectation of a healthy cross-section of lower income families, and to the concern that low-income families be effectively served). CONF. REP. NO. 93-1279, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 4449, 4461 (restates the hope that public housing programs will include families from a broad range of incomes).

29. See 12 U.S.C. § 1715z-1(f)(2) (1976) and note 2 *supra* (for 20% of the units in any project, the Secretary is authorized to make additional assistance payments on behalf of tenants whose incomes are too low for them to afford the basic rentals with 25% of their income); 42 U.S.C. § 1437a(1) (1976) (at least 20% of the units in any project under annual contribution contracts (see note 15 *supra*) shall be occupied by

with examples of congressional desire to attain an income mix among tenants in both traditional public housing³¹ and subsidized housing,³² including directions specifying how to achieve this mix. The

very low-income families); 42 U.S.C. § 1437d(c)(4)(A) (1976 and Supp. I 1977) (tenant selection criteria shall be designed to assure that, within a reasonable period of time, the project will include families with a broad range of incomes and will avoid concentrations of low-income families); *id.* § 1437f(a), (c)(7) (one purpose of this section is to promote economically mixed housing; thus, at least some of the families assisted under this section shall be very low-income families).

Section 1437d(c)(4)(A), dealing with conventional public housing, speaks most directly to income mix. The other sections cited, dealing with subsidized programs, merely require that a given percentage of the units in such programs be reserved for very low-income families. Due to the tension described in note 18 *supra*, this requirement would result in an income mix in subsidized programs. HUD's desire to choose the most affluent applicants, combined with the mandates above, leads to a variation in the incomes of tenants in any program. Therefore, Congress hoped to achieve income mix in both conventional public housing and in subsidized housing. See note 28 *supra*.

30 See 24 C.F.R. § 860.406 (1979) (at least 20% of the units in any project under annual contributions contracts shall be occupied by very low-income families); 24 C.F.R. § 880.117(b) (1979) (at least 30% of the units constructed under Section 8 Assistance Payments Program shall be occupied by very low-income families.); 24 C.F.R. § 881.117(b) (1979) (at least 30% of the units rehabilitated under Section 8 Assistance Payments Program shall be occupied by very low-income families); 24 C.F.R. § 882.113(b) (1979) (at least 30% of the units already existing under Section 8 Assistance Payments shall be occupied by very low-income families); 24 C.F.R. § 883.213(b) (1979) (at least 30% of the units developed under Housing Finance Agency set-asides shall be occupied by very low-income families); 24 C.F.R. § 886.117(b) (1979) (in filling vacancies, owners of buildings receiving Section 8 benefits shall rent to very low-income families until at least 30% of the units are occupied by such families); 40 Fed. Reg. 18,681 (1975).

Comments objected to the requirement of § 880.117(b) that the owner maintain at least thirty percent occupancy of contract units by very low income families . . . Section 8(c)(7) of the U.S. Housing Act requires that thirty percent of the families assisted under § 8 be very low income families . . . [T]he only administratively feasible method of complying with this statute is to apply the thirty percent requirement to each project. . . .

40 Fed. Reg. 18,902-03 (1975) (a similar comment regarding § 881.117(b)).

It should be noted that HUD attempted to follow the mandate in 42 U.S.C. § 1437d(c)(4)(A) (1976 and Supp. I 1977) to economically integrate conventional public housing by requiring that 20% of the units be reserved for very low-income families. 24 C.F.R. § 860.406 (1979). This supports the notion discussed in note 18 *supra* that the tensions toward excluding the poorest applicants that exist in subsidized housing also exist in conventional public housing. HUD chose the same means to achieve an income mix in conventional public housing as Congress did to integrate subsidized housing. See note 29 *supra*.

31. See 42 U.S.C. § 1437(d)(c)(4)(A) (1976 and Supp. I 1977) and 24 C.F.R. § 860.406 (1979) as discussed in notes 29-30 *supra*.

32. See notes 29-30 *supra*.

Supreme Court remanded *Fletcher*³³ for further consideration in light of the 1974 Act. The Sixth Circuit, reinstating its former judgment, found that the Act could not be applied retroactively.³⁴

Low-income public housing tenants in *Crawford v. Metropolitan Development and Housing Agency* (MDHA)³⁵ challenged a rent-range policy established under the same HUD circular³⁶ as in *Fletcher*. The court found MDHA's scheme unlawful as applied to low-income families who were denied housing before the 1974 Act became effective.³⁷ Although the 1974 Act authorized adoption of tenant selection criteria, the court reasoned that it must review MDHA's actions that occurred before implementation of the Act in accordance with *Fletcher*.³⁸ Thus, the court found the income variation policy to be inconsistent with the National Housing Act and an abuse of HUD and MDHA discretion.³⁹

The *Griffin* court rejected HUD's attempt without a statutory man-

33. *Housing Auth. of Louisville v. Fletcher*, 419 U.S. 812 (1974).

34. *Fletcher v. Housing Auth. of Louisville*, 525 F.2d 532, 535 (6th Cir. 1975). The *Fletcher* court addressed other issues as well. It found that HUD's pressure forced the Louisville Authority to adopt the rent range formula, which was neither reasonable nor consistent with the Housing Act of 1937. Eligibility criteria not authorized by Congress are not permissible. See notes 25-26 *supra*.

The *Fletcher* court also intimates a constitutional problem in granting automatic preferences to higher income applicants. "The rent range formula 'vaguely smacks of a quota system,' thus casting doubt on its constitutionality." *Colon v. Tompkins Square Neighbors, Inc.*, 294 F. Supp. 134, 139 (S.D.N.Y. 1968), as quoted at 491 F.2d at 798.

35. 415 F. Supp. 41 (M.D. Tenn. 1976). The district court in *Crawford* stayed its decision pending the outcome in *Fletcher*.

36. See note 23 *supra*.

37. 415 F. Supp. at 47-48. Section 201(b) of Pub. L. No. 93-383 provided that: "The provisions of subsection (a) of this section [enacting 42 U.S.C. 1437-1437j] shall be effective on such date or dates as the Secretary of HUD shall prescribe, but not later than 18 months after the date of the enactment of this Act [August 22, 1974]. . . ." 42 U.S.C. § 1437 (1976).

38. 415 F. Supp. at 44, 46.

39. The court based its decision on data submitted by MDHA in response to interrogatories that list the number and percentage of applications on file in each income category. *Id.* at 45. These figures show discrimination against applicants in the lowest range with long delays in obtaining housing for the families in this category. The court held that MDHA's rent range system was invalid, based on *Fletcher*. *Id.* at 46-47. To place plaintiffs in "the condition to which they are entitled, it is necessary that defendant housing authority give them first choice on units as they become available in the degree in which they would have been housed absent the illegal rent classification restrictions." *Id.* at 47-48.

date to achieve an economic mix in Rent Supplement Programs in order to balance project costs.⁴⁰ The court reasoned that the regulations require rent supplement payments in an amount equal to seventy percent of the approved rent, whenever such payments are necessary to limit the tenant's share to one-fourth of income.⁴¹ The handbook provisions, however, resulted in lower government payments.⁴² Although HUD argued that the handbook attempted to achieve a commendable goal of income mix, the court found that the provision did not achieve this goal.⁴³ Instead, arbitrarily selected tenants paid a higher percentage of their income in rent than did others similarly situated.⁴⁴ The court found the handbook rule to be invalid under the statute and regulations.⁴⁵

The *Griffin* court's rejection of HUD's attempt to economically integrate Rent Supplement Programs follows logically from *Fletcher* and *Crawford*.⁴⁶ The three courts refused to accept HUD's efforts because the rent range formulas at issue resulted in a denial of benefits to the neediest families.⁴⁷ Although the courts recognized that Congress deems income variation in housing desirable, the denial of benefits that necessarily results from income mix requirements di-

40. 571 F.2d at 772.

41. *Id.* at 769. The court's reasoning is based on two regulations. 24 C.F.R. § 215.45 (1979) states that the rent supplement payment shall be that amount by which the approved rent exceeds one-fourth of tenant's income. This provision is qualified by 24 C.F.R. § 215.25(a) (1979), which orders that payment shall not exceed the amount of the approved rent.

42. *See* note 6 *supra*.

43. 571 F.2d at 770-71. The *Griffin* court agreed that achievement of an income mix "was certainly desired by Congress." The handbook provision, however, had no effect upon the owner's selection of tenants. *See* note 12 *supra*.

44. *Id.* at 771.

45. *Id.* at 772. The court held that prospective relief was appropriate. HUD is not allowed to apply its handbook rule in the future. *Id.* at 772-73. Regarding retrospective adjustment, the court remanded the case to the district court because the lower court did not consider the ramifications of such relief. *Id.* at 773.

46. *Fletcher* and *Crawford* were actions by tenants in conventional public housing challenging rent range formulas instituted by HUD without statutory mandate. Plaintiffs in *Griffin* challenged a similar non-statutory formula in a subsidized housing program. Since tenants pay approximately 25% of their income in rent in both types of housing and since the tension between keeping programs solvent and providing housing to very low-income families is the same in both types of housing, the cases are comparable. *See* note 18 *supra*.

47. *Griffin v. Harris*, 571 F.2d 767, 771-72 (3d Cir. 1978); *Fletcher v. Housing Auth. of Louisville*, 491 F.2d 793, 797, 800 (6th Cir. 1974); *Crawford v. Metropolitan Dev. and Hous. Agency*, 415 F. Supp. 41, 44, 46 (M.D. Tenn. 1976).

rectly conflicts with the clear statutory policy to provide "a decent home . . . for every American family."⁴⁸ In addition, the *Fletcher* and *Crawford* courts refused to reconsider the propriety of rent range formulas in light of the 1974 Act,⁴⁹ without a specific statutory requirement for income mix, pre-1974 attempts to achieve a mix were inconsistent with the nation's housing goals.⁵⁰ Because HUD's fiscal interests too readily tend to eliminate the poor, those courts left Congress with the task of explicitly dictating a proper income mix mechanism.⁵¹ *Griffin* did the same.⁵²

The *Griffin* decision, however, did not mention the 1974 Act, which established a new policy of income mix in both traditional public housing and the subsidized programs.⁵³ Perhaps the *Griffin* court refused to extend this policy to the Rent Supplement Program since the program was not specifically included in the 1974 changes.⁵⁴

The *Griffin* court should have applied the 1974 Act's directives re-

48. See notes 1-2 *supra*.

49. *Fletcher v. Housing Auth. of Louisville*, 525 F.2d 532, 534-35 (6th Cir. 1975); *Crawford v. Metropolitan Dev. and Hous. Agency*, 415 F. Supp. at 44, 46.

50. The *Fletcher* and *Crawford* decisions clearly show that the courts gave much greater weight to the goal of providing housing for all. See note 1 *supra*. The courts not only refused to allow the specifically stated legislative goal to be made less effective by income mix provisions; they refused to view the 1974 Act's integration directives as a statement of what existed as part of legislative intent in pre-1974 housing.

51. *Fletcher* states that HAL may not set eligibility criteria unauthorized by Congress. 491 F.2d at 799, 804. Since the court held HAL's actions were inconsistent with the National Housing Act, *id.* at 800, the only way to validly achieve such a mix would be to amend the Act. *Id.* at 807.

52. It is notable that *Fletcher* and *Crawford* were decided shortly after the passage of the 1974 Act whereas *Griffin* was decided in 1978. The grievances in *Fletcher* and *Crawford* related to HUD actions before the 1974 Act came into effect and before any explicit statutory mandate for mixed income housing existed. *Fletcher* and *Crawford* held that a mix was not allowed until the date of the Act. In fact, *Crawford* declared that the mix is valid as applied to applicants after the effective date of the statute. 415 F. Supp. at 47. In *Griffin*, however, the plaintiff class included "all tenants in the nation on whose behalf the defendants made at the commencement of this action rent supplement payments. . . ." 571 F.2d at 773. The policies established in the 1974 Act were definitely in force when the court considered *Griffin*.

53. See notes 28-32 *supra*.

54. There are several possible reasons to explain why the Rent Supplement Program was not amended by the 1974 Act. It is a small program, see note 21 *supra*, and is usually "piggy-backed" onto programs which were affected by the 1974 Act. See also notes 2 and 20 *supra*.

Before the 1974 Act required income variation, the Rent Supplement Program often operated to achieve such a mix. See Tatar, *The Investor and the Section 236 Housing Program*, 8 HOUS. L. REV. 876, 878 (1971); *Low Income Housing: Section*

quiring economic integration in the Rent Supplement Program. It is absurd to believe that Congress desired income-mixed developments in every housing program except Rent Supplement.⁵⁵ The striking similarity between the newer Section 8 subsidy program,⁵⁶ which requires mixed-income occupancy,⁵⁷ and the Rent Supplement Program also suggests that the income variation requirement should have been applied in *Griffin*.⁵⁸

The *Griffin* decision, while recognizing that tenant mix is desirable,⁵⁹ focused on the resulting denial of benefit to people who are otherwise eligible.⁶⁰ Although the court defined the problem, it did not seize upon the solution offered in the 1974 Act. Instead, the decision calls for unnecessary legislation to clarify a policy already clearly established in 1974.⁶¹ Most important, the *Griffin* court refused to apply the new income-mix policy that the 1974 Act⁶² carefully and formally established in every other housing program. Although the court could have reasoned that all housing programs in this country have a single set of goals, *Griffin* merely adds another twist to the confusion of American housing legislation.

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236 of the National Housing Act and the Tax Reform Act of 1969, 31 U. OF PITT. L. REV. 443, 449 (1970).

55. See notes 29-30 *supra*.

56. The Housing and Community Development Act of 1974, Section 8, 42 U.S.C. § 1437f authorizes HUD to make assistance payments to local public housing agencies. The local agencies enter into contracts with landlords, establishing the maximum monthly rent which the owner is entitled to receive for each unit for which assistance payments are to be made. Tenants pay between 15 and 25 percent of their income in rent and the landlord receives a monthly payment from HUD equalling the difference between the rent paid by each occupant family and the total approved rent. The subsidy can be applied to newly constructed, rehabilitated, or existing housing. See generally Whitman, *Federal Housing Assistance for the Poor: Old Problems and New Directions*, 9 URB. LAW. 1 (1977); [1977] 2 HOUS. & DEV. REP. (BNA) for a description of Section 8.

57. See note 30 *supra*.

58. Since the programs operate similarly, it is reasonable to believe that Congress would want both programs to be integrated in the same way. See note 56 *supra*.

59. 571 F.2d at 770.

60. *Id.* at 770-72.

61. The *Griffin* court concluded that "[t]he statute contains no authority for such arbitrary action." *Id.* at 772.

62. See notes 29-30 *supra*.