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Urban Housing: A Strategic Role for the States

Peter W. Salsich, Jr.[†]

Amid the cacophony of the Clinton Administration's first year, quiet steps were taken to transform federal housing policy. Two popular housing programs, tax-exempt housing revenue bonds¹ and low-income housing tax credits,² were extended permanently in the Omnibus Budget Reconciliation Act of 1993.³ Tax-exempt housing revenue bonds have been the mainstay of a remarkable growth in state housing-finance programs in the past twenty years.⁴ The low-income housing tax credit, the only active federal housing production subsidy program, is administered by many of the same state housing agencies that issue tax-exempt housing revenue bonds.⁵ The congressional decision to give permanent status to these two programs is evidence of a growing confidence in the ability of states to be the primary managers of federal housing policy.

Expanding upon a recent article by the author,⁶ this Article argues that states have both the capacity and the opportunity to play a leading role in revitalizing national housing policy. I advocate redirecting federal housing policy away from the centralized bureaucracy of the past sixty years and toward a state-administered, national strategy to support creative, diverse, flexible, and community-planned affordable housing programs. This revitalized policy should include (1) redistributing federal tax subsidies to place greater

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1. In order for the income from these bonds to be tax-exempt under I.R.C. § 103 (1988), they must meet the requirements listed in I.R.C. § 142 (1988 & Supp. IV 1992) if the bonds are funding residential rental housing or the requirements listed in I.R.C. § 143 (1988 & Supp. IV 1992) if the bonds are funding owner-occupied residences.

2. The low-income housing tax credit, codified at I.R.C. § 42 (1988 & Supp. IV 1992), provides a tax credit to taxpayers who invest in low-income housing.

3. Pub. L. No. 103-66, §§ 13141-13142, 107 Stat. 312, 436-39 (1993) (to be codified at 26 U.S.C. §§ 25, 42, 143). Both programs had been subjected to sunset provisions and the annual uncertainty of reauthorization, since enactment of the Tax Reform Act of 1986. See *infra* note 25.

4. See *infra* notes 39-52 and accompanying text.

5. See *infra* part II.B.2.

6. Peter W. Salsich, Jr., *A Decent Home for Every American: Can the 1949 Goal be Met?*, 71 N.C. L. REV. 1619 (1992). The article reviewed national housing policies since 1968 as part of a symposium on the Twenty-fifth Anniversary of the Kerner Commission report on racial disturbances in the mid-1960s, NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (Bantam Books 1968). The article recommends the reallocation of federal housing subsidies by placing a cap on the mortgage interest tax deduction and using a portion of the resulting revenues to fund expanded housing programs for low-income persons.

emphasis on the housing needs of low-income persons, (2) decentralizing the housing subsidy distribution system to the states, and (3) accentuating inclusionary housing policies by coordinating housing development and land use regulation practices.

Ironically, one of the positive effects of the sharp reduction in federal support for housing and urban assistance programs during the 1980s⁷ was the growth of sophisticated state and local housing programs. Prodded by both the increased visibility of homelessness and the federal government's general withdrawal from active support of housing development efforts, states have begun to recognize housing as a legitimate area for spending to promote the public welfare.⁸ On the foundation of tax-exempt housing revenue bond finance programs established in the 1960s and 1970s,⁹ states have built a range of programs designed to respond to housing needs and to fill the gap left by curtailment of federal housing programs. All fifty states possess housing agencies of one sort or another that provide low-interest loans, grants, and other financial assistance to qualified housing developers, homeowners, and tenants.¹⁰ Most of these state housing programs have been funded by tax-exempt housing revenue bond proceeds and by reserves generated from the recycling of bond proceeds. An increasing number of states have appropriated or

7. For a review of the literature tracking the decline in federal housing programs during the 1980s, see John C. Boger, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C. L. REV. 1289, 1332-36 (1993).

8. The link between housing and general welfare was described eloquently by the New Jersey Supreme Court in the first *Mount Laurel* case:

There cannot be the slightest doubt that shelter, along with food, are the most basic human needs The same thought is implicit in the legislative findings of an extreme, long-time need in this state for decent low and moderate income housing, set forth in the numerous statutes providing for various agencies and methods of both state and local levels designed to aid in alleviation of the need

It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality. It has to follow that, broadly speaking, the presumptive obligation arises to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.

Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713, 727-28 (N.J.), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975). For a discussion of the *Mount Laurel* cases, see *infra* part II.D.3.

9. For a review of first generation state housing finance agency activities, see Peter W. Salsich, Jr., *Housing Finance Agencies: Instruments of State Housing Policy or Confused Hybrids?*, 21 ST. LOUIS U. L.J. 595 (1978); see also NATIONAL COUNCIL OF STATE HOUS. AGENCIES, STATE HFA PROGRAM CATALOGUE (1992).

10. See NATIONAL COUNCIL OF STATE HOUS. AGENCIES, *supra* note 9 (summarizing over 600 programs administered by state housing finance agencies).

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dedicated state funds to supplement this traditional reliance on bond financing.¹¹ All states have gained valuable experience in administering housing programs and determining how best to respond to housing needs.

A significant complement to state housing development programs is the growing state requirement that local governments engage in formal analysis of local housing needs before they exercise their zoning power.¹² States are recognizing that parochial exercise of the delegated zoning power can result in unreasonable housing imbalances by excluding lower income persons from residential communities. For example, some state courts have rejected exclusionary zoning practices as arbitrary exercises of state power.¹³ State legislatures are requiring municipalities to consider housing needs in local planning activities.¹⁴ A growing number of states are including regional housing needs in mandated housing needs assessments.¹⁵ Several states have also enacted special zoning appeals processes in order to shift the presumptions and burdens of proof toward favoring affordable housing developments.¹⁶ And one state has linked direct state financial support for affordable housing to participation in regional housing compacts.¹⁷

Part I of this Article reviews both the growth of state housing programs that has taken place in response to the federal government's withdrawal from

11. See, e.g., *A Summary of Revenue Sources Committed to Existing Housing Trust Funds, Update: Sept. 1992* (Housing Trust Fund Project, San Pedro, Cal.) [hereinafter *Summary of Revenue Sources, Update: Sept. 1992*] (summarizing housing trust funds in five states, one of which benefitted from state general fund appropriations); *A Summary of Revenue Sources Committed to Existing Housing Trust Funds, CURRENT TOPICS FROM THE HOUSING TRUST FUND PROJECT* (Housing Trust Fund Project, San Pedro, Cal.), Nov. 1991, at 12-17 [hereinafter *Summary of Revenue Sources, Nov. 1991*] (summarizing housing trust funds in 21 states, nine of which benefitted from state general fund appropriations).

12. See *infra* notes 58-60 and accompanying text.

13. See, e.g., *Britton v. Town of Chester*, 595 A.2d 492 (N.H. 1991) (state zoning enabling act does not permit local governments to exclude forms of affordable housing, such as apartments and smaller houses); *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (state constitution prohibits exclusionary zoning); *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J.) (same), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975); see also *Associated Homebuilders v. City of Livermore*, 557 P.2d 473, 483 (Cal. 1976) (holding that the constitutionality of a local zoning ordinance "must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region"); *Berenson v. Town of New Castle*, 341 N.E.2d 236, 240 (N.Y. 1975) (a local zoning ordinance can be attacked as constitutionally invalid "only if 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare'" (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926))); *Township of Williston v. Chesterdale Farms*, 341 A.2d 466, 468 (Pa. 1975) (striking down local zoning ordinance on the grounds that it was unreasonable and therefore unconstitutional because "it [did] not provide for a fair share of the township acreage for apartment construction" necessary to provide needed low- and moderate-income housing).

14. For a useful chronicle of the growth of state regulatory efforts to promote affordable housing, see S. MARK WHITE, *AFFORDABLE HOUSING: PROACTIVE & REACTIVE PLANNING STRATEGIES* (PAS Rep. No. 441, 1992); see also *STATE & REGIONAL COMPREHENSIVE PLANNING* (Peter C. Buchsbaum & Larry J. Smith eds., 1993).

15. See, e.g., CAL. GOV'T CODE §§ 65580-65584 (West 1983 & Supp. 1993); OR. REV. STAT. § 197.307 (1991 & Supp. 1992).

16. CAL. GOV'T CODE § 65589.5 (West 1983 & Supp. 1993); CONN. GEN. STAT. § 8-30g (1993); MASS. GEN. L. ch. 40B, §§ 20-23 (1993); R.I. GEN. LAWS §§ 45-53-1 to -7 (1991 & Supp. 1993).

17. CONN. GEN. STAT. §§ 8-336(f), -386, -387(b) (1993).

affordable housing policy and the increasing housing needs of the population over the last two decades. Part II discusses opportunities for state leadership in housing through coordinated application of state zoning powers in conjunction with state administration of federal housing programs. Part III recommends a national housing policy in which the states would become the centerpiece of a coordinated, multilayered strategy for providing well designed and well managed, neighborhood-based, affordable housing.¹⁸

I. THE INCREASED ROLE OF THE STATES IN HOUSING

A. Federal Withdrawal

The general withdrawal of the federal government from efforts to provide new money for low- and moderate-income housing development has been well-documented and can be summarized briefly.¹⁹ Since 1981, the federal government has dramatically reduced its role in housing assistance programs. The Reagan and Bush Administrations and Congress sharply curtailed or eliminated the major supply-side subsidy programs designed to encourage the production or rehabilitation of housing units for low- and moderate-income persons. Budget cutters noticeably reduced the Community Development Block Grant (CDBG) program, a substantial portion of which assists housing development.²⁰ Low appropriations and restrictive regulations have slowed implementation of the new housing block grant (HOME) program approved in 1990.²¹

The Tax Reform Act of 1986²² removed many of the popular tax deduc-

18. While housing affordability problems can exist at almost any income level, for purposes of this paper affordable housing is housing that is within the economic range of persons at or below the national median income for renters. The national median income for renters was \$20,696 in 1991, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES table 713 (1993), which marked approximately the top of the lower third of income, *id.* at table 715, and was marginally above the poverty line of \$15,141 for a family of five, *id.* at table 746. Over 31 million of the nation's 96 million households fell below this income level. *Id.* at table 715.

19. See, e.g., Boger, *supra* note 7, at 1332 & n.189.

20. The CDBG program is aimed at improving urban communities by providing grants to state and local governments for projects. 42 U.S.C. § 5301 (1988 & Supp. IV 1992). Among the authorized uses for the grants, CDBG funds may be used to reduce the cost of land acquisition, to provide infrastructure and site development improvements, and to make various forms of "soft second" loans designed to fill gaps between development costs and available private financing. 42 U.S.C. § 5305(a) (1988 & Supp. IV 1992). The term "soft second" comes from the fact that cities making such loans typically subordinate their liens to the first mortgage lender and agree to delay payback until a positive cash flow is generated, if ever.

21. HOME Investment Partnerships Act, Pub. L. No. 101-625, §§ 201-289, 104 Stat. 4079, 4095-128 (1990) (codified as amended at 42 U.S.C. §§ 12722-12839 (Supp. IV 1992)). This Act authorized the Secretary of the Department of Housing and Urban Development to aid the development of affordable housing by providing funds directly to state and local governments in support of a number of activities, ranging from acquiring property to providing security deposit assistance. *Id.*

22. Pub. L. No. 99-514, 100 Stat. 2085 (1986) (codified as amended in scattered sections of 26 U.S.C. (1988 & Supp. IV 1992)).

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tions, such as accelerated depreciation and passive loss deductions, which had enabled investors to obtain attractive tax shelters by participating in housing-development activities.²³ Housing advocates and investors found the replacement tax-subsidy vehicle, the Low Income Housing Tax Credit (LIHTC),²⁴ unattractive because of the complexity of its rules and the temporary nature of its authorization.²⁵ The congressional decision to make the LIHTC a permanent program in 1993²⁶ has helped it gain momentum as one of the few sources of support for housing-production activities. However, the LIHTC has had a limited impact on the total housing needs of low-income persons for several reasons: the significant loss from the market of existing low-rent units in recent years,²⁷ the limitation on the tax credit's availability to newly con-

23. *Id.* §§ 201, 501, 100 Stat. at 2121-42, 2233-41 (1986) (codified as amended in scattered sections of 26 U.S.C. (1988 & Supp. IV 1992)). Accelerated depreciation had allowed investors to generate paper losses that could offset income faster than their property's value actually decreased; passive loss deductions allowed investors to reduce their taxable income from other sources, including from earnings, by the paper losses from their passive investment activities. A report issued by the HUD Office of Policy Development and Research drew the following conclusions about the tax law changes:

The Tax Reform Act of 1986 dramatically changed incentives for rental housing and in fact were [sic] a major factor in the collapse of the real estate industry that followed. Tax life for depreciation purposes was extended from 15 to 27.5 years, and accelerated depreciation was abolished except for historic buildings. More significant, however, was the overnight elimination of one's ability to write off real estate losses against other income. Many apartment syndications called for investors to make their total payment over a 5-to-7 years in order to maximize the tax advantages. When investors' ability to deduct real estate losses was abolished in 1986, many of them defaulted on their notes. These defaults almost invariably led to default on the permanent mortgage and loan foreclosure and contributed to the savings and loan (S&L) problems.

OFFICE OF POL'Y DEV. & RES., U.S. DEP'T OF HOUS. & URB. DEV., REDISCOVERING URBAN AMERICA: PERSPECTIVES ON THE 1980S 5-23 (Jack Sommer & Donald Hicks eds., 1993).

Policymakers expected significant increases in rental income to replace the loss of these indirect housing subsidies. JAMES M. POTERBA, TAXATION AND HOUSING: OLD QUESTIONS, NEW ANSWERS, 7 National Bureau of Economic Research Working Paper No. 3963 (1992); see also James R. Follain & David C. Ling, *The Federal Tax Subsidy to Housing and the Reduced Value of the Mortgage Interest Tax Deduction*, 44 NAT'L TAX J. 147, 167 n.17 (1991). Overbuilding in the early 1980s, however, created an oversupply of rental units which prevented this from occurring. See POTERBA, *supra*, at 8. The combination of both the tax subsidy removal and the inability to raise rents resulted in diminished revenue from investment housing. Landowners responded by deferring maintenance. This caused asset values to drop, and made new infusions of capital difficult to obtain. See James R. Follain et al., *Real Estate Markets Since 1980: What Roles Have Tax Changes Played?*, 45 NAT'L TAX J. 253 (1992).

24. Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189-208 (codified as amended at 26 U.S.C. § 42 (1988 & Supp. IV 1992)). Tax credits or tax subsidy vehicles allow the taxpayer to reduce the amount of her tax bill by the credit or subsidy amount.

25. See *Continued Lobby for Extensions Urged; Passive Loss Relief Would Be Limited to Real Estate Income*, 20 [Current Developments] Hous. & Dev. Rep. (BNA) 894 (Mar. 15, 1993); *Senate Finance Committee Approves 18-Month Extensions for Tax Credits, Mortgage Bonds*, 20 [Current Developments] Hous. & Dev. Rep. (BNA) 85 (June 22, 1992); Joseph A. Haas, *Senate Debates Tax Bill Including Passive Loss, Capital Gains Relief, Tax Credit, Mortgage Bond Extenders*, 19 [Current Developments] Hous. & Dev. Rep. (BNA) 843, 883 (Mar. 16, 1992).

26. *Supra* note 3 and accompanying text.

27. EDWARD B. LAZERE & PAUL A. LEONARD, A PLACE TO CALL HOME: THE LOW INCOME CRISIS IN 44 MAJOR METROPOLITAN AREAS (Center on Budget & Policy Priorities ed., 1992). These authors estimated that there was a 4.1 million-unit gap between the number of available low-rent units (5.5 million units for under \$250/month) and the number of low-income (income below 50% of area median income) renters (9.6 million) in 1989. *Id.* at 15; see also Janet Stearns, *The Low-Income Housing Tax Credit: A Poor Solution to the Housing Crisis*, 6 YALE L. & POL'Y REV. 203 (1988).

structed or substantially rehabilitated units and to existing units when a transfer of ownership occurs,²⁸ and the presence of caps on the use of tax credits based on state populations.²⁹

The only federal housing program designed to deal directly with the housing needs of the very poor—the public housing program³⁰—has confronted continuing crises, particularly in large, highly concentrated “projects” in the inner cities. Congress and successive administrations have repeatedly balked at appropriating funds to construct new public housing units, and many of the existing urban units require major renovation or demolition.³¹

The advent of the Clinton Administration may have ushered in some new attitudes about the federal role in housing. The inability of the Administration to persuade Congress, however, to enact even a modest economic stimulus program during the spring of 1993 attests to the obstacles facing any attempt to expand housing subsidy programs. Political support for traditional federal housing production programs is likely to be extremely difficult to mobilize in this deeply indebted nation.

B. Growth in Housing Needs

During the 1980s, while federal support for direct housing assistance was diminishing, the need for such housing at the lowest economic levels was escalating.³² For example, a study by an Ohio committee concluded that twenty percent of that state’s ten million residents lived in high-cost, poor-quality, or overcrowded housing.³³ Numerous other studies have called atten-

28. I.R.C. § 42(b)(1)(A), (B)(i-ii) (1988).

29. I.R.C. § 42(h)(3)(C)(i) (Supp. IV 1992) (\$1.25 multiplied by state population).

30. Codified at 42 U.S.C. §§ 1437-1437w (1988 & Supp. IV 1992).

31. See THE NAT’L COMM’N ON SEVERELY DISTRESSED PUBLIC HOUSING, THE FINAL REPORT OF THE NATIONAL COMMISSION ON SEVERELY DISTRESSED PUBLIC HOUSING, A REPORT TO THE CONGRESS AND THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT 75-88 (1992) [hereinafter THE FINAL REPORT]. As the fiscal year 1995 budget recommendations were being prepared, the Clinton Administration reportedly was considering a proposal to reduce public housing funds in order to increase support for programs to combat homelessness. Robert S. Swierczek, *OMB Seeking 1995 Cuts in Housing Programs; CD Funding Would Be Stable; Homeless Aid to Increase*, 21 [Current Developments] *Hous. & Dev. Rep.* (BNA) 485 (Dec. 20, 1993).

32. See Boger, *supra* note 7, at 1332-35 (attributing increase in housing need to a variety of factors, including loss of millions of older, low-income rental units, “gentrification” of neighborhoods, and stagnating or declining incomes among low-income and minority persons).

33. STATE OF OHIO GOVERNOR’S ADVISORY COMM. ON FUNDING THE HOUS. TRUST FUND, SECURING A FUNDAMENTAL COMMUNITY ASSET: THE CASE FOR STATE LEADERSHIP IN AFFORDABLE HOUSING 17 (1992) [hereinafter GOVERNOR’S ADVISORY COMM.] (high-cost housing was defined as a household with an annual income of \$15,000 or less spending more than 35% of gross income for housing; overcrowded housing was defined as more than one person per room). The report estimated that a 10-year program to achieve a 50% reduction in Ohio’s housing need would cost \$7 billion. Assuming the federal government would cover 50% of that cost and private sources would cover 20%, the state would be responsible for 30%, or \$2.1 billion (\$210 million annually). The report recognized that \$200 million was “an ideal goal,” and so proposed to initially raise \$50 million annually for Ohio’s housing trust fund as the minimum necessary to fund “rational development and production of low-income housing and support services.” *Id.*

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tion to the housing-affordability problem resulting from the decline in the relative purchasing power of lower and middle-income persons.³⁴ For people officially in poverty, this problem approaches crisis proportions, as Table A indicates. Affordability is based on paying no more than thirty percent of family income on rent and utilities.³⁵

at 19-20.

34. See Boger, *supra* note 7, at 1334 (citing CENTER ON BUDGET & POLICY PRIORITIES & CENTER FOR THE STUDY OF THE STATES, THE STATES AND THE POOR: HOW BUDGET DECISIONS IN 1991 AFFECTED LOW INCOME PEOPLE vii-xiv (1991)).

35. The 30% of income standard for affordability was adopted by Congress in the 1980s. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, sec. 322(a), § 3(a), 95 Stat. 357, 400 (1981) (codified as amended at 42 U.S.C. § 1437a(a)(1) (Supp. IV 1992)). Low-income renters have had difficulty in meeting that standard. *Most Low-Income Tenants Pay Over 30 Percent for Rent, Report Says*, 20 [Current Developments] Hous. & Dev. Rep. (BNA) 688 (Jan. 4, 1993) (reporting that over 80% of low-income renters in 44 major urban areas spent more than 30% of their income on rent and utilities).

Table A
Housing Affordability Comparison

Annual Income	Monthly Affordable Housing Services	Monthly Market Housing Costs ^b	Monthly Housing Affordability Gap ⁱ
\$37,300 ^a	930	400-800	\$0
24,100 ^b	600	400-800	0 to 200
18,100 ^c	450	400-800	0 to 350
20,700 ^d	520	400-800	0 to 280
15,000 ^e	375	400-800	25-425
8,500 ^f	210	400-800	190-590
7,000 ^g	175	400-800	225-625

- a. National median income for owner-occupied households in 1991. BUREAU OF THE CENSUS, *supra* note 18, at table 713.
- b. Eighty percent of national median income for all households in 1991. *Id.* Traditionally a "lower income family" must earn no more than 80% of the area median income in order to be eligible for federal housing assistance. HUD determines the median income for the given area. 24 CFR § 813.102 (1992).
- c. Sixty percent of national median income, BUREAU OF THE CENSUS, *supra* note 18, at table 713, the qualifying level for LIHTC, I.R.C. § 42(g)(1)(B) (1988).
- d. National median income for renters in 1991. BUREAU OF THE CENSUS, *supra* note 18, at table 713.
- e. Projected 1994 poverty level for a family of four.
- f. Income from full-time job at the 1991 minimum wage of \$4.25/hour. BUREAU OF THE CENSUS, *supra* note 18, at table 675.
- g. National median income for Section 8 certificate and voucher holders.
- h. Market housing costs are based on the assumption that rent and utilities for an unsubsidized two- or three-bedroom existing apartment will cost between \$400 and \$600 per month; new units will cost between \$600 and \$800 per month. The median gross rent for the United States in 1990 was \$447. BUREAU OF THE CENSUS, *supra* note 18, at table 1241. Actual costs obviously will differ as local conditions dictate.
- i. Gap between 30% of monthly family income and monthly cost of market-rate housing.

(All annual income figures are rounded to the nearest hundred.)

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Critically, a family of four whose annual income is derived from a full-time job paying the minimum wage will have virtually no chance of finding decent housing without obtaining substantial government assistance or severely straining the family budget.

The complexities of modern social problems in America, however, have caused an unfortunate blurring of vision regarding the housing needs of low-income persons. On the one hand, because these social problems are so interrelated, citizens and governments have tended to despair that anything productive could be accomplished and have thus opted to withdraw from the effort altogether. On the other hand, because of the cost of housing subsidies and the reliance that communities must place on their ability to attract residents who can afford to pay taxes, policymakers share a predictable tendency to design programs that contribute little toward the housing needs of persons whose incomes are below the poverty level.³⁶ When "low- to moderate-income" is defined as between eighty percent and 115% of area median income,³⁷ housing programs geared to those definitions will reach persons whose incomes are in the \$25,000-40,000 range rather than in the \$5000-20,000 range.

As Table A illustrates, persons with incomes below \$20,000 are likely to face significant gaps between what they can afford and what available housing costs. Assuming a rent gap of \$250-\$400 per month for available, decent housing, an annual subsidy ranging from \$3000 to \$4800 would be necessary to enable a low-income family to obtain such housing. A program to provide subsidies of this nature would be expensive, ranging from three to five billion dollars annually per one million low-income families served.³⁸

C. The States' Response

The federal government's withdrawal from active support of low-income

36. Supporters of efforts directed to the moderate- or middle-income levels argue that when such a family moves from an apartment to a house, the apartment "filters down" to become available to a lower-income family. See WALLACE F. SMITH, HOUSING: THE SOCIAL AND ECONOMIC ELEMENTS 86, 279-80, 357-64, 388 (1970). Studies have cast doubt, however, on the effectiveness of a filtering strategy for families below the poverty line in inner cities. See HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES 161-203 (Roger Montgomery & Daniel R. Mandelker eds., 2d ed., 1979); James T. Little, *The Dynamics of Neighborhood Change*, in A DECENT HOME AND ENVIRONMENT 63 (Donald Phares ed., 1977). "The problem with this theory is that the housing that has been built and is now being built in suburbs such as Mount Laurel is rapidly *appreciating* in value so that none of it will 'filter down' to poor people." Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390, 451 (N.J. 1983).

37. For example, under the Section 8 Housing Assistance Payments Programs a "lower-income family" must earn no more than 80% of the median area income in order to be eligible for housing assistance. 24 C.F.R. § 813.102 (1992). HUD determines the area median income, and eligibility adjustments are made for smaller or larger families. A "very-low-income family" earns less than 50% of the median income. *Id.* Under the Affordable Housing Disposition Program, the income of an eligible "moderate-income family" is above 80%, but is not more than 115%, of area median income. 12 C.F.R. § 1609.2(u) (1993).

38. A study in 1992 estimated that in 1989 only 2.7 million of the 7.5 million poor renters received housing assistance from federal, state, or local governments. LAZERE & LEONARD, *supra* note 27, at 36.

housing places major new responsibilities on state governments to devise specifically tailored programs.³⁹ Many states are recognizing this reality and are moving to fill the low- and moderate-income housing production vacuum with creative and impressive commitments of state resources.⁴⁰ The states have a rich history of leadership in the development of ideas for housing programs.⁴¹ The use of tax-exempt revenue bonds by state housing-finance agencies to raise money for housing development loans began in New York and spread throughout the country during the 1960s and 1970s.⁴² Thirty years after the New York housing finance agency was established, housing finance agencies that market tax-exempt housing revenue bonds exist in all fifty states and have matured to the point that they operate a sophisticated range of programs supporting first-time homebuyers, nonprofit and limited-profit rental

39. The Florida legislature, in the preamble to its comprehensive Affordable Housing Planning and Community Assistance Act, stated:

[M]assive cutbacks in federal housing programs can spell disaster for many very low-income, low-income, and moderate-income persons in areas without well-prepared state and local government housing programs in place, and . . . the Legislature recognizes that the private sector will not construct enough housing to ensure an adequate supply of standard housing for Floridians in the lowest income quartile, and that the crisis in affordable housing among households in this group must be addressed at the state level

1986 Fla. Laws ch. 86-192 pmbl. (codified as amended at FLA. STAT. ANN. § 420.601 (West 1993)).

40. In 1991, states spent \$2.826 billion on housing, according to the Census Bureau. While all states spent some funds on housing, \$1.7 billion was concentrated in 10 states—California, Connecticut, Hawaii, Illinois, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, and Washington. *State Fiscal Crisis Has Impact on Housing*, 20 [Current Developments] Hous. & Dev. Rep. (BNA) 607 (Dec. 7, 1992) (noting that recession-related (state) budget problems were affecting state housing programs).

41. The first laws establishing health and safety standards for housing were enacted in New York in 1867 and 1901. LAWRENCE M. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION* 25-39 (1968). The prototype for the federal public housing program was a state-subsidized housing production program instituted by the State of New York in 1926. See John R. Nolon, *Shattering The Myth of Municipal Impotence: The Authority of Local Government to Create Affordable Housing*, 17 *FORD. URB. L.J.* 383, 407-09 (1989).

42. When New York voters rejected a series of proposed general-obligation bond issues for housing in the 1950s, the state legislature established a state housing finance agency with the power to issue tax-exempt revenue bonds and use the proceeds of those bonds to make lower-interest loans to nonprofit and limited-profit housing developers. Nolon, *supra* note 41, at 409-12. The key to the success of this new approach to housing finance was the "moral obligation" bond—a legally unenforceable, but politically enforceable pledge to make up any deficits in principal and interest payments on outstanding bonds with annual appropriations from state general funds. Inclusion of the moral obligation language persuaded bond traders to sell and investors to buy the new housing bonds without the necessity for a referendum to back the bonds with a pledge of the general credit of the State. Salsich, *supra* note 9, at 601; see also PETER MORRIS, *STATE HOUSING FINANCE AGENCIES* 8-9, 37-38 (1974); Janice C. Griffith, "Moral Obligation" Bonds: *Illusion or Security?*, 8 *URB. LAW.* 54, 57-66, 88-93 (1976). Most of the courts that have considered the question have upheld moral obligation clauses against charges of unconstitutional lending of credit on the theory that no legally enforceable obligation is created by the clause. See, e.g., *Steup v. Indiana Hous. Fin. Auth.*, 402 N.E.2d 1215 (Ind. 1980); *Massachusetts Hous. Fin. Agency v. New England Merchants Nat'l Bank*, 249 N.E.2d 599 (Mass. 1969); *Huber v. Groff*, 558 P.2d 1124, 1127-28 (Mont. 1976) (citing cases); *Utah Hous. Fin. Agency v. Smart*, 561 P.2d 1052 (Utah 1977); *Infants v. Virginia Hous. Dev. Auth.*, 272 S.E.2d 649 (Va. 1980); *State ex rel. Warren v. Nusbaum*, 208 N.W.2d 780 (Wis. 1973). *Contra Gibson v. Smith*, 531 P.2d 724 (Or. App. 1975); *State ex rel. West Virginia Hous. Dev. Fund v. Waterhouse*, 212 S.E.2d 724 (W.Va. 1974) (moral obligation provision unconstitutional but severable). See generally STATE AND LOCAL GOVERNMENT DEBT FINANCING §§ 2:22-23 (M. David Gelfand ed., 1986 & Supp. 1993).

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housing producers, and low-income tenants.⁴³ They also have become the administrators of the federal LIHTC program,⁴⁴ as well as the federal CDBG and HOME programs for rural areas.⁴⁵ In over half of the states, the housing programs are buttressed by state housing trust funds.⁴⁶

The tax-exempt housing revenue bond program is the backbone of state housing financing agencies. In the first thirty years that state housing finance agencies have been in operation, the proceeds from their bond sales have helped to make accessible over \$50 billion of housing units to assist low- and moderate-income renters and first-time homebuyers.⁴⁷ Over a million households have been assisted, many that would not otherwise have qualified for a home mortgage.⁴⁸ In 1990, over \$6 billion was invested in low- and moderate-income housing, resulting in over a hundred thousand additional homes.⁴⁹ Many of these agencies now have significant reserves, some of which are being reinvested to fund additional programs in conjunction with state housing trust funds.⁵⁰

While bond-financed state housing programs do not impose direct expenditure obligations on states or the federal government, they do result in an indirect loss of revenue to the federal government. The revenue loss, called a tax expenditure, occurs because income derived from investment in such bonds is not subject to federal taxation.⁵¹ Congress has responded to the tax expenditure issue by imposing an increasingly strict set of regulations that must be met to preserve the tax-exempt status of housing bonds. The most significant of these restrictions, from a housing policy standpoint, is a federal cap on the dollar volume of housing bonds that may be issued annually.⁵²

43. See NATIONAL COUNCIL OF STATE HOUS. AGENCIES, *supra* note 9.

44. I.R.C. § 42(m) (Supp. IV 1992).

45. 24 C.F.R. § 570.480 (1993).

46. See *infra* notes 53-57 and accompanying text.

47. See NATIONAL COUNCIL OF STATE HOUS. AGENCIES, *supra* note 9. The figures are drawn from a review of the state programs described in this five-volume report.

48. *Id.*

49. *Id.*

50. See *infra* part II.B.1.

51. The estimated revenue loss for fiscal year 1993 included \$1 billion resulting from the sale of tax-exempt bonds for rental housing and \$1.75 billion resulting from mortgage revenue bonds (single family housing). OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: ANALYTICAL PERSPECTIVES, FISCAL YEAR 1995, at 54, table 6-1.

52. Housing bonds are categorized as private activity bonds by the Internal Revenue Code, I.R.C. § 141 (1988 & Supp. IV 1992). To obtain tax exempt status, they must be approved by elected public officials or their designees after public hearings, I.R.C. § 147(f) (1988); projects they are intended to support must meet congressionally mandated low-income targeting and eligibility standards for lengthy periods of time (15 years), I.R.C. § 142(d) (1988 & Supp. IV 1992); bonds must be issued in registered form (in the name of the owner of the security) rather than in nonregistered form (payable to order or to bearer), I.R.C. § 149 (1988 & Supp. IV 1992); single family mortgage-revenue bonds must be limited to support for first-time home buyers who meet congressionally established income and home price limitations, I.R.C. § 143(d)(1)-(2), (f) (1988); annual bond volume must not exceed \$50 per capita or \$150 million per state, I.R.C. § 146(d)(2) (1988), with exemptions for housing for veterans and housing developed by qualified, I.R.C. § 501(c)(3) not-for-profit corporations, I.R.C. § 146(g) (1988 & Supp. IV 1992); and

Beginning in the early 1980s, states started supplementing tax-exempt housing revenue bond financed programs with dedicated revenue sources deposited in housing trust funds.⁵³ The majority of the states now have housing trust funds. The exact number of state housing trust funds varies depending on the definition used. By 1992, between twenty-six and thirty-six state housing trust funds had been established.⁵⁴ Thirteen of the more broadly defined state housing trust funds were established between 1990 and 1992.⁵⁵ Several other states are attempting to establish housing trust funds.⁵⁶ Housing trust funds represent a recognition by states of the continuing depth of the housing crisis and an assertion that support for affordable housing programs is a legitimate function of state government.⁵⁷

investment of idle bond proceeds must not result in "materially higher yield (arbitrage)" than the yield of the issue, I.R.C. § 148 (1988 & Supp. IV 1992).

53. See, e.g., CAL. HEALTH & SAFETY CODE §§ 50840-50842 (West 1986 & Supp. 1994); N.Y. PRIV. HOUS. FIN. LAW §§ 59-a, 1100-1103 (McKinney 1991). "Trust funds consist primarily of funds that are designated by law as trust funds. They are usually financed by earmarked receipts." OFFICE OF MANAGEMENT & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1994, 21 (1993). Public sector trust funds differ from their private sector counterparts. The government owns the assets of public trust funds, while beneficiaries own the assets of private trust funds which are managed by trustees with fiduciary obligations. Typically the corpus of a public trust fund is a revenue stream which includes (or is hoped to include at some time) an earmarked source of taxation, either new or diverted. *Id.*

54. NEWS FROM THE HOUSING TRUST FUND PROJECT (Housing Trust Fund Project, San Pedro, Cal.), June 1992, at 1-7; *Summary of Revenue Sources*, Nov. 1991, *supra* note 11. Under the Housing Trust Fund Project definition, which requires a permanently dedicated funding source, such as a real estate transfer tax, there are 26 state housing trust funds. The Housing Trust Fund Project also has identified 36 city or county housing trust funds. *Summary of Revenue Sources*, Nov. 1991, *supra* note 11, at 2-11. Others, using a more expansive definition which includes capital pools funded by a variety of techniques, contend there are 36 state housing trust funds, including the District of Columbia. GLENN D. PETHERICK, STATE HOUSING TRUST FUNDS (1993) at viii, app. A at 210. For example, in 1989 the Missouri legislature created a trust fund to be capitalized by surplus revenues of the Missouri Housing Development Commission (MHDC). MO. ANN. STAT. § 215.035 (Vernon 1993). By 1993, MHDC had committed \$10 million of its reserves to the trust fund for rental assistance to very low-income families. MISSOURI HOUS. DEV. COMM'N ANN. REP. 11 (1993).

Because of the permanent extension of the Mortgage Revenue Bond Program and the Low Income Housing Tax Credit, some may consider that all states have dedicated funding sources for these programs. The federal tax expenditures (that is, the estimated revenue loss) for the mortgage revenue bond and LIHTC programs were estimated to exceed \$4.2 billion in fiscal year 1993. OFFICE OF MANAGEMENT & BUDGET, *supra* note 51, at 54, table 6-1.

55. PETHERICK, *supra* note 54, at app. A at 210.

56. Missouri and Ohio, for example, are searching for a legislatively acceptable permanent funding source. See 1994 Mo. S.B. 648, 87th Leg., 2d Sess. (pending Feb. 1994); *infra* notes 116, 118 (describing the research and recommendations of the Ohio Governor's Advisory Committee on Funding of the Housing Trust Fund).

57. This is demonstrated in the rhetoric of the enabling legislation. For example, the Florida legislature, in the preamble to the State Housing Incentive Partnership Act, stated that:

(1) With cutbacks in federal assistance for housing programs, the projected population growth of the state, and the impact of the 1986 Tax Reform Act, Florida is experiencing a critical affordable housing shortage.

(2) The failure of the state to commit sufficient resources to address the severe housing problems has resulted in many residents of this state continuing to live in substandard or unaffordable housing or without shelter.

(3) Only seven states report a greater per capita need for low-income rental housing units than this state.

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In addition to the previously noted housing development and finance programs, at least seventeen states have enacted legislation encouraging or requiring local governments to engage in formal land use planning that includes affordable housing development as an essential element.⁵⁸ The housing elements of these statutes recognize the limited availability of affordable housing and encourage expanded housing opportunities for all citizens, especially those with low and moderate incomes. A number of statutes encourage municipalities to approve cluster zoning, increased densities, reduced minimum lot sizes, and use of municipally owned lands for housing.⁵⁹ In addition to encouraging local and regional housing planning, states increasingly are adopting formal plans

(9) As a matter of public policy, special programs are needed to stimulate public and private enterprises to build and rehabilitate housing in order to provide decent, safe, and sanitary conditions for very low-income persons, low-income persons, and moderate-income persons.

(10) The state should provide incentives for the formation of public-private partnerships as the means of achieving the greatest reduction in housing costs. The state should support partnership initiatives through regulatory relief, a streamlined application process for state-level programs, training, technical assistance, and flexible funding to enable local governments to meet local needs and to match federal funds.

FLA. STAT. ANN. ch. 420.0002 (Harrison Supp. 1992). Kentucky's General Assembly found:

[C]urrent economic conditions, federal housing policies, and declining resources at the federal, state, and local levels adversely affect the ability of very low-income persons to obtain safe, decent, and affordable housing; that an increasing number of individuals are homeless, are at risk of becoming homeless, or live in overcrowded, inadequate, and unsafe housing units; and it is in the public interest to establish a continuously renewable resource known as an affordable housing trust fund to assist very low-income persons in meeting their basic housing needs.

KY. REV. STAT. ANN. § 198A.705 (Michie/Bobbs-Merrill 1992).

58. CAL. GOV'T CODE §§ 65060, 65300, 65302 (West 1983 & Supp. 1994); CONN. GEN. STAT. § 8-23 (1993); FLA. STAT. ANN. § 187.201(5) (West 1987 & 1993); Planning & Growth Management Act, ch. 93-206, § 6, 1993 Fla. Sess. Law Serv. 93-206 (West); GA. CODE ANN. §§ 50-8-3, -7, -8 (Michie 1990 & Supp. 1993); HAW. REV. STAT. §§ 225M-1 to -2, 226-19 (1993); MASS. GEN. L. ch. 41, § 81D(3); MASS. GEN. L., ch. 121B, § 45 (1993); ME. REV. STAT. ANN. tit. 30-A, §§ 4312, 4326 (West 1993); An Act to Correct Errors and Inconsistencies in the Growth Management Laws, ch. 166, § 5, 1993 Me. Legis. Serv. 166 (West); MD. STATE GOV'T CODE ANN. § 8-201(b)(7) (1993); MD. ANN. CODE art. 20A, § 3-101 (1993); MD. ANN. CODE art. 66B, § 10.01 (1990 & Supp. 1993); NEB. REV. STAT. §§ 15-1102, 15-1301, 19-901, 19-903 (1991); N.C. GEN. STAT. § 122A-5.10 (Supp. 1993); N.J. STAT. ANN. §§ 52:18A-196, 18A-202.1 (West Supp. 1993); An Act Concerning Municipal Fair Share Obligations Under the "Fair Housing Act," ch. 31, 1993 N.J. Sess. Law Serv. 31 (West); An Act Concerning Municipal Fair Share Obligations Under the "Fair Housing Act," ch. 104, 1993 N.J. Sess. Law Serv. 104 (West); OR. REV. STAT. §§ 197.005, .190, .250-1, .303, .307 (1991); 53 PA. STAT. ANN. § 491 (1974 & Supp. 1993), §§ 10101, 10301(2.1) (1972 & Supp. 1993); 71 PA. STAT. ANN. § 1049.3 (1990); R.I. GEN. LAWS §§ 42-11-10 (1993), 45-22.2-3, -6 (1991); VA. CODE ANN. §§ 15.1-446.1, -447, -1406 (Michie 1989 & Supp. 1993); 24 VT. STAT. ANN. § 4302 (1992); WASH. REV. CODE ANN. §§ 36.70A.010-.040, § 36.70A.050, .70A.070 (West 1991); Act of May 28, 1993, ch. 6, § 4, 1993 Wash. Legis. Serv. 1st Sp. Sess. 6 (West).

Absent such statutes, the general rule is that the requirement that local zoning be carried out "in accordance with a comprehensive plan" does not require that a formal plan be adopted so long as the zoning ordinance is comprehensive. See generally Charles M. Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955). Hawaii is credited with beginning the trend toward greater state involvement in local land use regulation. While Hawaii's statute, first enacted in 1961, is unique in that it provides for state zoning instead of local zoning, lessons learned in Hawaii were influential in other states. 1961 Haw. Sess. Laws 187 (codified as amended at HAW. REV. STAT. §§ 205-1 to -18 (1993)); see FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 5 (1971). See generally JOHN M. DEGROVE, *PLANNING & GROWTH MANAGEMENT IN THE STATES* (1992).

59. See, e.g., FLA. STAT. ch. 163.3177(g)(11)(c) (1992); ME. REV. STAT. ANN. tit. 30-A, § 4326 (West 1993); WASH. REV. CODE ANN. § 36.70A.090 (West 1991).

and establishing "vertical consistency" requirements that all levels of planning be in accord with "state legislatively adopted goals."⁶⁰

II. OPPORTUNITIES FOR STATE LEADERSHIP IN HOUSING

The federal government's withdrawal from active support of subsidized housing efforts for persons with special needs or those whose incomes are below the poverty line imposes heavy burdens on states with large numbers of such persons. This withdrawal, however, provides significant opportunities for states to assume leadership roles in providing housing for their needy residents.

Experience indicates that states can play major roles in a revitalized national housing strategy. In particular, they have the ability to promote inclusionary housing policies and facilitate a more cooperative outlook among municipalities with respect to affordable housing. They are the level of government in the best position to strike the necessary balance among affordable housing, environmental, and infrastructure concerns. States are moving in the

60. See STATE & REGIONAL COMPREHENSIVE PLANNING, *supra* note 14, at 6. Oregon led the way with enactment of a "federalist" approach in 1973 featuring a "proactive" state agency, the Land Conservation and Development Commission, with authority to adopt and enforce broad state standards to which local planning and development must adhere. The Oregon experience is reviewed by Edward J. Sullivan, *Oregon Blazes a Trail*, in *id.* at 51. See also GERRIT KNAAP & ARTHUR C. NELSON, *THE REGULATED LANDSCAPE* 69-98 (1992) (reviewing Oregon's state land use control system as an instrument of state housing policy and concluding that statewide planning in Oregon has not resulted in either higher housing costs, as many expected, or more affordable multifamily units). Florida amended and strengthened its comprehensive planning legislation in May of 1993. The law establishes the governor as the chief planning officer of the state and requires the governor to conduct a biennial review and revision of the state comprehensive plan. The plan must include guidelines for growth management, air and water quality, transportation, and establishment of "state and regional solutions to the needs for affordable housing." Planning & Growth Management Act, ch. 93-206, § 6, 1993 Fla. Sess. Law Serv. 93-206 (West). For a discussion of the Florida planning experience, see Thomas G. Pelham, *The Florida Experience: Creating a State, Regional, and Local Comprehensive Planning Process*, in STATE & REGIONAL COMPREHENSIVE PLANNING, *supra* note 14, at 95. New Jersey's Fair Housing Act of 1985 offers an example of a narrower housing planning approach, with more attention directed to the effect of local land use regulations on the availability of affordable housing. N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1993). The Act is a response to the constitutional fair share requirement articulated in the *Mount Laurel* cases. Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) (state constitution prohibits exclusionary zoning); Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J.) (same), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975). The Act established a state Council on Affordable Housing (COAH) to identify housing regions and adopt procedures for allocating municipal fair share housing needs. N.J. STAT. ANN. §§ 52:27D-305 to -307 (West 1993). The Act also provided for state appropriations to be channeled through the State Department of Community Affairs and the New Jersey Mortgage and Housing Finance Agency to make grants and loans to municipalities to help them meet their low- and moderate-income housing needs. N.J. STAT. ANN. § 52:27D-304. (West 1993). In 1985, the New Jersey Legislature adopted a revised approach to state planning, mandating preparation of a State Development and Redevelopment Plan, as the "tool for assessing suitable locations for infrastructure, housing, economic growth and conservation." N.J. STAT. ANN. § 52:18A-196(a), (c) (West 1993). The state planning process was delayed, however, by political disagreements and a lack of statutory guidelines. For a discussion of the New Jersey experience, see Peter A. Buchsbaum, *The New Jersey Experience*, in STATE & REGIONAL COMPREHENSIVE PLANNING, *supra* note 14, at 176.

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direction of synchronizing general land use issues with housing programs, and have begun to grapple with the issues of the optimal level of and best locations for development.⁶¹ They are capable of administering more effectively federal housing production subsidies, particularly as they refine the planning and coordination processes.⁶² Finally, they are encouraging innovative responses to local housing needs through direct state funding.⁶³

A. Reforming Local Land Use Laws

The police power that is the basis for local land use regulation is a state sovereign power that has been delegated to local governments.⁶⁴ Increasingly, however, states are recognizing that land use regulations designed to protect property values can restrict severely the availability of affordable housing.⁶⁵ Land use regulations can retard efforts to provide affordable housing in subtle ways.⁶⁶ The federally mandated Comprehensive Housing Affordability State-

61. See, e.g., ME. REV. STAT. ANN. tit. 30, § 4323 (West 1993) (authorizing local growth management plans); N.H. REV. STAT. § 674:22 (1993) (allowing municipalities to "regulate and control the timing of development"); OR. REV. STAT., §§ 197.225-.250 (1992) (establishing state policy planning goals); VT. STAT. ANN. tit. 24, §§ 4301, 4302(c)(11) (1993) (stating that goals of state growth management plan include "safe and affordable" housing); WASH. REV. CODE ANN. § 36.70A.110 (West 1993) (urban growth areas to be designated); see DANIEL R. MANDELKER, *LAND USE LAW 437-55* (3d ed. 1993); see also John R. Nolon, *The Erosion of Home Rule Through the Emergence of State-Interests in Land Use Control*, 10 PACE ENVTL. L. REV. 497 (1993) (urging the New York legislature to create mechanisms that would require development planning at the regional level).

62. One of the major weaknesses of the federal housing programs of the past 50 years was the inability of the federal government to solve the locational issue problem; federally subsidized housing developments tended to be isolated from good neighborhood environments. See THE FINAL REPORT, *supra* note 31, at 47.

63. A complete discussion of all of the current state-operated housing initiatives is beyond the scope of this Article. A summary of over 600 state housing finance programs prepared by the National Council of State Housing Agencies is five volumes in size. NATIONAL COUNCIL OF STATE HOUS. AGENCIES, *supra* note 9.

64. The basic form of delegation, a comprehensive state zoning statute authorizing local governments to regulate land use through zoning, was approved by the Supreme Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

65. See *supra* notes 13-17 and accompanying text. For discussion of exclusionary zoning issues, see John C. Barker, *Common Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395 (1993) (discussing use of defamation suits to discourage citizen protests against unpopular developments and other government actions); Fred P. Bosselman, *The Commodification of "Nature's Metropolis": The Historical Context of Illinois Unique Zoning Standards*, 12 N. ILL. U. L. REV. 527 (1992) (reviewing the history of zoning in Illinois and the 19th century concepts on which it was based); Peter Margulies, *Building Communities of Virtue: Political Theory, Land Use Policy, and the "Not In My Backyard" Syndrome*, 43 SYRACUSE L. REV. 945 (1992) (recommending a model of "participating entitlements" as a response to the "Not in My Backyard" dilemma); Serena M. Williams, *The Need for Affordable Housing: The Constitutional Viability of Inclusionary Zoning*, 26 J. MARSHALL L. REV. 75 (1992) (reviewing regulatory techniques for encouraging affordable housing).

66. Saint Louis University and Washington University law and architecture students recently received an object lesson in the subtleties of land use regulation during a joint project to design and evaluate the feasibility of an affordable housing development. Architecture students were asked to design models for affordable housing to fit a vacant four-acre tract of land in an inner-ring suburb of St. Louis that had an apparently liberal land use policy which included employing modern "wait and see" techniques of planned unit developments. The law students were assigned to review the land use regulations to assess the legal

gy (CHAS)⁶⁷ process is responding by requiring recipients of federal housing and community development funds to study whether local regulations are acting as barriers to affordable housing. Local governments can be expected to look to the states for help and political cover in reforming local land use regulations. States have key roles to play in reforming local regulatory processes, facilitating regional cooperation, and providing financial incentives for local governments to accept affordable housing.

1. *Shifting the Burden of Proof*

States can improve significantly the climate for affordable housing by enacting legislation that shifts legal presumptions and burdens of proof for affordable housing development proposals. Generally, courts give municipalities the benefit of the doubt when affordable housing development proposals are denied rezonings, special permits, etc.⁶⁸ Instead, states should enact legislation that shifts the burden of proof to create a presumption that affordable housing development proposals are consistent with approved housing plans. Burden-shifting statutes can aid local and regional affordable housing plans by limiting the presumption shifting to appeals by proponents of affordable housing proposals that are consistent with adopted local, regional or state housing plans.⁶⁹ This limitation both encourages local governments to adopt

feasibility of the architecture students' proposals. Frustration ensued when the law students advised the architecture students that their affordable housing plans would require a lengthy, costly, and uncertain process before approval because the plans exceeded local density restrictions. One student commented that he understood better why many developers did not attempt to build housing for low- and moderate-income people but instead opt for "more acceptable" single-family housing for middle- and upper-income persons. Thomas L. Thomson et al., *Zoning and Affordable Fair Housing*, Paper Presented to the Arizona Governor's Conference on Affordable Housing (Jan. 1992) (on file with author). The classic study of exclusionary zoning is Norman Williams, Jr. & Thomas Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971). See also Eric J. Branfman et al., *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483 (1973); Lawrence Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969).

67. 42 U.S.C. § 12705 (Supp. IV 1992). As a requirement for receiving a variety of affordable-housing related assistance, state and local governments must provide a CHAS, which must include, among other information, a five-year projection of housing needs, the resources available to meet those needs, and the government's plan for addressing those needs. See *infra* notes 200-09 and accompanying text.

68. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (establishing "fairly debatable" standard of relaxed judicial review of zoning decisions).

69. For example, the Connecticut statute shifts the burden of proof to a municipality which denies or modifies a "qualified affordable housing application." CONN. GEN. STAT. § 8-30g (1993). Compare *Shapiro Farm Ltd. Partnership v. Planning & Zoning Comm'n*, No. CV 92-0517281S, 1993 Conn. Super. LEXIS 2807 (Oct. 15, 1993); *Wisniewski v. Berlin Planning Comm'n*, No. CV 92-0511017S, 1993 Conn. Super. LEXIS 2808 (Oct. 14, 1993); *West Hartford Interfaith Coalition v. Town Council*, No. CV 91-0501205S, 1992 Conn. Super. LEXIS 2614 (Aug. 26, 1992), *aff'd*, 228 Conn. 498 (1994); and *TCR New Canaan, Inc. v. Planning & Zoning Comm'n*, No. CV 384353, 1992 Conn. Super. LEXIS 683 (Mar. 5, 1992) (municipalities' decisions overturned) with *Greene v. Ridgefield Planning & Zoning Comm'n*, No. CV. 90-0442131S, 1992 Conn. Super. LEXIS 108 (Jan. 6, 1993); *Misky v. Planning & Zoning Comm'n*, No. CV 91-0500017S, 1992 Conn. Super. LEXIS 2947 (Oct. 15, 1992); and *Indian River Associates v. North Branford Planning & Zoning Comm'n*, No. CV 91-0392496S, 1992 Conn. Super. LEXIS 1406 (May

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such plans and provides these plans with powerful teeth.

Massachusetts,⁷⁰ California,⁷¹ Connecticut,⁷² and Rhode Island⁷³ have all enacted statutes streamlining appeals of adverse land use decisions regarding proposed affordable housing developments. The original Massachusetts statute, dubbed the "anti-snob" law, established a state housing appeals committee with authority to override local zoning decisions blocking housing developments receiving federal or state housing assistance.⁷⁴ It did not attract much attention until the high growth period of the 1980s, when it became an effective tool for gaining approval of affordable housing developments.⁷⁵

California has enacted a series of provisions designed to improve the procedural posture of affordable housing development proposals.⁷⁶ Local agencies are required to (1) refrain from imposing adverse design criteria,⁷⁷ (2) give specific public health or safety reasons for disapproving or reducing densities of housing developments that are consistent with local zoning and general plans,⁷⁸ and (3) carry the burden of proof when a developer or other person appeals a denial or density reduction.⁷⁹

The Connecticut appeals procedure is modeled after the Massachusetts program, although appeals are heard by the judiciary rather than by a state

8, 1992) (municipalities' decisions sustained).

70. MASS. GEN. LAWS ANN. ch. 40B, §§ 21-22 (West 1993).

71. CAL. GOV'T CODE §§ 65589.5-.6 (West 1993).

72. CONN. GEN. STAT. § 8-30g (1993).

73. R.I. GEN. LAWS § 45-53-1 to -7 (1993).

74. MASS. GEN. LAWS ANN. ch 40B, §§ 20-23 (West 1993). The statute was enacted in the early 1970s and was sustained by the Massachusetts Supreme Court against challenges that it violated local home rule powers, authorized illegal spot zoning and lacked sufficient standards to guide administrators. Board of Appeals of Hanover v. Housing Appeals Comm., 294 N.E.2d 393 (Mass. 1973). WHITE, *supra* note 14, at 8-9, compares the Massachusetts program to an unsuccessful attempt by the New York State Urban Development Corporation to override local zoning ordinances and directly produce affordable housing, noting that the Massachusetts law has "proven more successful."

75. See Emily F. Reed, *Tilting at Windmills: The Massachusetts Low & Moderate Income Housing Act*, 4 W. NEW ENG. L. REV. 105 (1981) (reporting that only 14,839 affordable housing units had been proposed and 3462 had been built from the enactment of the statute in 1969 to 1979); Lauren J. Resnick, *Mediating Affordable Housing Disputes in Massachusetts*, 45 ARB. J. 15, 17, 20 (1990) (reporting that more than 35,000 affordable housing units had been proposed, and 17,000 built from 1969 through January 1, 1989).

76. This summary of California procedural remedies is drawn from Katherine E. Stone & Philip A. Seymour, *California Land-Use Planning Law: State Preemption and Local Control*, in STATE & REGIONAL COMPREHENSIVE PLANNING, *supra* note 14, at 203.

77. CAL. GOV'T CODE § 65913.2(a) (West Supp. 1994).

78. CAL. GOV'T CODE § 65589.5(d)-(f) (West Supp. 1994).

79. CAL. EVID. CODE § 699.5 (West Supp. 1994); CAL. GOV'T CODE § 65589.6 (West Supp. 1994). California courts have limited the burden of proof shift, however, to administrative actions such as applications for special use permits and have refused to apply it to amendments to general plans, rezonings, or other legislative actions. *Mira Dev. Corp. v. City of San Diego*, 205 Cal. App. 3d 1201, 1222 (1988) (finding the requirement to provide specific public health or safety reasons for disapproving a housing development imposed by CAL. GOV'T CODE § 65589.5 (West Supp. 1994) inapplicable to local government zoning decisions, and therefore holding the burden-shifting requirement of CAL. GOV'T CODE § 65589.6 (West Supp. 1994) also inapplicable). *But see* *Building Ind. Ass'n v. City of Camarillo*, 718 P.2d 68, 73-75 (Cal. 1986) (in bank) (burden shifts concerning restrictive growth control measures are applicable to ordinances enacted by initiatives) (applying CAL. EVID. CODE § 669.5 (West Supp. 1994)).

agency.⁸⁰ The burden of proof is shifted to the community that denied an application to demonstrate that the denial is reasonable.⁸¹ This represents a policy shift to a presumption that affordable housing is an acceptable form of land use.⁸² Municipalities with large concentrations of affordable housing, and those which are participating in other successful voluntary housing programs, are exempt from the appeals procedure.⁸³

Drawing on the cases decided since the appeals process began in 1992,⁸⁴ an observer has concluded that the process establishes a "new and powerful tool" to facilitate the development of affordable housing, but it is no "slam dunk" for developers.⁸⁵ Most importantly, the "encouragement of dialogue" would "allow municipalities and developers to create appropriate affordable housing far more successfully than can be done by the court or legislature."⁸⁶

Burden-shifting statutes serve several purposes. They are strong statements that affordable housing is a state priority to which local governments must be sensitive. They provide teeth for local and regional housing plans without

80. CONN. GEN. STAT. § 8-30g(b) (1993). Under the statute, efforts are to be made to assign cases to a small number of judges so that "a consistent body of expertise can be developed." Appeals are heard on an expedited basis. The municipality's burden on appeal is to prove, based upon the evidence and the record compiled before the relevant zoning body, the following points: (1) The decision and reason cited are supported by sufficient evidence in the record; (2) the decision is necessary to protect substantial public interest in health, safety or other matters that may be legally considered; (3) the public interest clearly outweighs the need for affordable housing; and (4) the public interest cannot be protected by reasonable changes to the affordable housing development. Under the statute the court is required to wholly or partly revise, modify, remand or reverse the decision if the commission does not satisfy its burden of proof. *Id.*

81. CONN. GEN. STAT. § 8-30g(c) (1993).

82. Development proposals that qualify for the presumption-shifting appeals procedure include housing that would be assisted by state or federal programs or housing in which at least 20% of the units will be reserved for low- and moderate-income persons for at least 20 years after initial occupation. CONN. GEN. STAT. § 8-30g(a)(1) (1993).

83. CONN. GEN. STAT. § 8-30g(f) (1993).

84. *See, e.g.,* Greene v. Ridgefield Planning & Zoning Comm'n, 1993 Conn. Super. LEXIS 108, at *30 (Jan. 6, 1993) (sustained denial even though town "does not have, as defined by the legislature, sufficient affordable housing"); Misky v. Planning & Zoning Comm'n, No. CV 91-0500017S, 1992 Conn. Super. LEXIS 2947 (Oct. 15, 1992) (application was not for "affordable housing" as defined by the appeals statute); West Hartford Interfaith Coalition v. Town Council, No. CV 91-0501205S, 1992 Conn. Super. LEXIS 2614 (Aug. 26, 1992), *aff'd*, 228 Conn. 498 (1994) (builder's remedy granted approving application of for-sale housing by nonprofit organization); Indian River Associates v. North Branford Planning & Zoning Comm'n, No. CV 91-0392496S, 1992 Conn. Super. LEXIS 1406 (May 8, 1992) (town's burden sustained); TCR New Canaan, Inc. v. Planning & Zoning Comm'n, No. CV 384353, 1992 Conn. Supp. LEXIS 683 (Mar. 5, 1992) (statute applies to legislative acts such as zoning changes; town did not sustain its burden). A "builder's remedy" is an order directing that a particular project be approved. It is an extraordinary remedy rarely granted because it skirts the line separating judicial and legislative functions. Southern Burlington County NAACP v. Township of Mt. Laurel, 456 A.2d 390, 452 (N.J. 1983).

85. Janet E. Stearns, *The Affordable Housing Appeals Structure—The First Connecticut Cases*, LAW AND THE LAND, Spring 1993, at 4; *see also* Lantos v. Town of Newtown Planning & Zoning Comm'n, No. 30 66 07, 1992 Conn. Super. LEXIS 651 (Mar. 4, 1992) (holding that applicants seeking to use special housing appeals procedure must give assurances that affordable housing will be constructed). *See generally* WHITE, *supra* note 14, at 8-11.

86. Stearns, *supra* note 85, at 5. Rhode Island combines elements of both the Massachusetts and Connecticut statutes by including in one application all aspects of the approval process for rental housing developments that are dedicated for low- and moderate-income occupancy for at least 30 years and by providing for appeals to a state review board. R.I. GEN. LAWS §§ 45-53-4 to -5 (1991).

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forcing local governments to relinquish control over land development. And they give affordable housing advocates and developers a means to overcome opposition to such housing.

2. Seeking Consensus

As the impact of burden-shifting legislation grows, so will the need for alternatives to litigated resolution of affordable housing disputes.⁸⁷ Massachusetts has taken the lead in encouraging the resolution of local disputes over affordable housing through consensus building techniques.⁸⁸ It has been joined by a number of other states, including Connecticut,⁸⁹ Florida,⁹⁰ New Jersey,⁹¹ and Virginia.⁹²

Connecticut's innovative approach combines state financial assistance with efforts to reach consensus on regional housing plans.⁹³ The program seeks to establish "negotiated investment strategies" leading to "regional fair housing compacts" that would provide increased housing for low- and moderate-income families within particular regions.⁹⁴

87. Chief Justice Wilentz of the New Jersey Supreme Court, in his opinion in the second *Mount Laurel* case, made the following point:

The waste of judicial energy involved at every level is substantial and is matched only by the often needless expenditure of talent on the part of lawyers and experts. The length and complexity of trials is often outrageous, and the expense of litigation is so high that a real question develops whether the municipality can afford to defend or the plaintiffs can afford to sue.

Mt. Laurel, 456 A.2d at 410-11.

88. Resnick, *supra* note 75, at 20 (reporting that about 25% of cases appealed to the state housing appeals committee have been resolved through the auspices of the Massachusetts Mediation Service, a state agency).

89. CONN. GEN. STAT. § 8-386(a) (1993).

90. Planning & Growth Management Act, ch. 93-206, § 6, 1993 Fla. Sess. Law Serv. 93-206 (West) encourages local governments to collaborate with the public in developing a local comprehensive plan which "shall be adopted by the governing body of the jurisdiction." *Id.* § 5. Furthermore, the Act requires inclusion of an intergovernmental coordination element in the local comprehensive plan which "must demonstrate consideration of the particular effects of the local plan, when adopted, upon the development of adjacent municipalities, the county, adjacent counties, or the region and upon the state comprehensive plan." *Id.* sec. 6, § (6)(h)(1). The intergovernmental coordination element is required to "expressly provide for . . . a dispute resolution process . . . for bringing to closure in a timely manner those disputes that pertain to development proposals that would have impacts on adjacent local governments or identified state or regional resources or facilities." *Id.* sec. 6, § 6(h)(1)(C). Additionally, the Act requires local implementation of "a process to allow modification of development orders . . . without a loss of recognized development rights." *Id.* sec. 6, § 6(h)(1)(D).

91. N.J. STAT. ANN. § 52:27D-315 (West 1986 & Supp. 1993).

92. Although not strictly a dispute resolution mechanism, Virginia's proffered dedication procedure and incentive zoning for affordable housing authorization provide a framework for use of consensus building techniques. VA. CODE ANN. §§ 15.1-491, -491.8, -491.9 (Michie 1989 & Supp. 1993).

93. CONN. GEN. STAT. § 8-386(a) (1993).

94. *Id.* The statute authorized pilot programs in two regions of the state. Under the pilot programs, the secretary of the Office of Policy and Management selects mediators from a list of independent consultants. These mediators submit negotiated agreements both to the regional planning agencies for incorporation into regional plans and to the chief executive officers of the municipalities within the planning regions. The statute requires that 65% of the legislative bodies located within a planning region approve an agreement before it can be incorporated into a regional plan. *Id.*

For thoughtful case studies of the use of mediation to build consensus for affordable housing in the

Achieving consensus for affordable housing is difficult because “[n]o single person or individual interest group can produce affordable housing . . . [since] the power to create it is held in many different hands.”⁹⁵ Consensus can be reached, however, if a broad “partnership of interests,” including “key decisionmakers and stakeholders,” works to encourage the development of housing that is “carefully tailored to the needs and resources of the community.”⁹⁶ The state’s role in the consensus-building process is critical because of the state’s ability to look beyond the borders of individual communities and assess the external effects of local decisions. By providing state mediators⁹⁷ or offering to pay for private mediators,⁹⁸ states can encourage their municipalities to take a broader view of affordable housing issues.

3. *Providing Financial Incentives*

In addition to burden-shifting statutes and mediation services, states are providing financial incentives to local governments to adopt inclusionary housing policies. One of the most encouraging approaches is the “housing infrastructure fund” in Connecticut.⁹⁹ The money provided may be used for planning, construction or renovation of housing, or for any of the following items when necessary to support the development of housing in accordance with a regional fair housing compact: (1) sanitary sewer lines, (2) natural gas and other utilities, (3) storm drainage facilities, (4) public roadways and related facilities, (5) approved community septic systems.¹⁰⁰

The Connecticut program also authorizes the Commissioner of Housing,

two pilot regions, see LAWRENCE E. SUSSKIND & SUSAN L. PODZIBA, AFFORDABLE HOUSING MEDIATION: BUILDING CONSENSUS FOR REGIONAL AGREEMENTS IN THE HARTFORD AND GREATER BRIDGEPORT AREAS (1990). A mediator conducted a series of negotiations with the state Office of Policy and Management, the state Commissioner of Housing, the officers of the regional planning agency, and representatives of each municipality within the planning region. The negotiations were designed to formulate and reach consensus on a “fair housing compact” containing regional goals for the development of adequate affordable housing. *Id.* at 1-2. The authors concluded that the keys to agreement in the Hartford region, where 29 municipalities participated in the process, were “finding a formula that represented a set of principles that all the participants could endorse, and then, refining that general principle to take account of the special and different needs of each participant.” *Id.* at 23. For six municipalities in the Bridgeport area the key to agreement was “finding a mechanism that allowed for great flexibility regarding the strategies a municipality could use to meet its goal.” *Id.* at 36.

95. SUSSKIND & PODZIBA, *supra* note 94, at 39.

96. *Id.* at 40-42.

97. Massachusetts provides mediation through the Massachusetts Mediation Service, a state agency. Resnick, *supra* note 75, at 20.

98. The Connecticut legislature appropriated \$50,000 to pay professional mediators to help develop two pilot regional affordable housing plans. SUSSKIND & PODZIBA, *supra* note 94, at 2.

99. CONN. GEN. STAT. § 8-387(b) (1993). Proceeds from the fund are allocated at the discretion of the Commissioner of Housing, in consultation with the Secretary of the Office of Policy and Management, through contracts for grants-in-aid, loans, or combinations thereof, to municipalities located within planning regions in which a regional fair housing compact has been approved. The money is available only to those municipalities within the region that have approved the housing compact. *Id.*

100. *Id.*

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with the approval of the Commissioner of Public Works, the Secretary of the Office of Policy and Management, and the State Properties Review Board, to sell, exchange, lease, or otherwise dispose of any state-owned or controlled land in order to provide emergency shelter or transitional living facilities for homeless persons or to construct, rehabilitate or renovate housing for persons and families of low and moderate income.¹⁰¹ Approval of the municipality in which the land improvement or interest is located must be obtained before the state may transfer the land. The Commissioner of Housing also is authorized to acquire federal surplus land and transfer it to entities providing homeless shelter and housing for low- and moderate-income persons.¹⁰²

Affordable housing for low- and moderate-income persons imposes some very real costs on local governments. Higher densities tend to be the rule rather than the exception in such developments. These densities can place greater demands on schools, sewers, streets, and other public facilities. A desire to avoid such costs is no excuse for excluding affordable housing through restrictive zoning practices.¹⁰³ But state financial assistance, as illustrated by the Connecticut program, offers crucial moral and tangible support that can help suburban governments shed their traditional reluctance to cooperate in regional efforts to provide expanded housing opportunities for low- and moderate-income persons.

B. *Creating, Allocating, and Distributing Housing Subsidies*

Although it should reduce market cost and thus lessen the burden for people at the higher end of the low- and moderate-income scale, removing unnecessary regulatory barriers to affordable housing will not by itself result in more housing for people who are unable to pay market prices.¹⁰⁴ Persons unable to afford market prices generally are not able to obtain decent housing without governmental subsidies of some type. States are playing, and should play, increasingly important roles in the creation, allocation, and distribution of housing subsidies.

101. CONN. GEN. STAT. § 8-206(c) (1993).

102. CONN. GEN. STAT. § 8-37y (1993).

103. *See, e.g.,* Britton v. Town of Chester, 595 A.2d 492 (N.H. 1991) (holding exclusionary aspects of town's land use regulations incompatible with the statutory requirement that local zoning ordinances promote the "general welfare of the community" which included the housing needs of low- and moderate-income persons living in the general region of the municipality).

104. The concept of "least-cost" housing was developed by the Supreme Court of New Jersey in recognition of the fact that local affirmative action in land use regulation by itself might not enable some municipalities to provide for a realistic opportunity for the construction of lower-income housing. *Oakwood at Madison, Inc. v. Township of Madison*, 371 A.2d 1192, 1222-23 (N.J. 1977). Least-cost housing will satisfy a *Mount Laurel* obligation "if, and only if, it cannot otherwise be satisfied . . . [I]t is only after all alternatives have been explored, all affirmative devices considered . . . that least-cost housing will provide an adequate substitute." *Southern Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390, 419-20 (N.J. 1983).

1. *Creating Housing Subsidies*

The growth of housing trust funds in response to the severe cutbacks in federal housing subsidy commitments makes the states significant sources of housing subsidies.¹⁰⁵ Trust funds are being used to provide low-interest loans to bridge gaps in housing development financing.¹⁰⁶ They also are being used to help reduce the interest costs for acquisition and construction loans for nonprofit, neighborhood-based corporations,¹⁰⁷ and to provide crucial technical support to assist homeless and near-homeless service providers in expanding program development and production capacity.¹⁰⁸

States use a variety of sources for their housing trust funds. The Housing Trust Fund Project lists fourteen specific dedicated revenue sources, including the following: linkage programs, preservation programs, inclusionary zoning fees, property tax or tax increment funds, hotel or motel taxes, real estate transfer tax or document charge, unclaimed property funds, sale or lease of government property, loan repayment from government programs, funds available from bond issuances, interest from real estate escrow accounts, and interest from tenant security accounts.¹⁰⁹ Nothing, however, limits states to these sources; any legal tax or fee arguably could be used to supply the money for a trust fund.¹¹⁰

Trust funds subsidize the developer/owner or the tenant. They are distributed as grants or loans. They finance the widest range of programs, including new construction, rehabilitation, first time homebuyer assistance, subsidies and program services for low-income families and the homeless, matching funds for social services in assisted projects, capacity building grants for nonprofit housing corporations, mortgage insurance guarantees, and more. Funds generally are targeted to low- and very low-income residents, and efforts are made to distribute them throughout the state.¹¹¹

105. See *supra* notes 53-55 and accompanying text.

106. See, e.g., R.I. GEN. LAWS § 42-55.1-3 (1993) (giving the State Housing and Mortgage Finance Corporation authority to provide "financial assistance in the form of grants, loans, or any combination thereof . . . for use in the purchase, acquisition, construction and/or production" of affordable housing).

107. IND. CODE ANN. § 5-20-4 (Burns Supp. 1993); N.C. GEN. STAT. §§ 122E-6, -7 (1987).

108. IDAHO CODE § 67-8103 (Supp. 1993); N.Y. PRIV. HOUS. FIN. LAW § 45-c (McKinney 1991).

109. *Summary of Revenue Sources*, Nov. 1991, *supra* note 11, at 1.

110. Other examples include retained earnings from public utilities, Act of July 13, 1993, sec. 5, § 8-208(b), 1993 Ill. Legis. Serv. 88-33 (West), unpledged fund balances of the state housing-finance agency, MO. ANN. STAT. § 215.050 (Vernon 1983), stripper well settlement funds, N.C. GEN. STAT. § 122E-6(d) (1987), lottery earnings, IOWA CODE § 99E.32(s) (Supp. 1993), and broker trust accounts, WASH. REV. CODE ANN. § 18.85.310(s) (West 1989).

111. See, e.g., CAL. HEALTH & SAFETY CODE § 50842 (West 1986) (restricting expenditures to programs for lower-income and very-low-income households, as defined in the federal Section 8 program, 42 U.S.C. § 1437a(b)(2) (1988 & Supp. IV 1992); at least 20% of funds deposited annually must be expended in rural areas); FLA. STAT. ANN. §§ 420.9073, .9075 (Harrison Supp. 1992) (providing that qualifying counties receive guaranteed share of funds; at least 30% of all units assisted must be occupied by very-low-income persons and an additional 30% by low-income persons, as defined in 42 U.S.C. § 1437a(b)(2) (1988 & Supp. IV 1992)).

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Because of the wide variation among the states, and the lack of consistency in revenue sources and program cycles, it is difficult to aggregate these funds, or make any useful comparison between the sizes and scales of the programs. A former official of the National Council of State Housing Agencies estimates that housing trust funds have provided more than \$750 million and funded more than 80,000 housing units since their inception in the early 1980s.¹¹² The Housing Trust Fund Project has identified over \$110 million in annual revenue, with a total of almost \$190 million in appropriations from general revenue.¹¹³ Funds from these state sources have escalated sharply from zero in 1980 to more than \$100 million annually by 1992.¹¹⁴

Most importantly, the growth of state housing trust funds represents acceptance by states of the responsibility to provide direct financial assistance, in addition to tax-exempt bond financing, to support the provision of decent housing for low- and moderate-income persons.¹¹⁵ The incidence of regular appropriations of state general tax revenues to housing trust funds is growing.¹¹⁶ While the total amount appropriated to trust funds may be far short of the need, or even short of the usual amounts appropriated by the federal government,¹¹⁷ the move by states to fill that role is impressive.¹¹⁸

112. PETHERICK, *supra* note 54, at vii.

113. *Summary of Revenue Sources, Update: Sept. 1992, supra* note 11; *Summary of Revenue Sources*, Nov. 1991, *supra* note 11.

114. *Summary of Revenue Sources, Update: Sept. 1992, supra* note 11; *Summary of Revenue Sources*, Nov. 1991, *supra* note 11.

115. The author surveyed state housing finance agencies in 1978 and concluded that states needed to do more than provide lower-interest loans through the sale of tax-exempt bonds in order to make a measurable impact on housing concerns of low- and moderate-income people. Salsich, *supra* note 9, at 623-25.

116. CAL. HEALTH & SAFETY CODE § 50841 (West 1989 & Supp. 1993); FLA. STAT. ANN. ch. 420.0005 (Harrison 1990 & Supp. 1992); GA. CODE ANN. § 8-3-303 (Michie 1993); IND. CODE § 5-20-4-7 (Supp. 1993). The annual revenues available for housing through individual state trust funds vary greatly. For example, Florida's fund received \$45 million in 1993 and expects to receive \$115 million in 1995. *Summary of Revenue Sources, Update: Sept. 1992, supra* note 11, at 4; *see infra* part II.D.2. Perhaps a more useful way of comparing state efforts would be to examine per capita investment. The State of Ohio Governor's Advisory Committee on Funding the Housing Trust Fund compared the expenditures of six states: Ohio, Maryland, Virginia, Pennsylvania, Florida, and Washington. Per capita expenditures for persons below the poverty line were in the \$20-30 range, except that Maryland's rate was four to five times that amount. GOVERNOR'S ADVISORY COMM., *supra* note 33, at 27 (Ohio \$21.53, Maryland \$112.50, Virginia \$33.33, Pennsylvania \$26.15, Florida \$31.25, and Washington \$31.25).

This same Advisory Committee reported that one in every five Ohioans and one-third of all Ohio renters have a housing need. The Committee estimated that it would cost over \$7 billion to reduce Ohio's housing need by half over a 10-year period. Assuming that the federal government funded half of the effort, and local public and private sources contributed 20%, the state would be responsible for contributing \$210 million annually for 10 years. The Committee recognized that this was an ideal goal, and, referencing current limitations on state revenue, proposed the establishment of a low-income housing trust fund that would raise \$50 million annually from real estate conveyance fees, surcharge on estate taxes, interest on tenant security deposits, and mortgage recordation fees. These funds could be spent on rent subsidies, capital development grants, and homeownership programs. *Id.* at 17-21.

117. Congress appropriated \$25.1 billion for housing and community development programs in fiscal year 1994. *Congress Completes Action on Fiscal 1994 HUD Funding Bill, Funds HUD Demonstration Programs*, 21 [Current Developments] *Hous. & Dev. Rep. (BNA)* 358 (Oct. 25, 1993) (allocating \$9.313 billion to support 109,690 units of assisted housing, \$6.894 billion for public housing modernization,

The growth of dedicated source housing trust funds and state general revenue appropriations for housing provides evidence that states recognize the important role they must play in responding to the housing needs of their citizens. Such funds also give states greater flexibility than do housing revenue bonds in tailoring programs for low-income families and persons with special needs. Administering housing subsidy programs gives states the necessary experience to play expanded roles in a revitalized national housing policy.

2. Allocating Federal Housing Subsidies

Several important provisions in the Omnibus Budget Reconciliation Act of 1993¹¹⁹ complement the steps states are taking to develop a coordinated response to housing issues. Permanent extension of the Low Income Housing Tax Credit (LIHTC)¹²⁰ and tax-exempt status for Qualified Mortgage Bonds¹²¹ revive important incentives for private investors to supply equity and credit for low- and moderate-income housing development.¹²² For the states, the major significance of this development is the recognition of the role they play in the allocation of these indirect, tax-expenditure subsidies. The

operating subsidies, severely distressed projects, and drug elimination programs, \$1.275 billion for HOME housing block grants, \$723.7 million for homeless programs, \$25 million for fair housing, and \$35.7 million for assisted multifamily projects; an additional \$4.4 billion was appropriated for the CDBG program, which cities and states can use for housing as well as other community development programs).

118. For example, the Ohio Governor's Advisory Committee on Funding of the Housing Trust Fund has recommended annual appropriations of \$50 million increasing to \$210 million annually over a 10-year period to meet Ohio's \$2.1 billion share of an estimated \$7 billion state housing need. Under the Advisory Committee's approach, the state would pick up 30%, private sources 20%, and the federal government 50% of the total cost. GOVERNOR'S ADVISORY COMM., *supra* note 33, at 19.

The Minnesota legislature appropriated \$34 million in 1976 and \$40 million in 1977. Salsich, *supra* note 9, at 624. Direct state support continues. The state appropriated from general revenue \$28.3 million for 1992 and 1993. In addition, the Minnesota Housing Finance Agency (MHFA) will recycle reserves from bond and state-appropriated bond leverage funds. These will include \$37.5 million from MHFA's Housing Affordability Fund and \$26 million from the Housing Investment Fund. MINNESOTA HOUS. FIN. AGENCY, AFFORDABLE HOUSING PLAN 1992-1993, 8-9 (1992). Since its inception, MHFA has financed over 23,000 units of rental housing, provided mortgage financing for over 30,000 owner-occupied homes, approved almost 80,000 home improvement loans, and authorized grants or deferred loans to more than 20,000 homeowners for basic repairs; the funds are distributed by MHFA through more than forty programs in three broad categories: home improvement, homeownership, and rental housing. *Id.* at 5, 9. A few examples include: Home Energy Loan Program, Deferred Loan Program, Single Family Capital Reserve Program, Purchase Plus Program, Build It Now!, Housing Trust Fund, Low Income Large Family Rental Housing Program. *Id.* at 11.

119. Pub. L. No. 103-66, 107 Stat. 312 (1993).

120. Pub. L. No. 103-66, § 13142, 107 Stat. 312, 437-39 (1993) (to be codified at 26 U.S.C. § 42); see Joseph A. Haas & Robert S. Swierczek, *Clinton Signs Budget Bill with Permanent Tax Credit, Mortgage Bond Extensions, Enterprise Zone*, 21 [Current Developments] Hous. & Dev. Rep. (BNA) 193 (Aug. 16, 1993); see also Joseph A. Haas, *Industry Groups Hail Budget Bill As Positive for Housing, Real Estate*, 21 [Current Developments] Hous. & Dev. Rep. (BNA) 225 (Aug. 30, 1993).

121. Pub. L. No. 103-66, § 13141, 107 Stat. 312, 436-37 (1993) (to be codified at 26 U.S.C. §§ 25, 143); Haas & Swierczek, *supra* note 120.

122. In addition, relaxation of the passive loss rules for rental real estate activities for taxpayers who own rental real estate and who spend more than half their time in real property trade or business is expected to encourage greater investment in all types of real estate. See Haas, *supra* note 120, at 254-55.

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allocation process derives from the volume caps imposed by Congress for both the LIHTC and housing revenue bonds.¹²³

The LIHTC legislation requires states to distribute their housing credit dollar amounts in accordance with a "qualified allocation plan" that has been approved by the state legislature, the governor, or an elected state official designated by the governor.¹²⁴ While the housing bond provisions of the Internal Revenue Code do not specify allocation criteria in the detail of the LIHTC law, states are required to provide an allocation system by law,¹²⁵ and must comply with the housing credit allocation plan for projects that are assisted by both tax credits and tax-exempt bonds.¹²⁶

The potential for a coordinated state housing strategy is clear. Within the framework of the tax credit statutory allocation preferences for need and long-term use, states can use their housing credit and bond allocation responsibilities to support the goals and objectives of housing affordability strategies and land-use-mandated housing plans. By linking the planning and allocation processes, states can insure that scarce public resources are used to meet identified local needs. To accomplish this, states will have to be willing to make difficult choices to establish a system of priorities for housing spending and avoid "deal driven" processes in which little attention is paid to maximizing efficient use of public subsidies.¹²⁷

123. I.R.C. § 42(h)(3)(C) (Supp. IV 1992) (establishing state LIHTC ceiling of \$1.25 multiplied by the state population); I.R.C. § 146(d)(1) (1988) (establishing state private activity bond volume cap of either \$75 multiplied by the state population or \$250 million, whichever is greater).

124. I.R.C. § 42(m)(1) (Supp. IV 1992). "Qualified allocation plans" must contain three elements: (1) project selection criteria (which include project location, housing needs characteristics, project characteristics, sponsor characteristics, participation of local tax-exempt organizations, tenant populations with special housing needs, and public housing waiting lists); (2) preference for projects serving the lowest-income tenants, and projects obligated to serve qualified tenants for the longest periods; and (3) a procedure for monitoring compliance by housing credit recipients with the tax credit rules and for notifying the Internal Revenue Service of any noncompliance about which the monitoring agency becomes aware. I.R.C. § 42(m)(1)(B)-(C) (Supp. IV 1992).

125. I.R.C. § 146(e) (1988).

126. I.R.C. § 42(m)(1)(D) (Supp. IV 1992).

127. A study by the General Accounting Office recommended that states be given a greater role in allocation and compliance monitoring. U.S. GEN. ACCOUNTING OFFICE, RENTAL HOUSING: OBSERVATIONS ON THE LOW-INCOME HOUSING TAX CREDIT PROGRAM 21-22, 28-29 (1990). The 1993-94 allocation plan adopted by the Missouri Housing Development Commission requires applicants to include certifications that proposed projects meet needs as identified by applicable CHAS studies. The plan also identifies application standards, geographic distribution goals, set-aside priorities, mandatory federal preferences and development "characteristics which match the selection priorities as established by the housing needs assessment." Special attention is given to "smaller size projects" that are "hard-to-develop" (homeless housing, single-room-occupancy housing, and scattered-site projects) and are located in "difficult-to-develop areas." MISSOURI HOUS. DEV. COMM'N., ALLOCATION PLAN FOR THE LOW INCOME HOUSING TAX CREDIT 4-10 (1993). An earlier study urged public officials to give more attention to integrating the tax credit with state goals, policies, and programs. DANIEL D. PEARLMAN, NATIONAL HOUS. LAW PROJECT, STATE ADMINISTRATION OF THE LOW-INCOME HOUSING TAX CREDIT 4 (1988).

3. *Distributing Federal Housing Subsidies*

The gravity of the housing crisis and the enormous sums of money involved¹²⁸ require the federal government to continue to play the lead role in funding housing subsidies. Congress appropriated over \$18 billion in fiscal 1994 for low-income housing assistance.¹²⁹ State housing trust funds, the main sources of state housing subsidies other than tax-exempt housing bond-financed loans, accounted for less than one billion dollars in a similar period.¹³⁰

For the states, the housing trust fund movement demonstrates significant growth in state commitment and competency to administer sophisticated housing subsidy programs tailored to local and regional needs. The stage is set for the states to become the distributors of direct federal housing subsidies as they are now the allocators of indirect federal low-income assistance through administration of the LIHTC¹³¹ and tax-exempt housing revenue bonds.¹³² States now administer and distribute federal CDBG and HOME funds to rural areas and small cities.¹³³ State Public Housing Authorities can also now administer the section 8 certificate and voucher rental and assistance funds for non-urban areas.¹³⁴ The experience gained from these efforts, the knowledge derived from years of administering housing bond issues, the investment in housing evidenced by housing trust funds, and the planning responsibilities undertaken through the CHAS process¹³⁵ and state planning statutes¹³⁶ demonstrate that states are prepared and willing to play a major role in meeting the housing needs of their low- and moderate-income residents.¹³⁷

C. *Administering Programs to Preserve Assisted Housing*

In addition to their expanding roles in the creation, allocation, and distribution of housing subsidies, states have an important part to play in current efforts to prevent several hundred thousand housing units that were built with federal subsidies in the 1960s and 1970s from being removed from the affordable housing market. A complex federal housing statute was enacted in 1990

128. See *supra* notes 32-38 and accompanying text.

129. *Supra* note 117.

130. *Supra* note 112 and accompanying text.

131. See *supra* note 125 and accompanying text.

132. See *supra* note 126 and accompanying text.

133. 24 C.F.R. § 570.480 (1993).

134. 24 C.F.R. §§ 884.120-.124 (1992).

135. See *supra* note 67 and accompanying text; *infra* notes 200-09 and accompanying text.

136. See *supra* notes 58-60 and accompanying text.

137. For an argument that a range of "productive" programs, including housing and community development, should be devolved to the states, see ALICE M. RIVLIN, REVIVING THE AMERICAN DREAM 110-25 (1992).

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to respond to concerns that authorized prepayment of HUD-assisted mortgages could exacerbate the housing shortage for low- and moderate-income persons.¹³⁸ The Low Income Housing Preservation and Resident Homeownership Act (LIHPRHA)¹³⁹ and its predecessor, the Emergency Low Income Housing Preservation Act (ELIHPA),¹⁴⁰ established restrictions on prepayment of HUD-assisted mortgages and offered incentives to owners to retain their units in the assisted housing inventory.¹⁴¹

The statute attempts to balance the interests of project owners who have prepayment rights with community concerns about continuing shortages in the low- and moderate-income inventory. Nonprofit organizations are given an important role as potential purchasers of assisted developments who will retain the units for low- and moderate-income persons. Individual plans for disposition must be approved by HUD before prepayment of mortgages is permitted. Success of the program depends on significant amounts of technical assistance and coordination activities for which state housing agencies are especially suited. The National Housing Trust has proposed that statewide entities be created to oversee sales transactions of mortgage prepayment property.¹⁴² These entities would not actually purchase such properties but would instead provide technical assistance in the use of the federal statutes. They also would help create local not-for-profit purchasers and coordinate the actual sales transactions.¹⁴³

In the Cranston-Gonzalez National Affordable Housing Act, Congress directed HUD to delegate "some or all responsibility for implementing" the LIHPRHA program to state agencies "if such agency submits a preservation

138. See *Report by the National Low Income Housing Preservation Commission: Preventing the Disappearance of Low-Income Housing, Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 100th Cong., 2d Sess. 78-120 (1988).

139. Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4249-75 (1990) (codified at 12 U.S.C. §§ 4101-4125 (Supp. IV 1992)).

140. Housing & Community Development Act of 1987, Pub. L. No. 100-242, §§ 201-235, 101 Stat. 1815, 1877-86 (1987) (codified as amended at 12 U.S.C. § 17151 (1988)).

141. For a critical analysis arguing that the preservation statutes placed too great a burden on owners who wish to prepay their mortgages, see Howard D. Cohen & Taylor Mattis, *Prepayment Rights: Abrogation By The Low-Income Housing Preservation and Resident Homeownership Act of 1990*, 28 REAL PROP., PROB. & TR. J. 1 (1993).

142. *Report Suggests Statewide Entity to Oversee LIHPRHA-ELIHPA Sales*, 20 [Current Developments] Hous. & Dev. Rep. (BNA) 805 (Feb. 15, 1993).

143. The recommendation is based on a detailed study of preservation of corporations done by NHT on behalf of the North Carolina Low-Income Housing Preservation Consortia. A preservation corporation would work on behalf of local nonprofit housing organizations, community development corporations, public housing authorities, and resident groups interested in purchasing properties for extended use as affordable housing. The report suggests that a statewide entity could serve as a "bridge between buyer and seller" in which its role would include "negotiating with a seller and executing letters of intent on behalf of the purchasing entity, preparing an application for HUD predevelopment grants, and securing other resources for the purchaser." Under the National Housing Trust proposal, it would be "economically viable to create a statewide preservation corporation if at least 10 eligible properties were put up for sale over a four-year period in the state." *Id.*

plan acceptable to the Secretary."¹⁴⁴ In 1992, Congress directed HUD to issue interim regulations implementing the delegation provisions within thirty days after enactment of the Housing and Community Development Act of 1992, with final regulations to be issued following a 120-day public comment and HUD review period.¹⁴⁵ In June of 1993, a HUD official reportedly admitted that HUD "lacks the capacity to fully implement" LIHPRHA, but would delay issuing regulations to delegate administration to the states "until after it has identified a number of capable state housing-finance agencies and other authorized entities."¹⁴⁶

While HUD has resisted issuing LIHPRHA delegation regulations, it has developed a plan to test the effectiveness of passing to state housing finance agencies failed multifamily projects that HUD now owns as a result of mortgage assignment and foreclosures. A draft notice for the demonstration program circulated during July 1993 called for cooperative agreements with participating state housing agencies that would enable an agency to "act as financier, tax credit allocator, administrator, insurer, developer, or project manager."¹⁴⁷

Delegation of the assisted housing preservation program to qualified state agencies will enable that program to be coordinated with state housing development programs. Federally mandated housing preservation plans can be linked with state and local housing plans so that needs can be identified and appropriate responses prepared.

D. Linking Housing Planning, Development and Finance

A crucial first step in establishing a successful housing strategy is to develop effective connections among housing planning, development, and finance. States are experimenting with a variety of approaches to the linkage problem. A number of techniques are being used. Some states are requiring local governments to consider regional housing needs as a condition for receipt of state housing funds. Others are requiring affirmative steps be taken by local governments to provide a state-established fair share of affordable housing in a state-drawn region. States are establishing state housing goals and priorities and designating state agencies to coordinate local and regional efforts to meet those goals. California, Florida, and New Jersey provide good illustrations of

144. Pub. L. 101-625, sec. 601, § 227, 104 Stat. 4079, 4270 (1990) (codified at 12 U.S.C. § 4117 (Supp. IV 1992)).

145. Pub. L. No. 102-550, § 315, 106 Stat. 3672, 3770-71 (1992) (codified at 12 U.S.C. § 4117 note (Supp. IV 1992)).

146. *Retsinas Says HUD Not Ready to Delegate LIHPRHA Processing*, 21 [Current Developments] Hous. & Dev. Rep. (BNA) 80 (June 21, 1993).

147. *Initiative Drafted for State Role in FHA Multifamily Project Sales*, 21 [Current Developments] Hous. & Dev. Rep. (BNA) 136, 136-37 (July 19, 1993).

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this activity.

1. California

California has a three-part state housing policy. Part one is a comprehensive housing finance program, a significant portion of which is administered through a housing trust fund.¹⁴⁸ The second part is a statutory planning requirement that local governments adopt land use plans containing detailed analyses of housing needs and proposals for meeting those needs.¹⁴⁹ The third part of the California housing policy is a statutory fair share requirement. Under this statute, regional councils of governments, using data provided by state departments, determine the fair share of regional housing needs that each

148. CAL. HEALTH & SAFETY CODE §§ 50840-50842 (West 1986 & Supp. 1994). According to the legislative findings and declarations for the housing trust fund, one of the major problems in California is that "increasing rents result in hardships for those least able to afford housing. Approximately 1,600,000 lower income renters, which comprise over 18 percent of all households, pay more than 25 percent of their income for housing and nearly 1,100,000 pay more than 35 percent of their income for housing." In addition, the legislature found that "over 65 percent of all elderly renter households, pay more than 25 percent of their income for housing and over one-quarter pay more than 50 percent of their income for housing." The legislature further found that "over 650,000 persons, which is more than 7 percent of all households, live in overcrowded conditions which are threatening to their health and safety." CAL. HEALTH & SAFETY CODE § 50840 (West 1986). California statutes require that the Department of Housing and Community Development, in administering the housing trust fund, give "priority to projects that cannot be financed from bond proceeds, or that complement capital expenditures from bond proceeds." CAL. HEALTH & SAFETY CODE § 50841 (West Supp. 1994). Not less than 20% of the revenues deposited annually in the fund must be used in rural areas. CAL. HEALTH & SAFETY CODE § 50842 (West 1986). In fiscal year 1989-90, \$20 million was allocated to the California Housing Trust Fund from monies collected by the state Commission on Public Lands, CAL. PUB. RES. CODE § 6217 (West Supp. 1989), though the provision allocating funds to the California Housing Trust Fund was repealed in 1993, An Act to Amend Section 6217 of the Public Resources Code, 1993 Cal. Legis. Serv. 786, § 1 (West).

149. CAL. GOV'T CODE §§ 65100, 65103, 65583 (West 1983 & Supp. 1994). In the California land planning statute, the housing element must include an eight-point assessment of housing needs and an inventory of relevant resources and constraints, including an analysis of population and employment trends, household characteristics, and an inventory of available land; an analysis of potential government constraints on development of housing for all income levels such as land use controls, site improvement requirements, fees and exactions; an analysis of nongovernmental constraints, such as availability of financing, price of land, and cost of construction; an analysis of special housing needs of groups such as the handicapped, the elderly, large families, farm workers, families with female head of households, and persons needing emergency shelter; an analysis of opportunities for energy conservation, as well as a statement of community housing goals, qualified objectives and policies; an analysis of existing assisted housing developments that are eligible to change from low-income housing uses during the next 10 years; and a five-year schedule of proposed actions to be taken by the local government to implement the housing policies and achieve the housing goals and objectives. CAL. GOV'T. CODE § 65583 (West 1983 & Supp. 1994).

California municipalities have embraced the inclusionary housing movement, at least in concept. As of late January 1992, a survey by the San Diego Housing Commission found 52 California jurisdictions (45 cities and seven counties) with inclusionary programs in place. In 1991, at least eight jurisdictions implemented new programs and at least eight more strengthened existing programs. Other California cities and counties are now contemplating adoption of programs. "Of the state's large cities, San Francisco implemented in 1990 a policy of seeking 10 percent affordable units on a case-by-case basis in new developments of ten units or more. San Diego has retained consultants and impaneled a citizens task force to help develop an inclusionary housing program. The city council in Sacramento is considering an inclusionary ordinance." Richard A. Judd & David Paul Rosen, *Inclusionary Housing in California: Creating Affordability Without Public Subsidy*, A.B.A. J. AFFORDABLE HOUSING & COMMUNITY DEV. L., Fall 1992, at 4.

city and county should bear.¹⁵⁰ The California statute requires local governments to consider ways to meet their share of regional housing needs, but does not impose the specific legal requirements for affirmative action that is characteristic of the *Mount Laurel*¹⁵¹ jurisprudence of New Jersey.¹⁵² Because local governments are not legally required to meet the goals set by the housing elements, the housing-element statute is considered to establish a policy that is supportive of inclusionary housing programs but does not actually mandate them.¹⁵³

California relies heavily on three levels of governmental agencies: (1) active local redevelopment agencies whose governing laws are pro-affordable housing;¹⁵⁴ (2) regional planning agencies called councils of government that undertake housing need assessments and give municipalities their individually targeted goals of affordable housing units,¹⁵⁵ and (3) state housing and planning agencies that provide substantial financial assistance through housing bond issues and trust fund programs,¹⁵⁶ and take the lead in development of housing policy.¹⁵⁷ The distinctive elements are the significant role played by regional agencies and the tradition of support for housing at the state level. Its weakness lies in the spotty implementation of housing programs at the local level, partially because of the serious economic problems California has encountered,¹⁵⁸ and partially because of the voluntary nature of the

150. CAL. GOVT. CODE § 65584 (West 1983 & Supp. 1994).

151. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (state constitution prohibits exclusionary zoning); *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J.) (same), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

152. Judd & Rosen, *supra* note 149, at 4-5 (citing *Buena Vista Gardens Apartments Ass'n v. City of San Diego*, 175 Cal. App. 3d 289 (1985)).

153. *Id.* at 5.

154. See, e.g., CAL. HEALTH & SAFETY CODE § 33334.2(a) (West 1983 & Supp. 1994) (requiring that not less than 20% of tax benefit received by local redevelopment agency from a tax increment finance (TIF) redevelopment project must be used for affordable housing); *Lancaster Redev. Agency v. Dibley*, 20 Cal. App. 4th 1656 (1993) (holding that affordable housing funds may not be used to construct highway overpass leading to a planned business park that has no nexus to an affordable housing development); Daniel V. Potash, *California's Tax Increment Financing of Affordable Housing Development*, A.B.A. J. AFFORDABLE HOUS. & COMMUNITY DEV. L., Summer 1992, at 8.

155. CAL. GOV'T. CODE § 65584 (West 1983 & Supp. 1994).

156. See, e.g., CAL. HEALTH & SAFETY CODE §§ 50840-50842 (West Supp. 1994) (creating a housing trust fund).

157. See, e.g., CAL. HEALTH & SAFETY CODE § 50837 (West Supp. 1994) (creating the Advisory Task Force on Affordable Housing in Department of Housing and Community Development).

158. Professors Judd and Rosen suggest that based on an economic analysis conducted for the city of San Diego, use of tax-exempt mortgage financing can "offset a large proportion of the affordability cost of [a] city's proposed inclusionary ordinance." The authors note that to implement an inclusionary housing program successfully, local jurisdictions would have to be able to "overcome the current dearth of credit enhancement" based on the fact that financial institutions "have all but stopped issuing letters of credit at affordable terms for such bond issues." The authors also suggest that other forms of financing be pursued, "including the establishment of assessment districts to amortize the cost of facilities improvements over the life of the project." In addition, they note that it would be helpful if local jurisdictions provided, "pursuant to the requirements of the Community Reinvestment Act (CRA) that financial institutions meet the credit needs of the communities they serve," "assist[ance] in securing construction and permanent financing for residential projects complying with inclusionary housing requirements." Judd & Rosen, *supra*

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implementation process.¹⁵⁹

2. Florida

Another example of the increasing maturity of state housing programs is Florida's State Housing Incentive Partnership Act, enacted in 1992.¹⁶⁰ The Florida state housing trust fund receives an increase in the real estate transfer document stamp tax.¹⁶¹ The funds are distributed to local government housing trust funds pursuant to the State Housing Initiatives Partnership (SHIP) Program's requirements of local planning and organization.¹⁶²

Each county is eligible for at least \$250,000 to implement a Local Housing Assistance Program (LHAP). These local programs are created through a process that brings together local government officials, lenders, developers and housing advocates. Plans are prepared and adopted by participating local governments, and approved by the Florida Housing Finance Agency. Ordinances enacted under the program must: (1) create a Local Affordable Housing Assistance Trust Fund; (2) establish a program to implement the housing plan; and (3) create a nine-member advisory committee consisting of homebuilders, bankers, labor representatives, low-income housing advocates, real estate professionals, and three appointees of the local government.¹⁶³

The SHIP program thus turns state money into "local" money which can be used for locally originated programs or in conjunction with other Florida Housing Finance Agency programs.¹⁶⁴ The SHIP allocation of state trust fund monies to local governments is expected to be \$25 million in fiscal year 1993-94, \$27.45 million in fiscal year 1994-95, and \$80.02 million in fiscal year 1995-96 and beyond.¹⁶⁵

SHIP sets explicit requirements for how the money may be spent. Seventy-five percent of the monies must be used for construction, rehabilitation or emergency repairs of housing facilities; sixty-five percent of each local govern-

note 149, at 7.

159. *Id.*; see also IRA S. LOWRY & BRUCE W. FERGUSON, DEVELOPMENT REGULATION AND HOUSING AFFORDABILITY 159 (1992) (commenting favorably on California's allowance of local flexibility but concluding that the "absence of empowered regional review allows each jurisdiction to pursue narrow-minded and often self-defeating policies").

160. 1992 Fla. Laws ch. 317, § 32 (codified at FLA. STAT. ANN. chs. 420.907-.9079 (Harrison Supp. 1992)).

161. FLA. STAT. ANN. ch. 201.15 (Harrison Supp. 1992) (the amount available to local governments will double in 1995). This is expected to generate a total economic output of over \$1 billion and create more than 22,000 jobs in fiscal year 1994-95. *Florida Daily Reporter for Executives* 104d (BNA) 58 (May 29, 1992) (quoting Florida Sen. George Kirkpatrick).

162. FLA. STAT. ANN. chs. 420.9075-.9076 (Harrison Supp. 1992).

163. FLORIDA HOUSING AGENCY, A GUIDE TO THE STATE HOUSING INITIATIVES (SHIP) PROGRAM 3-6 (1992)

164. *Id.* at 2.

165. *Id.*

ment's allocation must be used to increase homeownership.¹⁶⁶ Only five percent of the funds may be used for administration costs.¹⁶⁷ In addition, local plans must earmark thirty percent of the money for "very low-income" persons, and an additional thirty percent for low-income persons.¹⁶⁸ Funds recaptured from loan repayments or other programs flow back to the local housing trust fund to be used according to the local plan.¹⁶⁹

Under Florida's mandatory planning statute, the local housing element must establish standards and plans that are guided by the following principles: (1) provide housing for existing and anticipated residents of the area; (2) eliminate substandard dwelling conditions; (3) structurally and aesthetically improve existing housing; (4) provide adequate sites for future housing, including housing for low-income and moderate-income families, mobile homes, group home facilities, and foster care facilities, and provide supporting infrastructure for public facilities; (5) identify housing in need of conservation, rehabilitation or replacement, such as historically significant housing, and provide relocation housing; and (6) formulate programs to implement the housing plans.¹⁷⁰

The major innovation of the Florida SHIP program, patterned after the Connecticut housing infrastructure fund,¹⁷¹ is the availability of state funds on a competitive basis to local governments who establish affordable housing programs, including local regulatory reform.¹⁷² Coupled with the nationally recognized "concurrency" program requiring local governments to manage growth in concurrence with development of public facilities such as streets and sewers,¹⁷³ the SHIP program offers promise of being an effective "carrot" to encourage municipalities to pay more attention to affordable housing needs.

166. FLA. STAT. ANN. ch. 420.9075(3)(a)-(b) (Harrison Supp. 1992).

167. FLA. STAT. ANN. ch. 420.9075(5) (Harrison Supp. 1992) (may be extended to 10% by resolution).

168. FLA. STAT. ANN. ch. 420.9075(3)(d) (Harrison Supp. 1992). "Low-income" persons have "total annual adjusted gross household income" that does not exceed 80% of the state or metropolitan median, whichever is greater; "very low-income" persons have incomes of 50% or less of the same amount. FLA. STAT. ANN. ch. 420.9071(17), (22) (Harrison Supp. 1992).

169. FLA. STAT. ANN. ch. 420.9079 (Harrison Supp. 1992). Because it is still in its infancy, SHIP's impact is not yet known. However, preliminary analysis indicates that the fiscal year 1992-93 allocation of \$18.75 million resulted in the production of 3712 units: 1658 for very low-income families, 1460 for low-income families, and 594 for moderate-income families. Most of the local plans provided that the funds were to be spent on homeowner assistance, construction, rehabilitation, and emergency repairs. Very little was directed towards rental housing. State housing officials reported that in the first year all of the 35 CDBG entitlement cities and the 66 counties submitted plans. While revisions were required to bring some of the plans into compliance with program specifications, all funds were ultimately distributed to local government affordable housing trust funds. The program must meet more stringent requirements as it matures. In fiscal year 1993-94, funds must be encumbered within six months after the close of the fiscal year. The following year local governments are required to expend the funds within six months of the close of the fiscal year. Telephone Interview with Carolyn Johnson, Community Assistance Consultant, Florida Housing Finance Agency (Nov. 8, 1993).

170. FLA. STAT. ANN. ch. 163.3177(6)(f) (Harrison Supp. 1992).

171. See *supra* notes 99-100 and accompanying text.

172. FLA. STAT. ANN. chs. 420.9072(2)(a), -9076(4), (6) (Harrison Supp. 1992).

173. See FLA. STAT. ANN. § 163.3202(2)(g) (West 1993).

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Rural counties took the lead in the first round of approved SHIP applications.¹⁷⁴ Effective implementation in urban areas may require greater emphasis on participation in regional housing compacts and use of mediators to help suburban communities find ways to cooperate, as is being tested in Connecticut.¹⁷⁵

3. New Jersey

New Jersey's legal and political struggle with affordable housing has received considerable attention because of the celebrated *Mount Laurel* cases¹⁷⁶ in which the state's supreme court repeatedly held that local governments had a constitutional obligation to "affirmatively afford a realistic opportunity for the construction of [a] fair share of the present and prospective regional need for low- and moderate-income housing."¹⁷⁷ After years of effort, the legislature enacted the state Fair Housing Act¹⁷⁸ establishing a state-administered system for determining what constitutes a "fair share" of low- and moderate-income housing and for resolving disputes regarding affordable housing development projects. Under the Act, a state agency, the Council on Affordable Housing (COAH), creates housing regions, calculates regional housing needs, and allocates "fair share" requirements. Municipalities may submit plans showing their compliance with their fair share requirements. If COAH approves their plans, these locales are exempt from affirmative judicial remedies that may be sought by builders through litigation.¹⁷⁹

State-administered housing programs such as New Jersey's have significant potential, but they are not panaceas. For example, the state's supreme court struck down a COAH regulation authorizing municipalities to give occupancy preferences for fifty percent of their regional fair share housing to income-eligible households that reside or work in the municipality.¹⁸⁰ In its opinion,

174. *Regulatory Reform in Florida*, ACTION (Regulatory Reform for Affordable Hous. Info. Ctr., Rockville, Md.), Spring 1993, at 1, 4 (summarizing Florida's SHIP program and characterizing as "unanticipated" the "enthusiastic response" of rural counties).

175. See *supra* notes 93-96 and accompanying text. The Florida legislature recognized this concern in the 1993 amendments to the Ship Statutes. See *supra* note 90.

176. Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983); Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J.), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

177. 456 A.2d at 413.

178. N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986 & Supp. 1993).

179. N.J. STAT. ANN. §§ 52:27D-305, -307, -309, -310. For a review of the New Jersey experience and a proposal to create a National Fair Share Act patterned after "the positive features" of the New Jersey statute, see John C. Boger, *Toward Ending Residential Segregation: A Fair Share Proposed for the Next Reconstruction*, 71 N.C. L. REV. 1573 (1993). Professor Boger's article collects many of the extraordinary number of commentaries about the *Mount Laurel* cases. *Id.* at 1590-95, nn.78-99.

180. *In re Township of Warren*, 622 A.2d 1257 (N.J. 1993). The court concluded that the occupancy-preference regulation, which applied to municipalities seeking certification that their regional fair share housing plan complied with the *Mount Laurel* doctrine and the State Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986 & Supp. 1993), "cannot be sensibly reconciled with the overall regulato-

the court reviewed the seventeen-year history of the *Mount Laurel* doctrine.¹⁸¹ The court noted that approximately 23,000 low- and moderate-income housing units had been scheduled for production and approximately 14,000 units had been completed, but that available information "suggests that such housing may not be serving regional needs."¹⁸² The court concluded that COAH's occupancy preference regulation "may be a factor in the existing pattern of absorption of *Mount Laurel* housing"; the court also expressed concern that the local residents/workers preference could lead to exclusion of minority low-income persons from suburban communities.¹⁸³

The court, in striking down the fifty percent occupancy preference regulation, left the door open for approaches that attempt to deal with the affordable housing needs of local residents. For example, the court suggested that municipalities zone for "additional affordable housing [above and beyond the fair share amount] and, subject to state and federal anti-discrimination laws, reserve such units to address exclusively local needs."¹⁸⁴ The court also suggested that a COAH methodology, taking into account financially needy households in affected municipalities, could consider "authorization of an occupancy preference tailored to eligible local households with special needs, on the condition that such a preference did not frustrate compliance with a municipality's regional obligation to provide affordable housing."¹⁸⁵

New Jersey's affordable housing program is distinctive for its emphasis on state administration of a regional fair share, court-directed mandate.¹⁸⁶ State administration of the fair share program provides enforcement muscle that may be missing from the California approach, but it also imposes a greater bureaucratic structure on the system. In addition, COAH's affordable housing planning responsibilities are independent from, but necessarily related to, a state plan that was not adopted until five years after COAH became operational.¹⁸⁷ The state planning process includes a "cross acceptance" feature that emphasizes negotiation of the required consistency between local plans and the state plan.¹⁸⁸ How the two planning systems will mesh is an important unresolved

ry scheme that has been adopted by COAH to implement the Fair Housing Act and therefore cannot coexist within the present regulatory framework." *Id.* at 1271. The court noted that there was a "fundamental inconsistency between the occupancy preference and COAH's methodology for calculating regional fair share and allocating that fair share among the region's municipalities." *Id.*

181. *Id.* at 1273-75.

182. *Id.* (citing Martha Lamar et al., *Mount Laurel At Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197, 1209 (1989)).

183. *Id.* at 1274 (citing Robert C. Holmes, *A Black Perspective on Mount Laurel II: Toward a Black "Fair Share,"* 14 SETON HALL L. REV. 944, 950 (1984) and John M. Payne, *Title III in Mount Laurel: Is Affordable Housing Fair Housing?*, 6 YALE L. & POL'Y REV. 361 (1988)).

184. *Id.* at 1275.

185. *Id.*

186. See Buschsbaum, *supra* note 60, at 184 (noting that New Jersey "has a remarkably centralized state zoning system for low- and moderate-income housing").

187. *Id.*

188. N.J. STAT. ANN. § 52:18A-202(b) (West Supp. 1993).

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question.¹⁸⁹

III. A COORDINATED STRATEGY

A coordinated strategy that responds effectively to local housing needs contains three basic elements: (1) an accurate assessment of local housing needs; (2) an allocation system that establishes priorities for responding to those needs; and (3) maximum leverage of public resources through public-private partnerships.¹⁹⁰ The question remains whether housing policy initia-

189. Buchsbaum, *supra* note 60, at 184 (noting the potential conflict between the state plan's call for development in growth centers with COAH's mandate to meet affordable housing quotas not necessarily limited to growth centers). Two reviews of the Mount Laurel experience give the program "mixed" reviews, with the positive grades going to changes in attitudes about affordable housing and negative grades going to the complexity of the process. Peter A. Buchsbaum, *Mount Laurel II: A Ten-Year Retrospective*, STATE & LOCAL L. NEWS, Winter 1994, at 7; Ellen Lovejoy, *Mount Laurel Scorecard*, PLANNING, May 1992, at 10.

190. While beyond the scope of this Article, one of the major lessons to be taken from the numerous attempts over the last 60 years to provide adequate and affordable housing for persons of low and moderate income is that successful housing programs do not exist in a vacuum: an individual housing unit, whether a single family house, a condominium, a cooperative or an apartment unit, is a physical and psychological part of a community as well as a form of shelter. In order to provide shelter successfully, a housing unit must be part of a safe and stable environment. It must be linked, not only physically, but psychologically and emotionally both to the needs of the occupants and to the needs of the surrounding environment. The unit's relationship to streets, to other housing units, to job centers, and to schools will inevitably be an important contribution to its success or failure as "housing."

For example, the Mayor of St. Louis, Missouri, the first African-American to hold that position, set forth a goal during his campaign that in order to stabilize neighborhoods five efforts must be underway simultaneously in a coordinated fashion: (1) improvement of housing quality, (2) elimination or substantial reduction of crime, (3) provision of jobs and job opportunities, (4) improvement of local schools, and (5) encouragement and support for neighborhood businesses. Federal officials are embracing this coordinated approach, often called "holistic planning," as they announce plans to streamline HUD and consider permitting more flexibility in housing and community development spending. *Cuomo Says Granters, Field Offices Will Manage Consolidated Plans*, 21 [Current Developments] Hous. & Dev. Rep. (BNA) 462 (Dec. 6, 1993).

Many of these efforts traditionally have been supported by state governments. For example, the public educational system in this country is the responsibility of state governments. While these educational responsibilities generally have been delegated to local independent school districts, the primary source of support for public education comes through the state taxing structure. *See, e.g., Rose v. Council for Better Educ.*, 790 S.W.2d 186, 205 (Ky. 1989) (holding that sole responsibility for providing an efficient system of public education rests with the General Assembly). The public provision of social services such as day care, visiting nurses, social worker assistance, and direct public welfare support has also been funneled through state agencies. While much of the money that goes to support services comes from the federal government, the delivery system is predominantly organized and managed by the states. In addition, crime control generally has been a state and local responsibility.

Two programs that provided good examples of the potential for effective state collaboration are the Caring Communities and Police in Neighborhoods programs in Missouri. The Caring Communities program began in 1988 with a breakfast meeting of the directors of the state departments of Elementary and Secondary Education, Health, Mental Health, and Social Service. The directors selected urban and rural pilot sites to test a "family-focused human services" model. These services are designed to keep children (1) in school, (2) "safely in their own homes," and (3) "out of trouble with the law." Martha Shirk, *A Ray of Hope*, ST. LOUIS POST-DISPATCH, Jan. 23, 1994, at 1C. The Missouri Housing Development Commission initiated the Police in Neighborhoods program in January 1994. This program provided financial incentives for 50 police officers in Kansas City and 50 in St. Louis to build or renovate homes in high crime areas and to become involved in those neighborhoods. Under the program, an \$80,000 house can

tives are best implemented by federal, by state, or by city or neighborhood agencies.¹⁹¹ There are a number of reasons why a state-administered housing strategy, conscious of broad national housing goals and sensitive to local and regional considerations, has the best chance of achieving success.

The controversial nature of affordable housing,¹⁹² as well as the necessity for public subsidy to provide housing commensurate with the need,¹⁹³ suggests that an effective housing strategy requires a "carrot-and-stick" approach. The federal government has the resources to provide the "carrots," but does not have the ability to respond effectively to local-exclusionary land use

be acquired in Kansas City for a \$1600 down payment and \$364 a month. In St. Louis, a house can be acquired for \$510 a month. Housing in Kansas City costs less because the City has agreed to match a \$20,000 per unit subsidy provided by MHDC. Karen Dillon, *Kansas City Offers Police Cheap Homes—But With a Catch*, KANSAS CITY STAR, Jan. 26, 1994, at A1.

One of the main thrusts of the Clinton Administration's Empowerment Zone and Enterprise Communities program is block grants to states for social services, codified at 42 U.S.C. §§ 1397-1397f (1988 & Supp. IV 1992). Grants of \$3 million per enterprise community, \$100 million per urban zone (over two years), and \$40 million per rural zone (over two years) will be passed through to nonprofit and profit groups for services identified in the strategic plans of qualifying zones and communities. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13761, 107 Stat. 312, 664-67 (amending 42 U.S.C. §§ 1397-1397e); Otto J. Hetzel, *Some Historical Lessons for Implementing the Clinton Administration's Empowerment Zones and Enterprise Communities Program*, 26 URB. LAW. 63, 67 (1994).

191. The argument for federal administration rests on the fact that federal tax dollars and federal tax policy are likely to remain the primary source of capital for housing subsidies. See, e.g., Curtis Berger, *Beyond Homelessness: An Entitlement to Housing*, 45 U. MIAMI L. REV. 315 (1990-91); Michael H. Schill, *The Federal Role in Reducing Regulatory Barriers to Affordable Housing in the Suburbs*, 8 J. LAW & POL. 703 (1992); Sara H. Strauss & Andrew E. Tomback, *Homelessness: Halting the Race to the Bottom*, 3 YALE L. & POL'Y REV. 551 (1985).

The argument for more local administration, however, rests upon the principle of subsidiarity, which holds that decisions are most effective if made by persons closest to the problem. See Pope John XXIII, *Mater Et Magistra*, Part II, No. 53, in RENEWING THE EARTH 62 (David J. O'Brien & Thomas A. Shannon eds., 1966); DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT* 277 (1992) (quoting a "rule of thumb" of the National Conference of State Legislatures: "unless there is an important reason to do otherwise, responsibility for addressing problems should lie with the lowest level of government possible").

Finally, the fact that housing markets do not tend to respect municipal boundaries supports the proposition that regionally administered strategies are preferable.

192. The currently popular land use planning acronyms, "NIMBY" (Not in My Back Yard) and "LULU" (Locally Undesirable Land Use), are applied in many communities to multifamily developments, group homes, accessory apartments, and manufactured housing—all of which are effective types of affordable housing. See Margulies, *supra* note 65; Williams, *supra* note 65.

193. See *supra* notes 32-38 and accompanying text.

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practices that bar or severely restrict various forms of affordable housing.¹⁹⁴ Municipalities generally do not have the resources (carrots) to respond effectively to housing needs within their boundaries, particularly urban centers with high concentrations of poor people.¹⁹⁵ Regional governments, if they even exist, do not have the requisite taxing and regulatory powers, nor the resources, to implement an effective housing strategy.¹⁹⁶ States, on the other hand, have both the general taxing power to complement federal resources and the ability to respond to exclusionary land use practices through their legal control over local regulatory power.¹⁹⁷

A. Assessing Housing Needs Accurately

State planning programs that fully assess housing trends and needs on a broader base than local plans are critical components of an effective national housing strategy. Housing markets vary from state to state, as well as within

194. Land use regulation is a function of a state's police power. Absent a delegation of that power by the state to the federal government or absent federal preemption of the land use regulatory power (for which there has been little political support except in the environmental area), the federal government is unlikely to be able to deal effectively with communities that practice exclusionary zoning unless the exclusionary provision violates federal fair housing laws or constitutional equal protection guarantees. See *Huntington, Branch NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *review declined in part, judgment aff'd*, 488 U.S. 15 (1988) (holding a refusal to rezone to permit multifamily apartments in a largely white area violative of Fair Housing Act because of discriminatory effect).

For an argument that the federal government could effectively regulate local land use practices through its power to attach conditions to federal subsidies or to preempt local regulation of matters affecting interstate commerce, see Schill, *supra* note 191, at 708-18; see also Boger *supra* note 179, at 1573 (1993) (advocating a federal fair share plan); Peter A. Buchsbaum, *Federal Regulation of Land Use: Uncle Sam the Permit Man*, 25 URB. LAW. 589 (1993) (reviewing the growth of federal environmental land-use regulations).

195. See, e.g., U.S. CONFERENCE OF MAYORS TASK FORCE ON HUNGER AND HOMELESSNESS, ENDING HOMELESSNESS IN AMERICA'S CITIES 39-46 (1993); David R. Morgan & Michael W. Hirlinger, *The Dependent City and Intergovernmental Aid*, 29 URB. AFFAIRS Q. 256 (1993).

196. Regional planning agencies exist in all of the states but, for the most part, are advisory. See THE PRACTICE OF STATE AND REGIONAL PLANNING 55-61, 133-65 (Frank S. So et al. eds., 1986); William W. Goldsmith, *Marxism and Regional Policy: An Introduction*, in URBAN AND REGIONAL PLANNING IN AN AGE OF AUSTERITY 23 (Pierre Clavel et al. eds., 1980); Ann R. Markusen, *Regionalism and the Capitalist State*, in URBAN AND REGIONAL PLANNING IN AN AGE OF AUSTERITY, *supra*, at 29. For an analysis of a regional government with tax allocation power, see Robert Freilich & John Ragsdale, *Land Use Control in the Minneapolis-St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009 (1974); see also Patricia E. Salkin, *Regional Planning: New Political Magnetism*, LAND USE L. & ZONING DIG., June 1992, at 3 (surveying state growth management activities and concluding that regional planning is becoming more popular).

197. The Supreme Court's approval in 1926 of state enabling legislation authorizing local governments to divide land into districts or zones and apply uniform land use, bulk and density regulations within those districts ushered in the modern era of land use regulation. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). For histories of zoning, see ZONING AND THE AMERICAN DREAM (Charles M. Haar & Jerold S. Kayden eds., 1989); RICHARD BABCOCK, THE ZONING GAME (1965); EDWARD M. BASSETT, ZONING (1940); ALFRED BETTMAN, CITY AND REGIONAL PLANNING PAPERS (1946); SEYMOUR I. TOLL, ZONED AMERICAN (1969).

areas of particular states. Because of the dynamics of these markets,¹⁹⁸ assessments of housing needs tend to be more accurate if they are made from a perspective that is broader than a local perspective but narrower than a national one.

As noted earlier, states are becoming increasingly involved in housing planning.¹⁹⁹ Changes in federal housing legislation recognize the importance of housing planning and provide an impetus for greater state activity. The Comprehensive Housing Affordability Strategy (CHAS) provision of the 1990 Cranston-Gonzalez National Affordable Housing Act,²⁰⁰ requires states and municipalities to prepare five-year estimates of housing needs and annual supplements, and also requires states to devise strategies for meeting those needs in order to qualify for federal housing subsidies.²⁰¹

A provision of the CHAS assessment that received little attention initially but which is becoming an important feature of CHAS review is the requirement that local governments evaluate the impact of relevant local public policy, such as land use regulations, on their implementation of an affordable housing

198. For a collection of commentaries on housing markets, emphasizing that they do not respect local boundaries, see *HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES* 39-79 (Roger Montgomery & Daniel Mandelker eds., 2d ed. 1979).

199. See *supra* notes 58-60, 148-89 and accompanying text. Florida and New Jersey are examples of what has been called "top down" planning in which the state establishes firm directions for local government planning activities. An alternative approach, called "bottom up" planning is illustrated by new legislation in Washington, *infra* note 206, in which the state provides guidelines, assistance, and incentives to encourage local planning efforts. See *State Development Initiatives Spur New Government Relationships*, 20 [Current Developments] Hous. & Dev. Rep. (BNA) 352 (Sept. 14, 1992) (reviewing URBAN LAND INST., STATE AND REGIONAL INITIATIVES FOR MANAGING DEVELOPMENT (1992)).

200. Pub. L. No. 101-625, §§ 105-106, 104 Stat. 4079, 4088-91 (codified at 42 U.S.C. §§ 12705-12706 (Supp. IV 1992)).

201. The 1990 Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 105(a), 104 Stat. 4079, 4088 (codified at 42 U.S.C. § 12705(a) (Supp. IV 1992)), extends the CHAS mandate to the new HOME Investment Partnership housing block grant funds, Pub. L. No. 101-625, § 201-289, 104 Stat. 4079, 4094-128 (codified at 42 U.S.C. § 12721-12839 (Supp. IV 1992)). The CHAS mandate was also extended to the continued receipt of Community Development Block Grant (CDBG) funds by § 922 of the Act, 104 Stat. 4079, 4402-03 (amending 42 U.S.C. § 5304), to the Homeownership and Opportunity for People Everywhere (HOPE) programs by § 105(a) of the Act, 104 Stat. 4079, 4088 (codified at 42 U.S.C. § 12705(a) (Supp. IV 1992)) and by §§ 412-413 of the Act, 104 Stat. 4079, 4172-73 (codified at 42 U.S.C. §§ 1437aaa-1 & 1437aaa-2 (Supp. IV 1992)), to participation by state housing agencies in the Low-Income Housing Preservation Program by § 105(a) of the Act, 104 Stat. 4079, 4088 (codified at 42 U.S.C. § 12705(a) (Supp. IV 1992)) and § 601 of the Act, 104 Stat. 4079, 4270-71 (codified at 12 U.S.C. § 4117 (Supp. IV 1992)), to the Stewart B. McKinney Homeless Assistance Act and the Section 8 Moderate Rehabilitation Single Room Occupancy program by § 836 of the Act, 104 Stat. 4079, 4366 (amending 42 U.S.C. § 11361), to the Supportive Housing for the Elderly program by § 105(a) of the Act, 104 Stat. 4079, 4088 (codified at 42 U.S.C. 12705(a) (Supp. IV 1992)) and by § 801 of the Act, 104 Stat. 4079, 4297-99 (codified at 12 U.S.C. § 1701g (Supp. IV 1992)), and to the Supportive Housing for Persons with Disabilities Program by § 105(a) of the Act, 104 Stat. 4079, 4088 (codified at 42 U.S.C. § 12705(a) (Supp. IV 1992)) and by § 811 of the Act, 104 Stat. 4079, 4324-27 (codified at 42 U.S.C. § 8013 (Supp. IV 1992)). CHAS reports are not required for Public and Indian Housing, nor for Section 8 existing-housing certificates and vouchers, but HUD allocations of Section 8 funds are to be made in a way that assists participating jurisdictions to accomplish their affordable housing goals under § 556 of the Act, 104 Stat. 4079, 4233 (amending 42 U.S.C. § 1439(d)(1)(A)).

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strategy.²⁰² A 1991 report of an advisory board established by the Bush Administration called attention to the fact that overly restrictive land use and building regulations can have a severe effect on affordable housing development by increasing the cost of land and other essential components.²⁰³ In 1992, Congress responded by authorizing HUD to make grants to states and municipalities "for the costs of developing and implementing strategies to remove regulatory barriers to affordable housing."²⁰⁴

The CHAS requirement underscores the federal government's understanding of the importance of planning for housing. States are also beginning to recognize this need.²⁰⁵ To avoid inevitable duplication and confusion, however, the CHAS review process should be delegated to state agencies that are responsible for administering state housing planning and production programs.²⁰⁶ This would require an amendment to the CHAS legislation which would remove the exemption from state approval for local government housing strategies.²⁰⁷ In states that have developed state housing review plans,²⁰⁸ local CHAS strategies should be subject to the same review to achieve maximum coordination.²⁰⁹

B. *Recutting the Federal Housing Assistance Pie*

Three-quarters of all federal housing assistance goes to people in the middle

202. Pub. L. No. 101-625, § 105(b)(4), 104 Stat. 4079, 4089 (codified at 42 U.S.C. § 12705(b) (4) (Supp. IV 1992)). City planners confess to a "love-hate" relationship with CHAS. They applaud the fact that developers must obtain certificates of compliance with local CHAS plans before receiving Federal housing assistance. They acknowledge that CHAS forces cities to pay more attention to people with low income or special needs—"people out of the main stream." But they object to the "flavor" of CHAS, complaining that "cities are guilty until proven innocent." Charles P. Kindleberger, Director of Research, Community Development Agency, City of St. Louis, Remarks at The American Planning Association, St. Louis Metropolitan Section (Oct. 28, 1993).

203. ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., "NOT IN MY BACK YARD": REMOVING BARRIERS TO AFFORDABLE HOUSING 4-5 (1992).

204. Removal of Regulatory Barriers to Affordable Housing Act of 1992, Pub. L. No. 102-550, §§ 1201-1207, 106 Stat. 3672, 3938-41 (codified at 42 U.S.C. §§ 12705a-12705d (Supp. IV 1992)).

205. See *supra* notes 58-60 and accompanying text.

206. New legislation in the state of Washington requires the state "to coordinate, encourage, and direct, when necessary" public and private sector efforts to provide affordable housing. Housing Policy Act, 1993 Wash. Legis. Serv. 478, § 2 (West). The statute directs the state Department of Community Affairs to establish an 18-member affordable-housing advisory board and to work with the advisory board in analyzing state housing needs, and in preparing annual reports and five-year housing-advisory plans and programs reports. 1993 Wash. Legis. Serv. 478, §§ 5-6, 12 (West).

The Department of Community Affairs is designated "the principal state department responsible" for coordinating federal and state housing activities within the state and for working with local and regional agencies to maximize coordination. 1993 Wash. Legis. Serv. 478, § 13 (West). The department is also responsible for analyzing regulatory barriers to affordable housing and for providing technical assistance and information to assist in overcoming such barriers. 1993 Wash. Legis. Serv. 478, § 14 (West).

207. Pub. L. No. 101-625, § 105(d), 104 Stat. 4079, 4090 (codified at 42 U.S.C. § 12705(d) (Supp. IV 1992)).

208. See *supra* note 58-60 and accompanying text.

209. See, e.g., the new Washington state housing planning policy, described at *supra* note 206.

and upper income ranges through tax policies such as the mortgage interest and property tax deductions²¹⁰ and the LIHTC.²¹¹ A cap should be placed on the mortgage interest deduction, and the tax receipts derived from the cap should be split between deficit reduction and a dedicated housing fund to increase the proportion of available housing assistance for people with the most pressing housing needs.²¹²

Such a fund could generate \$5-10 billion annually in new money that could be distributed to the states on a matching basis to implement state approved local and regional housing plans.²¹³ The HOME Investment Partnership block grant program could be the vehicle for distributing the funds to the states, if that program was redesigned to eliminate many of the bureaucratic roadblocks that have plagued its early years and to incorporate states more directly into the distribution system.²¹⁴ The Intermodal Surface Transportation Efficiency Act (ISTEA)²¹⁵ can serve as a useful model because of the congressional shift away from imposition of a federal transportation program to guidelines directing states and metropolitan areas to develop flexible transportation strategies as conditions for receipt of federal funds.²¹⁶

Funds from the mortgage interest deduction cap could be allocated to states

210. While the LIHTC is designed to encourage the development of housing for low- and moderate-income persons, the direct beneficiaries of the credit are the individuals and corporations with the discretionary income to permit such investment. See CONGRESSIONAL BUDGET OFFICE, *THE COST-EFFECTIVENESS OF THE LOW-INCOME HOUSING TAX CREDIT COMPARED WITH HOUSING VOUCHERS* 2-3 (1992).

211. See Salsich, *supra* note 6, at 1628.

212. *Id.* at 1634-37. Characterization of the mortgage interest tax deduction as a governmental subsidy may be disputed on the grounds that the government does not pay middle- and upper-income persons for buying houses. Instead, the argument is that persons may be "tax advantaged" by virtue of their ownership. Letter from James I. Bliss to Peter W. Salsich, Jr. (Oct. 21, 1993) (on file with author). While housing assistance may be a more accurate term, the notion of tax deductions as subsidies is becoming common. See, e.g., Peter G. Peterson, *Facing Up*, ATLANTIC MONTHLY, Oct. 1993, at 77, 84-85.

213. As much as \$20 billion could be reallocated to low-income housing programs were it not for the serious federal deficit. See Peterson, *supra* note 212 (arguing that the cause of "huge" budget deficits is "out-of-control spending on welfare programs for the middle and upper classes"). Because of the federal deficit problem, half of the funds generated by a mortgage interest deduction cap should be earmarked for deficit reduction. See Salsich, *supra* note 6, at 1637.

214. See Rick Cohen, *Getting Your Piece of the New Federal Home Funds*, SHELTERFORCE, May/June 1992, at 14-17 (summarizing five major problems arising from the complexities of the HOME program); see also *Lack of Data Won't Delay 1994 HOME Consortia Funds*, HUD Says, 20 [Current Developments] Hous. & Dev. Rep. (BNA) 988 (Apr. 26, 1993); *Most of 1992 HOME Changes Already in Effect*, HUD Says, 20 [Current Developments] Hous. & Dev. Rep. (BNA) 541 (Nov. 23, 1992).

215. Pub. L. 102-240, 105 Stat. 1914 (1991) (codified at scattered sections of 49 U.S.C. & 23 U.S.C.).

216. See 23 U.S.C. §§ 133 (surface transportation program), 134 (metropolitan planning), 135 (statewide planning) (Supp. IV 1992). Regulations to implement the new approach were issued in October, 1993. 23 C.F.R. pt. 450; 49 C.F.R. pt. 613 (1993); 58 Fed. Reg. 58040 (1993). A newsletter of the East-West Gateway Coordinating Council, the voluntary regional planning agency for the St. Louis bistate region, describes ISTEA as "landmark legislation" that "represents a new direction for surface transportation." *The Intermodal Surface Transportation Efficiency Act: New Directions for Surface Transportation in the St. Louis Region*, TRANSPORTATION REDEFINED (East-West Gateway Coordinating Council, St. Louis, Mo.), Feb. 1993.

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on a need-based formula and drawn down by the states as supplements to state housing fund allocations.²¹⁷ States have made impressive strides in responding to housing problems of their residents. Yet, it would be unrealistic to expect states to be able to take over all housing funding responsibility from the federal government under the current tax structure. States do not have the ability to generate the amount of tax revenue currently available to the federal government.²¹⁸ But states are in a position to administer effectively a national housing strategy funded by an increase in federal funds allocated to housing and matched by growing state appropriations.

America's housing needs have not been and will not be met by a monolithic national housing bureaucracy. States are in the strategically significant position of being able to channel federal housing funds toward distinctive features of local housing markets, while simultaneously expanding the reach of housing programs so that economic, environmental, and resident mobility considerations are taken into account. The states' housing laboratories²¹⁹ are producing a variety of creative responses to affordable housing needs. The experience gained in that process makes them excellent candidates for full partnership with the federal government in a new national housing strategy.

217. See *supra* notes 53-55 and accompanying text. Revenue generated by capping the mortgage interest deduction could fund a variety of programs. For example, the LIHTC could be expanded to encourage investment in homeownership by persons with lower or moderate incomes who live in neighborhoods that are identified as good candidates for revitalization. The existing state caps on use of the LIHTC could be increased in proportion to the amount of new tax revenues generated by the mortgage interest deduction cap. Such an approach would redirect the mortgage interest deduction toward its original purpose of encouraging homeownership. I am indebted to Richard Baron and Kevin McCormack, President and Vice President of McCormack, Baron & Associates, Inc., St. Louis, Mo, for the tax credit expansion suggestion.

A start could also be made by replacing large public housing projects with smaller, community-based, family housing clusters. Based on experiences in Europe and in the cohousing movement in America, developments of 35-50 unit clusters offer hope of integrating well designed and managed public housing into surrounding neighborhoods. The current federal expenditures for operating subsidies and for direct public housing support could serve as a fund to reconfigure the sites of distressed public housing units into new mixed-income developments in which the residents are economically integrated. This would enable them to build a sense of community. McCormack Baron & Assocs., Urban Revitalization Demonstration (Mixed-Income Housing Initiative), Jan. 10, 1994 (unpublished report on file with author).

218. See, e.g., Charles E. Connerly, *A Survey and Assessment of Housing Trust Funds in the United States*, 59 J. AM. PLAN. ASS'N 306, 313 (1993) (concluding that state housing trust funds "will not be able to come close" to federal funding levels for affordable housing that existed in the 1970s). For recommendations to revise the national tax structure to devolve more of the tax revenue to the states, see RIVLIN, *supra* note 137, at 142-50 (recommending common shared taxes such as corporate income and gasoline taxes).

219. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

C. Decentralizing the Distribution of Federal Housing Subsidies

As discussed earlier, states have developed sophisticated capabilities for distributing federal housing subsidies.²²⁰ The U.S. Department of Housing and Urban Development, in contrast, has been criticized severely for an overly centralized bureaucratic structure and mismanagement of programs.²²¹

The states are in a position to assume greater responsibility for implementing federal housing policies. Many of the elements of a new model for addressing urban housing and neighborhood development issues can be found in the state programs described above.²²² Through greater delegation of authority and responsibility for administering federal housing funds, the states can more effectively respond to the twin dilemmas of rebuilding inner city neighborhoods and opening up the suburbs to low- and moderate-income persons.

D. A Revised Federal Role

Decentralization of federal housing subsidy programs to the states does not mean that the federal government would have less of a responsibility for providing national leadership and resources. Rather, the role would change from manager to partner. Implementation of the mortgage interest deduction cap would result in a substantial increase in direct federal support for affordable housing. Decentralization of the distribution system would free the federal government to concentrate on effective implementation of national nondiscrimi-

220. See *supra* notes 133-37 and accompanying text.

221. Former Secretary Jack Kemp called HUD a "swamp." In a generally favorable article summing up Secretary Kemp's efforts, Congressman Barney Frank of the House Subcommittee on Housing and Community Development was quoted praising Kemp's honesty for stating that "there's considerably less theft now." Guy Fugliotta, *Kemp Helped Agency Recover Self-Respect; Still, HUD "Needs a Plan and . . . Restructuring,"* WASH. POST, Dec. 29, 1992, at A13. See generally OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOUS. & URBAN DEV., SEMI-ANNUAL REPORT TO CONGRESS, FOR THE PERIOD ENDING MARCH 31, 1993, at 1-15 (reviewing the "top 10 management issues facing HUD" and finding that "substantial effort is needed to effectively address these problems").

For a review of the "HUD Scandal" of the 1980s, see the HUD Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987 (1989) (codified at scattered sections of 42 U.S.C.); Michael Allan Wolf, *HUD and Housing in the 1990s: Crises in Affordability and Accountability*, 18 FORDHAM URB. L.J. 545 (1991); see also Rachel G. Bratt & W. Dennis Keating, *Federal Housing Policy and HUD: Past Problems and Future Prospects of a Beleaguered Bureaucracy*, 29 URB. AFF. Q. 3 (1993) (recommending major reorganization of federal housing programs). The Clinton Administration cited the public housing program as the epitome of the "industrial-era program: hierarchical, rule-bound, and bureaucratic." AL GORE, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS 40 (1993). According to one HUD official, "[w]e are starting over" to revamp HUD in a way that "is reinventing its priorities." Nelson A. Diaz, *HUD Speaks: General Counsel Diaz Examines His Office's Role in the Administration's and HUD's New Agenda*, A.B.A. J. AFFORDABLE HOUS. & COMMUNITY DEV. L., Fall 1993, at 6.

222. OSBORNE & GAEBLER, *supra* note 191 at 321 (arguing that a "new paradigm . . . a shift in the basic model of governance used in America" is underway but largely unseen "because we are not looking for it").

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nation policies, both through aggressively enforcing the Fair Housing Act²²³ and by encouraging the development of new design techniques and living arrangements to end the isolation of low-income households.²²⁴ The federal government should also have primary responsibility for monitoring state and local efforts to remove artificial regulatory barriers to affordable housing.²²⁵ It should play a catalytic role in creating opportunities for low-income resident management and ownership.²²⁶ And it should continue to provide emergency housing assistance in response to major disasters such as earthquakes, floods, and hurricanes.²²⁷ A revised federal role does not require a huge bureaucracy, but rather a well-organized, clearly focused agency capable of supporting state and local programs with timely research data, technical assistance, training programs, strong enforcement procedures, and quick response capabilities for emergency relief.²²⁸

223. Enforcement of the Fair Housing Act is a major HUD responsibility. 42 U.S.C. §§ 3601, 3608 (1988); *Achtenberg Says HUD Planning Stronger Fair Housing Efforts*, 21 [Current Developments] Hous. & Dev. Rep. (BNA) 500 (Dec. 20, 1993).

224. Challenge grants under the new Urban Revitalization Demonstration Program (URD) could stimulate this activity. Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1993, Pub. L. No. 102-389, tit. II, 106 Stat. 1571, 1579 (codified at 42 U.S.C.A. § 14371 note (West Supp. 1993)); see Gordon Cavanaugh, *Ending Severely Distressed Public Housing—A Congressional Initiative, a HUD Challenge*, A.B.A. J. AFFORDABLE HOUS. & COMMUNITY DEV. L., Fall 1993, at 13-14. These grants also could help stimulate coordination of necessary social services so that persons residing in assisted housing have access to resources enabling them to be responsible tenants and active participants in their neighborhoods.

225. In 1992, HUD established a Regulatory Reform for Affordable Housing Information Center to collect and disseminate information on efforts to reduce regulatory barriers to affordable housing. *Regulatory Reform Information Center Opens Its Door*, ACTION (Regulatory Reform for Affordable Hous. Info. Ctr., Rockville, Md.), Summer 1992, at 1.

226. The Homeownership and Opportunity for People Everywhere (HOPE) program, enacted in 1990, is the centerpiece of the federal government's efforts to provide home-ownership opportunities for low-income persons. The program authorizes loans, grants and other financial and technical assistance to help low-income residents form cooperative associations and acquire title to publicly- and privately-owned assisted housing units. Pub. L. 101-625, tit. IV, 104 Stat. 4079, 4148-80 (1990) (codified at scattered sections of 42 U.S.C.). Six HOPE programs exist: HOPE I, public and Indian housing homeownership, 42 U.S.C. §§ 1437aaa-1 to -8 (Supp. IV 1992); HOPE II, ownership of multifamily units, 42 U.S.C. §§ 12871-12800 (Supp. IV 1992); HOPE III, homeownership of single family homes, 42 U.S.C. §§ 12891-12898 (Supp. IV 1992); HOPE IV, job opportunities for low-income young adults in housing construction and rehabilitation (Youthbuild), 42 U.S.C. §§ 12899-12899g (Supp. IV 1992); HOPE V, demonstration program to test the effectiveness of combining Section 8 housing assistance with support services to assist frail elderly persons with independent living, 42 U.S.C. § 8011 (Supp. IV 1992); and HOPE VI, competitive grants to fund innovative local programs to recast severely distressed public housing projects into economically- and racially-integrated communities, 42 U.S.C.A. § 14371 (West Supp. 1993). Severely distressed public housing has one or more of the following conditions: distressed families, high crime rates in the surrounding neighborhoods, barriers to effective management, and deteriorated buildings. THE FINAL REPORT, *supra* note 31, at B-2.

227. See, e.g., Seth Mydans, *Health Concerns Mount As Tents Rise After Quake*, N.Y. TIMES, Jan. 23, 1994, at 18 (describing efforts to provide emergency shelter and housing in the first days after the Jan. 17, 1994 Los Angeles earthquake).

228. The HUD Office of Inspector General stressed that because "it is unlikely that HUD will significantly increase its resources," there exists a necessity for "better [use] of existing resources." OFFICE OF INSPECTOR GEN., *supra* note 221, at 5.

E. Overcoming a Lack of Local Confidence in State Leadership

States were virtually ignored during the years of the major federal housing-production programs, particularly with respect to urban areas. In part, this was their own doing because they showed little interest or ability in responding to housing needs. It was also, however, a product of the growth of federal domestic programs after the Depression and the Second World War and the belief that massive federally subsidized public housing projects could solve the housing problems of the poor.²²⁹

The states, however, traditionally have been the "laboratories" for domestic programs.²³⁰ States have also been the traditional dispensers of "basic" public services such as education, family and child care services, and infrastructure (bridges, roads, sewers, street lights, etc.). An irony of federal housing initiatives is that the federal public housing system is based on a model developed by the State of New York.²³¹ The states dropped out of the public housing system after enacting enabling legislation authorizing the creation of local public housing authorities in the 1940s.²³² Fifty years later, housing is back on the states' agenda. This time, the states are true participants, making use of their taxing powers to support housing efforts through subsidies, credit, planning initiatives, and inclusionary incentives.

Years of neglect or outright hostility in the states to affordable housing concerns have left a legacy of suspicion and distrust that is not easily overcome. States have a long way to go to persuade Congress, housing advocates, and the American people that states can and should play a key role in a national urban strategy for housing.²³³

Confidence is not acquired overnight, but only through painstaking efforts to demonstrate that confidence is merited. That is the significance of the state

229. A large, high-rise public housing project in St. Louis was complemented by an architecture magazine for "innovative cost-saving and community-building design features" when the project opened in the mid-1950s. Twenty years later, the project was demolished because it had become a national symbol of failure. See Henry J. Schmandt & George D. Wendel, *Pruitt-Igoe: Sozialwohnbau in St. Louis, 1954-1976*, WERK-ARCHITHESE, May 1977, at 3 (citing *Slum Surgery in St. Louis*, ARCHITECTURAL F., April 1951, at 128).

230. See *supra* note 219.

231. See *supra* note 41.

232. 42 U.S.C. § 1437a(b)(6) (1988 & Supp. IV 1992) defines "public housing agency" to include governmental entities which are "authorized to engage in or assist in the development or operation of low-income housing." Most states enacted legislation establishing housing authorities as independent municipal corporations when cities and counties declared a housing need to exist. See, e.g., CAL. HEALTH & SAFETY CODE § 34240 (West 1973); FLA. STAT. ANN. ch. 421.04 (Harrison 1990); ILL. ANN. STAT. ch. 310, paras. 2-3 (Smith-Hurd 1993); MO. REV. STAT. § 99.040 (Vernon 1989); N.J. STAT. ANN. § 40A:12A-17 (West 1993); State *ex rel.* City of St. Louis v. Ryan, 776 S.W.2d 13, 16 (Mo. 1989) (en banc) (housing authority "exists to further the state interest in housing its urban citizens, not to act as the arm of local government").

233. For example, an impassioned call by a U.S. Conference of Mayors task force for a "National Plan of Action" to end homelessness said little or nothing about the potential for state involvement. U.S. CONFERENCE OF MAYORS TASK FORCE ON HUNGER AND HOMELESSNESS, *supra* note 195.

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housing funding and planning movements. States are demonstrating, through their limited but growing direct investment of general funds, that housing is an important state responsibility.²³⁴ States also are demonstrating that they are no longer willing to allow local governments to use the state's police power to exclude housing for low-income families from their communities.²³⁵

These efforts should be applauded and nurtured, rather than dismissed for their limited scope. They form the basis for a new national housing initiative in which federal and state housing funds are distributed through a state-administered allocation system. Funding would be based on state-coordinated local and regional housing plans in which priorities are established for meeting national goals of ending discrimination and providing reasonable housing opportunities to all citizens in the context of specific local needs.

IV. CONCLUSION

The housing prospects for the nation between now and the year 2000 can be viewed in two ways. On the one hand, the withdrawal of the federal government from an active housing policy role, the increase in the number of persons with serious housing needs, and the state of the economy all suggest that housing prospects are not good. On the other hand, the growing commitment of resources by states, the presence of experienced state housing agencies, and the creative potential being discovered by states suggest that they can take effective leadership roles in a renewed effort to meet the housing needs of their citizens.

Despite the belief that inner cities are "America's most obvious problem," housing practitioners express cautious optimism for the future.²³⁶ This is based on an increasing recognition that, while the large public housing developments of the 1950s generally failed because of their concentrated and isolated environment, housing for low-income families that is well designed and well managed can become a resource rather than a threat. In a number of states, impressive efforts are underway to rejuvenate local housing efforts. This type of approach requires a shift in federal housing policy that would gradually phase out the centralized federal housing bureaucracy in favor of state-coordinated local and regional programs that work to establish coordinated strategies for the provision of well designed and well managed family housing.

234. See *supra* notes 109-18 and accompanying text.

235. See *supra* notes 64-86 and accompanying text.

236. See Nicholas Lemann, *The Myth of Community Development*, N.Y. TIMES MAG., Jan. 9, 1994, § 6 at 27 (reporting that few practitioners believe that the new federal Empowerment Zones program is likely to succeed in revitalizing inner cities, but that coordinated crime control, child care, education programs, health services, housing, income support, job training, and social services offer hope for inner city residents).