# TOWARD A POLICY OF HETEROGENEITY: OVERCOMING A LONG HISTORY OF SOCIOECONOMIC SEGREGATION IN HOUSING

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## I. INTRODUCTION

Imagine that you are pro bono counsel to a neighborhood church organization or a community development corporation located in a middle class neighborhood.[1] The neighborhood may be located in a central city, an inner ring suburb, or a small town being transformed into an "edge city."[2] Your organization has several proposals on tonight's meeting agenda, all involving the prospective purchase of a vacant 1950s vintage California ranch-style house on a 10,000 square foot lot[3] that has been on the market for several weeks: (1) renovate and rent the house to a single person with three school-age children who is escaping a life in homeless shelters and transitional housing with the assistance of not-for-profit providers of "supportive housing";[4] (2) add a second story to the house and sell it

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1. Our hypothetical neighborhood has an estimated median family income of $60,000, which is slightly above the Department of Housing and Urban Development's estimated national median family income for Fiscal Year 2006 of $59,600. U.S. DEP'T OF HOUS. & URBAN DEV., ESTIMATED MEDIAN FAMILY INCOMES FOR FY 2006, ATTACHMENT 2, NOTICE PDR-2006-01 (2006), *available at* http://www.huduser.org/datasets/il/il06/MedianNotice_2006.pdf.

2. Joel Garreau coined the phrase in his best-selling book, EDGE CITY: LIFE ON THE NEW FRONTIER (1991).

3. Real estate people have called such houses "starter homes" because of their traditional popularity with young families, although they now also are being called "retirement homes" because of their growing attraction to older singles and couples such as my wife and I, who recently purchased one such house.

4. The Corporation for Supportive Housing ("CSH"), founded in 1991, is a

to a large family (four or more children) that is eligible for or currently lives in public housing;[5] (3) adopt the "tear down"

national organization based in New York City that offers local organizations funds and training to help them provide "permanent affordable housing linked to a range of comprehensive support services." Corporation for Supportive Housing, Why Supportive Housing?, http://www.csh.org/index.cfm?fuseaction=Page.viewPage&pageID=367 (last visited Feb. 11, 2007). CSH focuses on "people with chronic health conditions who also are frequent users of multiple institutional settings." CSH Business Plan 2005-2007, http://documents.csh.org/documents/communications/2005-2007_business_plan_external.pdf (last visited Feb. 18, 2007). A St. Louis organization, Beyond Housing/NHS, has been providing supportive housing to low-income families with children since 1980. The not-for-profit corporation owns over two-hundred single family houses in inner ring suburban neighborhoods. For a discussion of Beyond Housing's philosophy and work, see Peter W. Salsich, Jr., *Beyond Housing: A Case Study of Combining Social Services and Affordable Housing*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 20 (2000). Current programs can be viewed at http://www.beyondhousing.org (last visited Feb. 11, 2007).

5. A consent decree to settle arguably the most significant housing discrimination litigation involving public housing, the *Gautreaux* case, established the first serious effort to eliminate the excessive concentration of low-income and minority households in inner city ghettos by offering Section 8 subsidies (42 U.S.C. § 1437f (2000), 24 C.F.R. § 880 (2006)), to private landlords who would rent to public housing tenants in city and suburban locations that were not racially concentrated. Gautreaux v. Landrieu, 523 F. Supp. 665, 672-83 (N.D. Ill. 1981), *aff'd sub nom.* Gautreaux v. Pierce, 690 F.2d 616 (7th Cir. 1982). A major factor in the settlement was the Supreme Court's acceptance of the concept of "inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation." Hills v. Gautreaux, 425 U.S. 284, 292 (1976). Following the Supreme Court decision, two Chicago-area organizations, Business and Professional People for the Public Interest ("BPI") and the Leadership Council for Metropolitan Open Communities, crafted what became known as the Gautreaux Section 8 Residential Mobility Program. *See* BUS. AND PROF'L PEOPLE FOR THE PUB. INTEREST, WHAT IS GAUTREAUX? 8-11 (1991), *available at* http://www.bpichicag.org/pht/phtcr_pubs.html (commemorating the twenty-fifth anniversary of the commencement of the *Gautreaux* litigation). Alexander Polikoff, the lead counsel for the original plaintiff, the late Dorothy Gautreaux, has written an account of the litigation and its aftermath. ALEXANDER POLIKOFF, WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO (2006). The program officially ended in 1998 when the consent decree's goal of 7100 families placed in new surroundings was reached. *Id.* at 244.

Modifications to the Section 8 program enable local public housing authorities to allocate a portion of their Section 8 funds to assist eligible households to make mortgage payments. 42 U.S.C. § 1437f(y) (2000). In St. Louis, for example, the housing authority has entered into a partnership with Habitat for Humanity-St. Louis and Beyond Housing/NHS to offer homeownership in 2006 to fourteen families in the Jeff-Vander-Lou neighborhood on the city's north side. Habitat will build the houses through its celebrated "sweat equity" program and offer purchasers interest-free loans of

philosophy driving the "McMansion" craze[6] and replace the house with a new triplex that can be rented to three homeless persons or families who previously lived in a "big box" shelter;[7] or (4) demolish the house, subdivide the lot into two smaller lots, and construct two small "Katrina Cottages" (600-800 square feet of living space, including two bedrooms) to be sold to welfare-to-work families graduating from a local home ownership and management course.[8]

These four proposals represent newer ways of thinking about providing housing for low-income households.[9] Instead of relying on

$81,000. Beyond Housing, a twenty-five-year-old not-for-profit corporation that until now has concentrated its efforts on providing rental units to low-income families with children, will offer second mortgages of $30,000 to complete the funding of the cost of construction. In lieu of rental subsidies, the housing authority will make payments to Beyond Housing on behalf of the purchasers to amortize the second mortgage notes. Petra Breyerova, *New Program Opens Doors to Housing for the Needy*, ST. LOUIS POST-DISPATCH, July 21, 2006, at B4.

6. *See, e.g.*, David Pendered, *Council Fails to Ban Big Houses: Both Sides Claim Victory After 11-3 Vote*, ATLANTA J.-CONST., Feb. 9, 2006, at 1C; Walter Dawkins, *Big Houses on Little Lots Irk Folks Next Door; Some Don't Want to Live in Shadow of "McMansion"*, HERALD NEWS (Passaic County, N.J.), Apr. 2, 2006, at B1; Annie Gowen, *Board Votes to Limit Arlington Home Sizes: Restrictions Are Toughest in N. Virginia*, WASH. POST, Nov. 16, 2005, at B8.

7. Dan Buck, CEO of St. Patrick Center, a homeless services organization in St. Louis, used the term "big box shelter" in describing his organization's decision to move away from a shelter approach and develop and operate a permanent supportive housing facility for homeless men with disabilities at a conference, *Creating Healthy Communities: Ending Homelessness* (Feb. 24, 2006), sponsored by the American Bar Association Forum on Affordable Housing and Community Development Law and the Saint Louis University Public Law Review. Ronald M. Katz, Chair's Message: A New Season of Dedication, 15 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 303 (2006); St. Patrick Center, SPC Responds to Mayor's Homeless News Conference (Feb. 27, 2007), http://www.stpatrickcenter.org/NewsDetail.aspx?newsId=491daf3b-3e32-46d0-b992-85ede98bf8f4 (quoting Mr. Buck, "This innovative, 'housing first' approach is completely changing how we deal with chronically homeless people.").

8. What is being called a cottage industry has emerged in the wake of Hurricane Katrina as architects and builders endeavor to respond to the housing emergency caused by that devastating storm. Michael Kunzelman, *Katrina Spawns Cottage Industry*, Associated Press, July 4, 2006, *available at* http://kxnet.com/t/washington/20145.asp; *see also* Rex Perry, *Katrina Cottages*, COTTAGE LIVING (2006), *available at* http://www.cottageliving.com/cottage/print/0,21432,1195049,00.html.

9. The National Low Income Housing Coalition notes that while homeownership is the goal of many, almost thirty-six million households (one-third of the total) in the United States are renters, and households with less than $34,000 in annual income (about forty-two million households), adjusted for differences in wages and housing costs across the country, will have a difficult time affording rent and utilities for a two-bedroom apartment. A

the high rise and/or large tract urban public housing complexes of the 1950s and 1960s,[10] the large privately owned subsidized apartment developments of the 1970s and 1980s,[11] the homeless shelters of the 1990s and 2000s,[12] and the FEMA trailers of 2005-

person working full time at the federal minimum wage ($5.15 per hour in 2006) will make $10,712, less than one-third of the benchmark figure. NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 2006, Introduction, *available at* http://www.nlihc.org/oor/oor2006/introduction.pdf.

10. The 1937 Housing Act ushered in a new era of federal financial assistance for housing development and management with the authorization for local public bodies called housing authorities to issue United States government-backed bonds to finance the construction of rental units to be owned and managed by the housing authorities. The statute is codified at 42 U.S.C. § 1437 (2000). While the program produced approximately 1.4 million units of decent housing for low-income households and remains to this day the only federal program providing direct financial support to house the lowest income Americans, the urban high rise portion of the program, about 86,000 units (only six percent of the total units constructed), remains mired in controversy because of the ghettos they became. The contrast between the urban high rises and the other public housing units is described in NAT'L COMM'N ON SEVERELY DISTRESSED PUB. HOUS., THE FINAL REPORT (1992). *See also* Lynn E. Cunningham, *A Structural Analysis of Housing Subsidy Delivery Systems: Public Housing Authorities' Part in Solving the Housing Crisis*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 95 (2003) (reviewing four housing delivery systems: (1) tax-assisted homeownership; (2) block grants to states with local-entity competition for funds; (3) local nonprofit developers; and (4) public housing authorities, and arguing that public housing authorities have an important role to play); Sean Zielenbach, *Catalyzing Community Development: HOPE VI and Neighborhood Revitalization*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 40 (2003) (discussing the program created by Congress to implement recommendations of the Commission on Severely Distressed Public Housing).

11. The Section 221(d), Section 236, and Section 8 new construction/substantial rehabilitation programs featured interest and/or rental subsidies for private owners and lending institutions. *See generally* 12 U.S.C. § 1715 (2000) (Section 221) (mortgage insurance); 12 U.S.C. § 1715z-1 (Section 236) (interest subsidy); 42 U.S.C. § 1437f(a) (2000) (Section 8) (rental assistance). In 1983, Congress repealed the Section 8 rental assistance authorization for new or substantially rehabilitated units, thereby restricting future program support to existing units. Pub. L. No. 98-181, § 209(a)(1), 97 Stat. 1183 (1983).

12. Government and private organizations have stepped up rhetorical and substantive efforts to end homelessness, at least for the chronically homeless. *See, e.g.*, COALITION FOR HOMELESSNESS INTERVENTION AND PREVENTION, INDIANAPOLIS BLUEPRINT TO END HOMELESSNESS (2002), *available at* http://www.chipindy.org/blueprint.aspx; NAT'L ALLIANCE TO END HOMELESSNESS, THE TEN YEAR PLAN, http://www.endhomelessness.org/section/tools/tenyearplan (last visited Feb. 11, 2007); U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, GOOD . . . TO BETTER . . . TO GREAT: INNOVATIONS IN 10-YEAR PLANS TO END CHRONIC

2006,[13] housing providers and advocates increasingly are emphasizing the importance of mixing assisted and/or supportive housing[14] with market rate housing in stable residential neighborhoods, either in relatively large developments[15] or in scattered site, single family, or duplex placements.[16] The four hypothetical proposals are variations of the scattered site theme.

There is only one catch: in many such neighborhoods throughout the country, current land use regulations may not permit any of the four proposals to be implemented.[17] For over eighty years, the particular form of land use regulation known as Euclidean zoning,[18] which separates single family detached housing

HOMELESSNESS IN YOUR COMMUNITY (2006), *available at* http://www.usich.gov.

13. As a temporary housing measure following the expiration of emergency housing vouchers, the Federal Emergency Management Agency ("FEMA") acquired and installed several thousand trailers through the Gulf Coast region for storm victims. Shaila Dewan, *Evacuees Find Housing Grants Will End Soon: FEMA Tells Thousands Eligibility is Over*, N.Y. TIMES, Apr. 27, 2006, at A1; Greg Thomas, *Where Would You Rather Live?*, TIMES-PICAYUNE (New Orleans), Mar. 18, 2006, at A1.

14. "Assisted" housing refers to privately owned housing whose owner receives financial assistance from a government source; "supportive" housing refers to housing whose occupants receive supportive services as a result of their occupancy.

15. The HOPE VI program emphasizes this approach. *See* Zielenbach, *supra* note 10.

16. The Gautreaux Mobility and Beyond Housing/NIS programs emphasize this approach. POLIKOFF, *supra* note 5*;* Salsich, *supra* note 4.

17. A Brookings Institution survey of the fifty largest metropolitan areas in the country concluded that "in nearly a quarter of the local governments [in those metropolitan areas] the maximum permitted residential density in the zoning ordinance is less than 4 dwellings per acre." The study also found that thirty-two of the fifty metropolitan areas (thirty-one in the midwestern, northeastern, and southern areas, as well as Salt Lake City) had land use policies that were dominated by restrictive density regulations that did not permit more than eight units per acre and for the most part required single family detached houses. As a result, these metropolitan areas, including their "large and medium sized cities as well as [their] unincorporated areas . . . [appear] less hospitable to both high density and affordability than the national average." ROLF PENDALL ET AL., BROOKINGS INST., FROM TRADITIONAL TO REFORMED: A REVIEW OF THE LAND USE REGULATIONS IN THE NATION'S 50 LARGEST METROPOLITAN AREAS 10, 21-22 (2006), *available at* http://media.brookings.edu/mediaarchive/pubs/metro/pubs/20060810_LandUse.pdf. Land use regulations in metropolitan areas in the western part of the country, as well as some parts of the south, appeared to be more hospitable to higher residential densities and more affordable housing developments, although in some of those metropolitan areas growth "containment mechanisms" had a negative effect on housing affordability. *Id.* at 24-27.

18. The term comes from the Supreme Court decision upholding the zoning

from all other forms of permissible land use has been the traditional favorite of local governments, particularly in the suburban areas of the nation's metropolitan areas. Justice Sutherland's derogatory reference to apartments (and by necessary implication, their occupants) as "mere parasite[s]" on residential neighborhoods in the *Euclid* decision[19] has helped sustain an extreme reluctance of local governments, particularly in outlying suburbs,[20] to permit the levels of density generally thought to be necessary to encourage developers to build housing for the lower half of the market,[21] not to mention

technique against constitutional challenge, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

19. *Id.* at 394. Professor Richard Chused argues that the opinions of both District Court Judge David Westenhaver, invalidating zoning as a violation of private contractual rights, and Supreme Court Justice Sutherland, approving zoning as a reasonable exercise of the police power, were "derived from and embedded with the racism of the era in which the case was decided." Richard H. Chused, Euclid*'s Historical Imagery,* 51 CASE W. RES. L. REV. 597, 597 (2001). Westenhaver was allegedly influenced by the Supreme Court's disapproval of racially restrictive local ordinances in *Buchanan v. Warley*, 245 U.S. 60 (1917) and its approval of racially restrictive covenants in *Corrigan v. Buckley*, 271 U.S. 323 (1926). Chused, *supra*, at 605-09. Sutherland was allegedly influenced by the argument that apartments needed to be kept separate from single family homes to prevent nuisances associated with "tenement house districts" of New York vintage from threatening harm to upper-class children. *Id.* at 612-14.

20. The growth of outlying suburbs has fueled a national debate about the significance of what has been called urban sprawl. *See, e.g.*, Marcy Burchfield et al., *Causes of Sprawl: A Portrait from Space*, 121 Q. J. ECON. 587, 587 (2006) (citing a survey conducted by the Pew Center for Civic Journalism in 2000 that found "18 percent of Americans [believed that] urban sprawl and land development were the most important issue facing their local community—the top response, tied with crime and violence").

21. The practice of separating single family detached housing from all other forms of residential uses, as well as from commercial and industrial uses, became known as exclusionary zoning in the 1970s as the effect of such practices on the development of suburban America following World War II became visible. *See, e.g.*, MICHAEL N. DANIELSON, THE POLITICS OF EXCLUSION 5-6 (1976); LEONARD S. RUBINOWITZ, LOW-INCOME HOUSING: SUBURBAN STRATEGIES 31 (1974); Eric J. Branfman et al., *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483, 484-85 (1973); Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65, 66-67 (2001); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 780-81 (1969); Michael H. Schill & Susan M. Wachter, *Housing Market Constraints and Spatial Stratification by Income and Race*, 6 HOUSING POL'Y DEBATE 141, 142-43 (1995); Norman Williams, Jr. & Thomas Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475, 475-76 (1971); *see*

permitting scattered site deviations from the norm of single family-owned housing.[22] As a result, restrictive local land use regulations increasingly are being identified as a major roadblock to affordable housing efforts throughout the country.[23]

The question thus presents itself: is there a role for government, particularly the federal government, to play in enabling policies of the type being considered by our hypothetical not-for-profit client to be implemented in the face of local regulatory hostility? This Article answers "yes," with the recommendation that Congress enact legislation to authorize planning support for state and regional affordable housing initiatives and a federal override of local zoning laws when necessary to enable affordable housing developments receiving federal and state financial assistance to be scattered throughout residential neighborhoods.[24]

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*also* PENDALL ET AL., *supra* note 17, at 12-23.

22. District Judge Westenhaver, who set the stage for the Supreme Court battle in *Euclid* by declaring the village's zoning ordinance unconstitutional, perhaps had a premonition of what was to come when he opined that "[t]he purpose to be accomplished [by zoning] is really to regulate the mode of living of persons who may hereafter inhabit [the zoned land]. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life." Ambler Realty Co. v. Vill. of Euclid, 297 F. 307, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926). *Euclid* has profoundly affected land use patterns in the United States and has been the subject of an overwhelming amount of analysis and commentary. For representative examples, see AM. PLANNING ASS'N, ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP (Charles M. Haar & Jerold S. Kayden eds., 1989); SEYMOUR I. TOLL, ZONED AMERICAN 213-27 (1969); Eric R. Claeys, Euclid *Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731 (2004); Charles M. Haar & Michael Allan Wolf, Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158 (2002); Charles M. Haar & Michael Allan Wolf, *Yes, Thankfully,* Euclid *Lives*, 73 FORDHAM L. REV. 771 (2004); Gerald Korngold, *The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion Story to* Village of Euclid v. Ambler Realty Co., 51 CASE W. RES. L. REV. 617 (2001).

23. In recent years, land costs and resulting increases in housing prices have fueled growing concern that housing affordability is moving from a localized problem for low-income households in inner cities to "a deepening national crisis . . . [that] has climbed the income ladder and moved to the suburbs." Michael Grunwald, *The Housing Crisis Goes Suburban*, WASH. POST, Aug. 27, 2006, at B1; *see also* BARBARA J. LIPMAN, CTR. FOR HOUS. POLICY, A HEAVY LOAD: THE COMBINED HOUSING AND TRANSPORTATION BURDENS OF WORKING FAMILIES (2006) (arguing that savings on housing costs in outer suburbs are eaten up by commuting costs), *available at* http://www.nhc.org/pdf/pub_heavy_load_10_06.pdf.

24. The development of particular affordable housing plans and strategies would remain the province of state and local governments, as recommended by

Such legislation would be in keeping with the congressional tradition of supporting in an ad hoc way certain land use activities deemed important to the national interest, which may be threatened by strong local opposition that, despite its sincerity, may be unfounded,[25] rather than enact comprehensive land use planning and regulatory legislation.[26] Examples of this ad hoc approach include the Coastal Zone Management Act ("CZMA"),[27] the Endangered Species Act,[28] the wetlands protection program in the Clean Water Act,[29] the National Manufactured Housing Construction and Safety Standards Act,[30] the Telecommunications Act of 1996,[31] the group homes for the handicapped provision of the

the American Planning Association. AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 4-69 to 4-116 (Stuart Meck, FAICP ed., 2002) [hereinafter GROWING SMART].

25. This Article is a follow-up to a previous article, Peter W. Salsich, Jr., *Saving Our Cities: What Role Should the Federal Government Play?*, 36 URB. LAW. 475 (2004), in which I suggested that the federal government had a tripartite role to play in a new metropolitan development strategy: (1) encouraging a rethinking of local government boundaries and structures, (2) substantially increasing the public resources available to cities, and (3) redoubling its efforts to enforce fair housing and other civil rights legislation.

I am indebted to Tim Iglesias, Associate Professor, University of San Francisco School of Law, for the specific suggestion that the ad hoc nature of federal regulatory support for potential locally undesirable land use ("LULU") activities be examined in light of congressional failure to enact comprehensive land use planning and regulatory legislation. Professor Iglesias has proposed a state-centered strategy patterned after the Environmental Impact Statement ("EIS") requirement of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321, 4332 (2000), and the Environmental Impact Report ("EIR") requirement of the California Environmental Quality Act ("CEQA"), Cal. Pub. Res. Code §§ 21000, 21002.1 (2000). Under his proposal, local governments would be required by state law to prepare Housing Impact Assessments ("HIA") regarding "local government land use decisions and policy-making." Tim Iglesias, Housing Impact Assessments: Opening New Doors for State Housing Regulation While Localism Persists, 82 OR. L. REV. 433, 477 (2003).

26. The last major effort at enactment of a national land use planning law was the late Senator Henry "Scoop" Jackson's (D-Wash.) Land Use Policy and Planning Assistance Act (S. 268), which was approved by the Senate in 1973 but died in the House. For discussion of the bill, see S. Rep. No. 93-197 (1973). On the other hand, Congress was willing to enact comprehensive environmental protection legislation, the National Environmental Policy Act ("NEPA"), in 1969. 42 U.S.C. §§ 4321-4370f (2000).

27. 16 U.S.C. §§ 1451-1465 (2000).

28. §§ 1531-1544.

29. 33 U.S.C. § 1344 (2000), *amended by* Pub. L. No. 107-303 (2002).

30. 42 U.S.C. § 5415 (2000).

31. 47 U.S.C. § 332 (2000).

Fair Housing Amendments Act of 1988 ("FHAA"),[32] and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU") and its predecessor transportation planning assistance legislation.[33] The Religious Land Use and Institutionalized Persons Act ("RLUIPA")[34] may be another example, although that statute was enacted to accommodate constitutionally protected religious activities.[35]

Part II reviews recent research by economists and others highlighting the effect of exclusionary land use regulation on housing availability and cost. Part III reviews the history of public and private efforts to provide housing for low- and moderate-income households in residential neighborhoods. Part IV examines the parallel effort to provide such housing for persons with disabilities. Part V proposes a legislative response that articulates a policy elevating affordable housing for low- and moderate-income households to a level of national concern similar to national policies favoring efficient transportation, protecting coastal and wetland areas and endangered species, setting safety standards for manufactured housing, encouraging cheap and efficient communications, making reasonable accommodations for persons with disabilities, and protecting religious activities.

## II. THE IMPACT OF LAND USE REGULATION ON HOUSING AVAILABILITY AND COST

From its inception in Los Angeles in 1909,[36] the territorial division of land known as zoning has been the favorite form of local land use regulation in the United States. The basic simplicity of the concept, territorial division of land into districts (zones) and uniform regulation of land use within each district, and the corresponding

32. 42 U.S.C. §§ 3604(f) & 3607(b)(1) (2000).

33. 23 U.S.C. § 134 (1991), successor to the Intermodal Surface Transportation Efficiency Act ("ISTEA") of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991) and the Transportation Equity Act for the 21st Century ("TEA-21"), Pub. L. No. 105-178, 112 Stat. 107 (1998) (providing matching funds for local and regional transportation planning).

34. 42 U.S.C. § 2000cc (2000).

35. U.S. CONST. amend. I.

36. PETER DREIER ET AL., PLACE MATTERS: METROPOLITICS FOR THE TWENTY-FIRST CENTURY 113 (2d ed. rev. 2004) (citing GWENDOLYN WRIGHT, BUILDING THE DREAM: A SOCIAL HISTORY OF HOUSING IN AMERICA 213 (1981)). The zoning ordinances, No. 19-500, approved December 30, 1909, and No. 19-563, approved January 10, 1910, established seven industrial districts and placed the rest of the city, with exceptions, into a "residence district." *Ex parte* Quong Wo, 118 P. 714, 715 (Cal. 1911) (upholding the exclusion of laundries from residence district).

ease of administration, meant that cities could implement zoning without a major impact on their budgets. At the same time, zoning's segregative technique of separating perceived incompatible land uses from one another made it highly controversial.[37]

Gwendolyn Wright, in her book, *Building the Dream: A Social History of Housing in America*, places the rise of zoning in a time of rapid change in the housing patterns of the country.[38] The 1920 census reported that "for the first time in the nation's history, the majority of Americans were classified as urban or suburban."[39] During the 1920s, she notes, "the suburbs grew twice as rapidly as the center cities, reaching a population of 17 million by 1930."[40] Herbert Hoover notes in his memoirs that his efforts to promote zoning through the Commerce Department Building and Housing Division were designed to "protect homes" as part of a broader effort to "stimulate and better guide home building."[41] "When I came to

37. Federal District Judge David C. Westenhaver of the Northern District of Ohio, in ruling that the Village of Euclid's zoning ordinance was unconstitutional as "a taking of plaintiff's property without due process of law" (echoes of the *Lochner* era), expressed his opinion that "[i]n the last analysis, the result to be accomplished [by zoning] is to classify the population and segregate them according to their income or situation in life." Ambler Realty Co. v. Vill. of Euclid, 297 F. 307, 312, 316 (N.D. Ohio. 1924). Richard Chused argues that Judge Westenhaver was not necessarily condemning such segregation, but rather believed he had no choice but to invalidate the zoning ordinance because the Supreme Court just a few years earlier had invalidated a Louisville, Kentucky ordinance prohibiting "colored" people from occupying houses in white neighborhoods. That ordinance was deemed a violation of the parties' freedom to contract respecting property. Buchanan v. Warley, 245 U.S. 60, 82 (1917). Applying what Chused refers to as "a distinctly pre-New Deal legal construct about race and freedom of contract that is strange to present-day sensibilities" because during that same time frame the Supreme Court had approved racially restrictive covenants in *Corrigan v. Buckley,* 271 U.S. 323 (1924), Judge Westenhaver opined:

> It seems to me that no candid mind can deny that more and stronger reasons exist, having a real and substantial relation to the public peace, supporting [the *Buchanan*] ordinance than can be urged under any aspect of the police power to support the [*Euclid*] ordinance as applied to plaintiff's property. . . . The blighting of property values and the congesting of the population, whenever the colored or certain foreign races invade a residential section, are so well known as to be within the judicial cognizance.

Chused, *supra* note 19, at 605-06 (first alteration in original) (quoting *Euclid*, 297 F. at 312-13).

38. Wright, *supra* note 36.

39. Id. at 195.

40. *Id.*

41. HERBERT C. HOOVER, THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY 1920-1933, at 92-93 (1952).

the Department I was convinced that a great contribution to reconstruction and a large expansion in employment could be achieved by supplying the greatest social need of the country—more and better housing."[42]

Justice Sutherland's dictum in *Euclid* that "very often the apartment house is a mere parasite" on residential neighborhoods,[43] coupled with the Supreme Court's virtual absence from the field of residential land use regulation for the next half century,[44] left lower courts with little guidance as they grappled with a series of social and economic forces that remade the face of residential America: (1) the migration of African American families from the rural South to the industrial North in the wake of the Great Depression;[45] (2) the return of millions of G.I.s and their families from wartime to peacetime status following World War II; (3) the flight from the city core, first to the inner ring suburbs[46] and later to the far reaches of

42. *Id.* at 92.

43. Ambler Realty Co. v. Vill. of Euclid, 272 U.S. 365, 394 (1926).

44. Following its decision upholding an injunction against the application of a zoning ordinance to a particular piece of property in *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928), the Supreme Court did not make another important residential land use decision until 1974, when it approved a restrictive definition of "family" in the Village of Belle Terre, New York, zoning ordinance. Vill. of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974).

45. *See generally* NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA (1991) (describing the impact of the Great Black Migration on subsequent housing patterns and trends, as evolved to the current scheme); CAROLE MARKS, FAREWELL–WE'RE GOOD AND GONE: THE GREAT BLACK MIGRATION (1989) (discussing the historical context of the Great Black Migration); J. Trent Alexander, *The Great Migration in Comparative Perspective: Interpreting the Urban Origins of Southern Black Migrants to Depression-Era Pittsburgh*, 22 SOC. SCI. HIST. 349 (1998) (comparing the Great Black Migration in the 1930s to similar European migrations).

46. St. Louis, Missouri, for example, went from a population of 856,796 in 1950 to a population of 348,189 in 2000 while neighboring St. Louis County grew from less than 500,000 to more than 1,000,000 residents during the same period. U.S. BUREAU OF THE CENSUS, 1950 U.S. CENSUS OF POPULATION, CENSUS TRACT STATISTICS (St. Louis, Mo.) 7 tbl.1, 14-20 tbl.1; UNITED STATES CENSUS 2000, MISSOURI: 2000 at 26 tbl.1 (St. Louis County) & 32 tbl.1 (St. Louis City); ST. LOUIS COUNTY, 2002 ST. LOUIS COUNTY FACT BOOK 1 (2002), http://www.stlouisco.com/plan/factbook2002/population.pdf. For an analysis of white population movement in 112 metropolitan areas in which the central city's 1960 population was 100,000 or more, see Harvey Marshall, *White Movement to the Suburbs: A Comparison of Explanations*, 44 AM. SOC. REV. 975 (1979). For an argument that the movement was not unique to post-war America, but that it had begun pre-war and was international in scope, see Peter Mieszkowski & Edwin S. Mills, *The Causes of Metropolitan*

the metropolitan area,[47] by middle and upper-middle class, predominantly white, families;[48] (4) the proliferation of new municipalities made possible by permissive state incorporation statutes; and (5) the corresponding delegation of zoning power to those municipalities that had been sanctioned by the *Euclid* decision. The interaction of these forces helped create a residential pattern in urban and suburban America that was highly segregated by both race and class.[49]

The twin migrations to and from the cities, coupled with the transition from wartime to peacetime, triggered major changes in American housing patterns: the construction of massive high-rise public housing projects located in center city ghettos and the development of single family detached houses in large tract suburban subdivisions. The prevalence of racial segregation, aided and abetted by government policies, led to urban high-rise public housing becoming largely populated by minority families and single family subdivisions in the suburbs becoming largely white.

As metropolitan areas expanded and demand for new housing soared, many communities responded by enacting comprehensive zoning ordinances following the general design of the *Euclid* ordinance.[50] The *Euclid* ordinance, enacted in 1922, influenced the

*Suburbanization*, 7 J. ECON. PERSP. 135 (1993).

47. The story is told in two influential books: GARREAU, *supra* note 2 (describing the rise of the new urban centers on the outskirts of cities, which are dominated by single-family detached dwellings), and KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985) (describing the divergence of America from the rest of the world, in terms of extensive suburbanization and individual homeownership). *See also* Edward H. Ziegler, *Urban Sprawl, Growth Management and Sustainable Development in the United States: Thoughts on the Sentimental Quest for a New Middle Landscape*, 11 VA. J. SOC. POL'Y & L. 26, 27 (2003) (discussing the evolution of urban sprawl toward the phenomenon of "hypersprawl").

48. Outmigration continued in the early years of the twenty-first century. *See, e.g.*, MARC J. PERRY, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: DOMESTIC NET MIGRATION IN THE UNITED STATES: 2000 TO 2004 (2006), *available at* http://www.census.gov/prod/2006pubs/p25-1135.pdf.

49. Perhaps the most dramatic articulation of this phenomenon was the statement by the Kerner Commission in 1968 that "[o]ur nation is moving toward two societies, one black, one white," which were "separate and unequal." NAT'L ADVISORY COMM'N. ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968) [hereinafter KERNER REPORT]; *see also* H.V. Savitch, *Black Cities/White Suburbs: Domestic Colonialism as an Interpretive Idea,* 439 ANNALS AM. ACAD. POL. & SOC. SCI. (URB. BLACK POL.) 118 (1978) (explaining American race relations through the prism of demographic changes between cities and suburbs).

50. Growing Smart, *supra* note 24, at xxviii; Chused, *supra* note 19, at 603

development of the Standard Zoning Enabling Act that was published in 1924 by an advisory committee appointed by then-Secretary of Commerce Herbert Hoover.[51] The essence of zoning is the territorial division of the land within a municipality into zones, or districts, and the segregation of uses by district through the imposition of uniform land use regulations within each district.[52] While the original concept called for segregation of residential, commercial, and industrial uses,[53] the practice developed of separating single family detached housing from all other forms of residential housing as well as from commercial and industrial uses.[54] Professor Eric Claeys argues that Euclidean zoning took the decisionmaking power over undeveloped land away from landowners and lodged it in the hands of "experts" working for municipal governments.[55]

Comprehensive municipal zoning passed a crucial constitutional test in *Euclid*, and in so doing received a major boost. Justice Sutherland and the rest of the Court apparently were influenced strongly by an amicus brief submitted by Alfred Bettman on behalf of the National Conference on City Planning and other national and state planning organizations.[56] Professor Richard Chused notes that

("Euclid followed in the footsteps of New York City, which adopted its first zoning ordinance in 1916 . . . .").

51. GROWING SMART, *supra* note 24, at xxviii. The advisory committee was created by Secretary Hoover in 1921. In his memoirs, Hoover described the effort as follows: "We inaugurated nation-wide zoning to protect home owners from business and factory encroachment into residential areas. We called a national conference of experts who drafted sample municipal codes for this purpose. When we started, there were only 48 municipalities with zoning laws; by 1928 there were 640." HOOVER, *supra* note 41, at 94. Professor Chused points out that Alfred Bettman, who was from Cincinnati, Ohio, was the principal drafter of the Act for Hoover's advisory committee. Chused, *supra* note 19, at 604. Bettman authored a law review article in 1924 that analogized zoning to control of nuisances, but argued that zoning was necessary because of "the utter inadequacy of the law of nuisances to cope with the problems of municipal growth." Alfred Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834, 836-38, 841 (1924). He also later authored a famous amicus brief in the *Euclid* case. *See, e.g.*, Commentary, Village of Euclid v. Ambler: *The Bettman Amicus Brief*, 58 PLAN. & ENVTL. L. 3 (2006).

52. Bettman, *supra* note 51, at 834.

53. *Id.*

54. William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 URB. STUD. 317, 317-31 (2004).

55. Claeys, *supra* note 22, at 742-57.

56. Brief on Behalf of the National Conference on City Planning et al., Amici Curiae, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (No. 665), *reprinted in* 24 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT

Bettman, in arguing in favor of comprehensive zoning, drew heavily on nuisance law analogies, particularly in arguing that zoning can bring needed order to cities because "unregulated city growth tends to subject the home districts to offensive environment."[57] Chused argues that Bettman used "telling imagery of middle and upper class men protecting their children from moral risk to justify single family residential zones,"[58] and that Justice Sutherland's characterization that "the apartment house is a mere parasite" was in a paragraph containing "many haunting similarities to Bettman's prose."[59] This attitude that single family homes needed to be protected, not only from the disruptive effects of commercial and industrial activity, but also from perceived negative impacts of apartments and their occupants, was reflected in the recommendations of Secretary Hoover's advisory committee.[60]

The dramatic growth and expansion of the suburbs in the years after World War II was characterized by a predominance of single family residential subdivisions. This growth was both encouraged and required by the popularity of *Euclid*-style zoning ordinances that established single family residential use as the use most deserving of protection from other land uses that might threaten the character of the new homogeneous neighborhoods being created.[61] While zoning was but one of a number of major forces shaping the growth of metropolitan areas during the middle years of the twentieth century—the automobile, the interstate highway system, the expansion of the defense industry, the Federal Housing

OF THE UNITED STATES: CONSTITUTIONAL LAW 757 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter Bettman Brief].

57. Chused, *supra* note 19, at 612 (quoting Bettman Brief, *id.* at 786).

58. *Id.* For example:

> [T]he man who seeks to place the home for his children in an orderly neighborhood, with some open space and light and fresh air and quiet, is not motivated so much by considerations of taste or beauty *as by the assumption that his children are likely to grow mentally, physically and morally more healthful in such a neighborhood than in a disorderly, noisy, slovenly, blighted and slum-like district*.

Bettman Brief, *supra* note 56, at 791 (emphasis added).

59. Chused, *supra* note 19, at 613-14 (quoting *Euclid*, 272 U.S. at 394).

60. *See, e.g.*, ADVISORY COMM. ON ZONING, A ZONING PRIMER 2 (1922) ("Suppose you have just bought some land in a neighborhood of homes and built a cozy little house. . . . If your town is zoned, no one can put up a large apartment house on those lots, overshadowing your home, stealing your sunshine and spoiling the investment of 20 years' saving.").

61. The story of suburbanization is perhaps best told by Kenneth Jackson in CRABGRASS FRONTIER, *supra* note 47. He notes that within ten years of the *Euclid* decision eighty-five percent of all American cities had adopted zoning ordinances. *Id.* at 242.

Administration ("FHA") mortgage insurance program, and the prevalence of racially restrictive covenants and appraisal standards being others[62]—zoning played, and continues to play, a special role because of the way in which it shaped attitudes about community life and property values, both of which were, and are, presumed to be threatened by diversity.[63]

The exclusionary effect of this form of land use regulation was brought to national public attention with the *Mount Laurel* cases in New Jersey, in which the New Jersey Supreme Court found a state constitutional violation stemming from the exclusion of households of low and moderate income and ordered municipalities to adjust their land use regulations so that they could accommodate their "fair share" of the regional need for affordable housing.[64] The *Mount Laurel* litigation and similar efforts in other states became the focal point for advocates of affordable housing for low- and moderate-income households because the Supreme Court had ruled a few years earlier that there was no federal constitutional right to housing.[65]

Economists examining the long-running trend toward larger houses and higher housing costs find a significant link with local land use regulations. Such regulations can affect the supply of housing and thus the cost, particularly during periods when demand is strong.[66]

62. Robert Fishman lists the 1956 Interstate Highway Act and the dominance of the automobile as the "top . . . influence[] on the American metropolis of the past 50 years." Robert Fishman, *The American Metropolis at Century's End: Past and Future Influences,* 11 HOUSING POL'Y DEBATE 199, 200 (2000). The Federal Housing Administration mortgage insurance program and its accompanying influence on local subdivision regulation came in second. *Id*. Edward Ziegler agrees with the emphasis on the interstate highway system and adds the tilt of the federal tax system toward home ownership. Ziegler, *supra* note 47, at 35-36.

63. Gerald Frug characterizes this aspect of zoning as "protecting people from their fear of otherness." GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 145 (1999).

64. Hills Dev. Co. v. Twp. of Bernards, 510 A.2d 621, 631-32 (N.J. 1986) (*Mount Laurel III)*; S. Burlington County NAACP v. Twp. of Mount Laurel, 456 A.2d 390, 415 (N.J. 1983) (*Mount Laurel II)*; S. Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 724-25 (N.J. 1975) (*Mount Laurel I)*.

65. Lindsey v. Normet, 405 U.S. 56, 64-66, 78-79 (1972) (holding that most sections of an Oregon summary eviction statute do not violate Equal Protection or Due Process clauses); James v. Valtierra, 402 U.S. 137, 142-43 (1971) (holding California mandatory referendum approval for public housing location does not violate Equal Protection clause).

66. *See generally* Bruce W. Hamilton, *Zoning and the Exercise of Monopoly Power*, 5 J. URB. ECON. 116 (1978).

Professor William Fischel contends that American zoning causes excessive sprawl and income segregation. He argues that "[a]lthough . . . neighborhood income segregation [is] as likely to occur under almost any mechanism that operates without a strong dose of coercion, it must be emphasized that income segregation is greatly accentuated by modem [sic] zoning."[67] He argues that zoning does not follow the market and that local zoning has a systematic bias toward low-density residential uses in part because of a desire to keep new housing for low-income households out of the community.[68]

A team of economists, led by Professor Edward Glaeser of Harvard, examined in 2004 the supply-side factors that influence housing costs: land, construction costs, and government regulations affecting the right to build.[69] The authors traced the cost of housing during the half century between 1950 and 2000, noting that "the average price across the 316 metropolitan areas of the continental United States has increased 1.7 percent annually from $59,575 in 1950 (in 2000 dollars) to $138,601 in 2000."[70] During the first twenty years, 1950-1970, "structure appears to have represented almost all of the costs of housing."[71] During this time, new construction rates were high, but by the latter years of the century, new construction rates had fallen sharply in the 102 metropolitan areas that they studied while prices continued to climb.[72] They also found that the price of land was not a major source of the increase in housing cost, leading them to conclude that the third factor, the right to build, "is worth a great deal."[73] They concluded that

> the evidence points toward a man-made scarcity of housing in the sense that the housing supply has been constrained by government regulation as opposed to fundamental geographic limitations. The growing dispersion of housing prices relative to construction costs suggests that these regulations have

67. William Fischel, *Does the American Way of Zoning Cause the Suburbs of Metropolitan Areas to Be Too Spread Out?*, *in* GOVERNANCE AND OPPORTUNITY IN METROPOLITAN AMERICA 151, 156 (Alan Altshuler et al. eds., 1999).

68. *Id.* at 169.

69. Edward L. Glaeser et al., *Why Have Housing Prices Gone Up?* (Harvard Inst. of Econ. Research, Discussion Paper No. 2061, 2005), *available at* http://post.economics.harvard.edu/hier/2005papers/HIER2061.pdf.

70. *Id.* at 2.

71. *Id*. at 4.

72. *Id.* at 5-7.

73. *Id.* at 8.

spread into a larger number of local markets over time.[74]

The authors discussed several "possible reasons why it has become more difficult to build new homes since 1970."[75] Reasons noted include greater willingness of courts to accept "anti-development sentiment," increases in the "organization and political impact of local residents," a reduction in the ability of developers "to use cash to influence local decision-makers," an increase in the ability and willingness to pay for "high amenity . . . [and] low density neighborhoods," and a change in housing markets occasioned by homeowners' beliefs "that new construction will significantly reduce housing prices."[76] They concluded, though, that "little evidence on the relevance" of these theories exists.[77]

Glaeser and company call for more research and more debate about the reasons for the changes, concluding that "[c]hanges in housing supply regulations may be the most important transformation that has happened in the American housing market since the development of the automobile."[78] The role the federal government may have had in this transformation is examined in the next Part.

## III. HISTORY OF FEDERAL HOUSING POLICIES[79]

The United States has a strong tradition of encouraging homeownership and allocating to the private sector most decisions about the development, financing, management, and ownership of housing. For example, taxes foregone as a result of the mortgage interest tax deduction on owner-occupied homes in fiscal year 2005 exceeded $62 billion, almost twice the 2005 budget for the U.S. Department of Housing and Urban Development ("HUD").[80] More than seventy-five million households (68.5% of the total number of

74. *Id.* at 8-9.
75. *Id.* at 14-19.
76. *Id.*
77. *Id.* at 19.
78. *Id.* at 20.
79. This Part is drawn from Peter W. Salsich, Jr., *Housing: A Brief History of Federal Public and Private Housing Law in the United States*, *in* ENCYCLOPEDIA OF LEGAL HISTORY (Oxford University Press forthcoming) (permission to use on file with author).
80. HUD News Release No. 04-010, HUD Announces $31.3 Billion Budget for FY 2005 (Feb. 2, 2004), *available at* http://www.hud.gov/news/release.cfm?content=pr04-010.cfm; OFFICE OF MGMT & BUDGET, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2007, at 292 tbl.19-2 (2006), *available at* http://www.gpoaccess.gov/usbudget/fy07/browse.html.

households) owned their own homes that year.[81] More than thirty-three million households (about 26.56% of the total number of households) rented from private landlords.[82] Less than five percent of the total number of households received assistance from federal programs administered by HUD, either through occupancy of public housing (1.2 million) or receipt of rental assistance (3.4 million).[83]

As the country grew and urbanized during the twentieth century, government at all three levels took an increasing interest in the housing industry. Prior to the Great Depression, little federal support existed for housing except for the mortgage interest tax deduction for owner-occupied homes.[84] Local laws regulating the construction and operation of apartment buildings originated as reactions to tenement houses and slums in New York City and other urban areas in the early years of the twentieth century.[85] State statutes authorizing local governments to enact laws regulating the location and size of specific types of buildings, including housing, appeared about the same time and were approved by the U.S. Supreme Court in the landmark *Village of Euclid v. Ambler Reality Co.* decision in 1926.[86]

The Great Depression dramatically changed public attitudes about housing. Prior to the Depression, most housing finance was accomplished through small, locally owned savings associations, which issued relatively short term (six to eleven year) mortgage loans requiring large down payments (up to sixty percent) and offering little or no amortization of principal, thus imposing large "balloon" payments at the end of the term.[87] Thousands of families lost their homes as a byproduct of job loss during the Depression.

81. U.S. CENSUS BUREAU, CENSUS BUREAU REPORTS ON RESIDENTIAL VACANCIES AND HOMEOWNERSHIP 6 tbl.5 (2006), *available at* http://www.census.gov/hhes/www/housing/hvs/qtr106/q106ind.html.

82. U.S. CENSUS BUREAU, HOUSING VACANCIES AND HOMEOWNERSHIP (CPS/HVS) tbl.8 (2006), *available at* http://www.census.gov/hhes/www/housing/hvs/historic/histtab8.html.

83. U.S. DEP'T OF HOUS. & URBAN DEV., PERFORMANCE AND ACCOUNTABILITY REPORT: FY 2005, 322 app.2 (2005), *available at* http://www.hud.gov/offices/cfo/reports/2005parappendices.pdf.

84. *See* I.R.C. § 163 (2000).

85. TIMOTHY COLLINS, AN INTRODUCTION TO THE NYC RENT GUIDELINES BOARD AND THE RENT STABILIZATION SYSTEM 19-21 (2006), *available at* http://housingnyc.com/html.about/intro%20PDF/full%20PDF/intro_2006/full.pdf.

86. 272 U.S. 365, 388 (1926).

87. U.S. DEP'T OF HOUS. & URBAN DEV., EVOLUTION OF THE U.S. HOUSING FINANCE SYSTEM: A HISTORICAL SURVEY AND LESSONS FOR EMERGING MORTGAGE MARKETS 3, 4 tbl.1 (2006), *available at* http://www.huduser.org/publications/pdf/US_evolution.pdf.

Thousands of other families could not find decent housing because the real estate industry had been virtually shut down by the Depression.

### *A. Federal Assistance for Housing*

In an effort to restart the economy, President Roosevelt recommended, and Congress enacted, a wide range of laws authorizing public works programs and public subsidies for businesses, including a number of statutes designed to provide both direct and indirect financial assistance for the construction, operation, and ownership of single family and multi-family housing.

#### *1. Mortgage Insurance/Secondary Mortgage Market*

As the President's Committee on Urban Housing (also known as the Kaiser Committee) observed in its 1968 report, *A Decent Home*,[88] several Depression-era federal statutes have played major roles in shaping the development of housing finance.[89] The Federal Home Loan Bank Act of 1932[90] established the Federal Home Loan Bank Board to regulate savings and loan institutions, the traditional source of home loans for many households.[91] The National Housing Act of 1934[92] established the FHA and authorized it to insure mortgage loans given by participating lenders to enable families to purchase modest homes at affordable prices.[93] The mortgage insurance program was funded by premiums charged to buyers for the insurance against default protection provided to their lenders.[94] The National Housing Act Amendments of 1938[95] authorized the

88. THE PRESIDENT'S COMM. ON URBAN HOUS., THE REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING: A DECENT HOME 54-56 (1968) [hereinafter A DECENT HOME].

89. Donna S. Harkness, *Predatory Lending Prevention Project: Prescribing a Cure for the Home Equity Loss Ailing the Elderly*, 10 B.U. PUB. INT. L.J. 1, 4-5 (2000).

90. Federal Home Loan Bank Act of 1932, Pub. L. No. 304, 47 Stat. 725 (codified as amended at 12 U.S.C. §§ 1421-1449 (2000)).

91. Deirdre M. Roarty, *Resolving Pre-Receivership Claims Against Failed Savings and Loans: An Unnecessarily Exhausting Experience*, 63 FORDHAM L. REV. 2315, 2320 (1995).

92. National Housing Act of 1934, Pub. L. No. 479, 48 Stat. 1246 (codified as amended at 12 U.S.C. §§ 1701-1750 (2000)).

93. Fred Wright, Commentary, *The Effect of New Deal Real Estate Residential Finance and Foreclosure Policies Made in Response to the Real Estate Conditions of the Great Depression*, 57 ALA. L. REV. 231, 251 (2005).

94. 12 U.S.C. § 1709(c) (2000).

95. National Housing Act Amendments of 1938, Pub. L. No. 424, 52 Stat. 8, 23, 24 (codified as amended at 12 U.S.C. § 1716 (2000)).

Federal National Mortgage Association ("Fannie Mae"), chartered by Congress as a quasi-government agency, to purchase qualified residential mortgage loans from originating banks and savings and loan associations.[96]

These three statutes, together with laws establishing the loan guarantee program administered by the Veterans Administration (Servicemen's Readjustment Act, 1944),[97] the rural loan and guarantee programs of the Farmers Home Administration (Bankhead-Jones Farm Tenant Act, 1937),[98] along with laws creating additional secondary market agencies, the Government National Mortgage Agency ("Ginnie Mae") in 1968 (Housing and Urban Development Act, 1968)[99] and the Federal Home Loan Mortgage Corporation ("Freddie Mac") in 1970 (Federal Home Loan Mortgage Corporation Act, 1970),[100] established the core infrastructure to enable financial institutions to provide the necessary support for the housing boom in the second half of the twentieth century. The key tradeoff, which changed the face of residential mortgage finance, was the federal requirement that participating lenders offer fully amortizing loans with level monthly payments, fixed interest rates, and low down payments.[101] Lenders were willing to comply with these conditions because of the confidence generated by the mortgage insurance and guarantee programs and the creation of a secondary market to purchase the loans.[102]

But while the government's mortgage loan insurance and guarantee programs made home loans affordable for millions of Americans, decisions by government agencies administering the programs made it extremely difficult for nonwhites to take advantage of these programs, particularly in the suburbs developed after World War II.[103] For example, the FHA, in its administration

96. Wright, *supra* note 93, at 259.

97. Servicemen's Readjustment Act of 1944, Title III, Pub. L. No. 346, 58 Stat. 284, 291 (codified as amended at 38 U.S.C. §§ 3701-3708 (2000)).

98. The Bankhead-Jones Farm Tenant Act of 1937, Pub. L. No. 210, 50 Stat. 522 (codified as amended at 7 U.S.C. §§ 1922-2009ee (2000)).

99. Housing and Urban Development Act of 1968, Title VIII, Pub. L. No. 90-448, 82 Stat. 476, 536 (codified as amended at 12 U.S.C. §§ 1716b-1717 (2000)).

100. Federal Home Loan Mortgage Corporation Act of 1970, Title III, Pub. L. No. 91-351, 84 Stat. 451 (codified as amended at 12 U.S.C. §§ 1421-1449 (2000)).

101. A DECENT HOME, *supra* note 88, at 55.

102. *Id.* at 55-56.

103. Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186 (2005).

of the mortgage insurance program, used a neighborhood rating system devised by the short-lived Home Owners' Loan Corporation ("HOLC") to establish criteria for insuring loans based on the notion that neighborhood stability required "that properties . . . continue to be occupied by the same social and racial classes."[104] This, coupled with the FHA's sanction of racially restrictive covenants, effectively denied nonwhites the opportunity to purchase homes in the newly developing suburbs that featured single family protective Euclidean zoning.[105] The combination of Commerce Department-marketed single family zoning and FHA-influenced home mortgage practices tilted single family homeownership strongly toward whites and away from nonwhites, something that would not necessarily have happened without these governmental actions.[106]

*2. Public Housing*

A fourth Depression-era statute, the United States Housing Act of 1937,[107] established the public housing program. Preceded by a temporary federal housing program during World War I and a short-lived Public Works Administration program during the mid-1930s, as well as a few state-run housing programs, most notably in Massachusetts and New York, the 1937 law was designed to provide housing for "a huge, new, submerged middle class" created by the Depression.[108] As with most major pieces of legislation, the public housing statute was a political compromise. The National Association of Real Estate Boards, which favored the home

104. *Id.* at 207-08 (citing JACKSON, *supra* note 47, at 208 (1985)).

105. *See supra* notes 18-19 and accompanying text.

106. Gordon makes the points that the HOLC did not use its rating index as a major factor when it refinanced previously defaulted home loans in the early years of the Great Depression and that housing segregation was not a serious problem for blacks in the early years of the twentieth century. Gordon, *supra* note 103, at 207-08. The term "redlining," which became so controversial in the 1960s and 1970s, *see, e.g.*, Jean Pogge, *Reinvestment in Chicago Neighborhoods: A Twenty-Year Struggle*, *in* FROM REDLINING TO REINVESTMENT: COMMUNITY RESPONSES TO URBAN DISINVESTMENT 133 (Gregory D. Squires ed., 1992), was based on the fact that HOLC's color-coded neighborhood rating maps used the color, red, to identify the neighborhoods which had been given the lowest quality rating of "D," including predominantly black neighborhoods. Gordon, *supra* note 103, at 207. *See also* Amy E. Hillier, *Redlining and the Home Owners' Loan Corporation*, 29 J. URB. HIST. 394, 395-96 (2003) (discussing various interpretations of Kenneth Jackson's seminal book *Crabgrass Frontier: The Suburbanization of the United States*).

107. United States Housing Act of 1937, 42 U.S.C. § 1437 (2000).

108. LAWRENCE M. FRIEDMAN, GOVERNMENT AND SLUM HOUSING, *in* RAND MCNALLY POLITICAL SCIENCE SERIES 100-01 (Morton Grodzins ed., 1968).

ownership assistance of the new FHA mortgage insurance program and was concerned that rental housing owned and operated by the government would compete unfairly with the sale of single family homes, advocated a housing voucher program that was a prototype for the current voucher program.[109] Organized labor favored the job-creation potential of new public housing construction. Liberals believed the government should respond to the housing plight of the poor, and conservatives sought a decentralized program that would be available to "innocent victims of economic reverses."[110]

Though it did not begin as housing for very low-income households, public housing became, and still remains, the only federal program providing direct financial support for the construction and operation of housing that serves low-income households. The 1937 statute authorized the federal government, originally the United States Housing Authority, now the Department of Housing and Urban Development, to enter into Annual Contributions Contracts ("ACCs") with local public housing authorities ("LPHAs") that committed the federal government to pay annual principal and interest costs of long-term (up to forty years) tax-exempt municipal bonds that the PHAs issued to fund the costs of constructing new rental housing units.[111] ACCs were backed by the full faith and credit of the United States, and the interest income from the bonds was tax exempt, two features that made the bonds very attractive to investors.[112]

The pledge to pay annual principal and interest costs, rather than making upfront capital grants, kept the initial government costs relatively low but created greater long-term costs. In addition, while the government's commitment was substantial, limiting it to annual principal and interest charges for construction funds meant that annual expenses to operate the units had to come from rental income, thus only tenants with enough income to pay the required rents could afford public housing.[113] But because of concerns expressed by representatives of the private home building industry, the program was designed only "for those who could not afford what private enterprise was willing and able to build."[114] Inflationary pressures, together with a radical change in the makeup of the public housing tenant population in the mid-1960s, led to a series of

109. Charles J. Orlebeke, *The Evolution of Low-Income Housing Policy*, *1949 to 1999,* 11 HOUSING POL'Y DEBATE 489, 502 (2000).

110. FRIEDMAN, *supra* note 108, at 109.

111. United States Housing Act of 1937, 42 U.S.C. § 1437c (2000).

112. *Id.* § 1437c(a)(1), (c)(3).

113. FRIEDMAN, *supra* note 108, at 108-09.

114. *Id.* at 105.

rent strikes in St. Louis and elsewhere protesting high rent charges. In response, amendments to the public housing statute in 1969, 1970, and 1974 placed restrictions on the amount of rent that could be charged, authorized annual contributions contracts to cover some of the operating costs of public housing, and permitted tenants to be elected or appointed to governing boards of LPHAs.[115]

Approximately 1.4 million public housing units were constructed, primarily between 1950 and 1965.[116] While the program originally was approved by Congress in 1937, it was put on hold during World War II and was not really revived until enactment of the Housing Act of 1949, following a long and often bitter debate about the merits of the program.[117] The Act articulated a goal of construction of 810,000 new public housing units in six years, one that required twenty years to meet, in part because of continuing controversies about the program.[118] That same Act committed the United States to an ambitious goal of "the realization as soon as feasible of the goal of a decent home and suitable living environment for every American family," a goal that was repeated in housing legislation enacted in 1968, 1974, 1987, and 1990,[119] but has yet to be met.

One of the sad legacies of the public housing program is its history of intentional discrimination in building site selection and tenant assignment, which was brought to national attention through the celebrated *Gautreaux* case in Chicago.[120] More than ten years of class action litigation, highlighted by court approval of an inter-district remedy featuring metropolitan area relief outside the boundaries of Chicago,[121] led to a consent decree approving the allocation of several thousand Section 8 certificates and vouchers,

115. United States Housing Act, 42 U.S.C. §§ 1437a, 1437g (2000).

116. THE NAT'L COMM'N. ON SEVERELY DISTRESSED PUB. HOUS., THE FINAL REPORT 5 (1992). As noted *infra* in the text accompanying notes 117-19, the 1949 Act was a major stimulus to public housing construction. With the enactment of programs in the 1960s and 1970s encouraging housing production by private entities, new construction of public housing units was curtailed. *See infra* notes 126-37 and accompanying text.

117. Alexander von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1949*, 11 HOUSING POL'Y DEBATE 299, 299-303 (2000).

118. *Id.* at 310.

119. Sylvia C. Martinez, *The Housing Act of 1949: Its Place in the Realization of the American Dream of Home Ownership*, 11 HOUSING POL'Y DEBATE 467, 467 & n.1 (2000).

120. Gautreaux v. Chi. Hous. Auth., 296 F. Supp. 907 (N.D. Ill. 1969).

121. Gautreaux v. Chi. Hous. Auth., 503 F.2d 930, 931-32, 939 (7th Cir. 1974), *aff'd sub nom.* Hills v. Gautreaux, 425 U.S. 284 (1976).

discussed *infra*, to enable members of the *Gautreaux* class to rent existing units from private landlords inside and outside Chicago.[122] After almost thirty years of court involvement, a settlement was achieved in 1998 with attainment of the consent decree goal of 7100 families placed in private housing.[123]

While most public housing units continue to provide decent housing for low-income households, serious controversies over the location and condition of less than 100,000 units built in high-rise complexes within isolated urban ghettos[124] led Congress and the country to shift focus to the private sector in the 1960s and later, ultimately resulting in the HOPE VI program to transform urban high-rise public housing into low-rise, mixed-income neighborhoods.[125]

*3. Mortgage Insurance for Moderate-Income Persons*

During the 1950s and 1960s, the gap between the income levels required for admission to public housing and participation in the unsubsidized mortgage market, even as modified by the FHA insurance program, contained a sufficiently large number of households to attract congressional attention.[126] The result was a series of statutes expanding the mortgage insurance program and adding to it an interest subsidy to reduce the interest costs for eligible borrowers, first to three percent and then in 1968 to one percent.[127] These programs utilized the indirect subsidy approach of

122. Gautreaux v. Landrieu, 523 F. Supp. 665 (N.D. Ill. 1981), *aff'd sub nom.* Gautreaux v. Pierce, 690 F.2d 616 (7th Cir. 1982).

123. The story is told by the lead *Gautreaux* attorney, Alexander Polikoff, in POLIKOFF, *supra* note 5.

124. *See, e.g.*, THE NAT'L COMM'N ON SEVERELY DISTRESSED PUB. HOUS., *supra* note 116, at 2-4.

125. Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, § 539, 112 Stat. 2594 (codified at 42 U.S.C. § 1437z-7 (2000)).

126. U.S. DEPT. OF HOUS. & URB. DEV., HOUSING IN THE SEVENTIES: A REPORT OF THE NATIONAL HOUSING POLICY REVIEW 11-21 (1974).

127. Section 221 of the Housing Act of 1954 extended eligibility for FHA mortgage insurance, *see* Wright, *supra* note 93, to loans enabling land owners to provide rental housing for moderate income and displaced families. Pub. L. 560, § 221, tit. I, § 123, 68 Stat. 599 (1954) (codified at 12 U.S.C. § 1715*l* (2000)); Pub. L. 89-117, § 102(b), 79 Stat. 451 (1967) (codified at 12 U.S.C. § 1715*l*(d)(5)(2000)) added authority to insure loans with the below market interest rate ("BMIR") of three percent; Pub. L. 90-448, tit. I, § 235, 82 Stat. 476, 477 (1968) (codified at 12 U.S.C. § 1715z (2000)) added authority to enable the Secretary of HUD to make interest reduction payments to create an effective interest rate of one percent on qualifying loans for home purchase by lower income families; *id.* § 236 (codified at 12 U.S.C. § 1715z-1 (2000)) added authority to enable the Secretary to make interest reduction payments to create

the FHA program by featuring mortgage insurance and interest subsidies rather than the direct subsidy of the public housing ACC approach.[128] Participation was regulated by statutory limits on eligible per-unit mortgage amounts and income eligibility limits in the 95-135% of local area median incomes.[129] The interest subsidy programs were popular for a few years but were suspended and later phased out because of disputes over alleged high costs and inefficiencies in the early 1970s.[130]

*4. Section 8 Certificates and Vouchers*

In 1974 Congress enacted a new housing program designed to persuade private housing developers and owners to provide rental units that were affordable to households eligible for public housing.[131] The program, called Section 8 for the section of the Housing and Community Development Act of 1974 in which it was located, offered direct subsidies to participating private landlords to make up the difference between what a low-income family (one whose income does not exceed eighty per centum of the area median income) or very low-income family (income not exceeding fifty per centum of area median income) could afford, using twenty-five (later thirty) percent of household income, and the fair market rental rate for the particular unit, as established by HUD for the particular area.[132] The format of the new program followed that of public housing—legislative authorization for HUD to enter into ACCs with LPHAs, who in turn would contract with private developers and owners of existing units to transmit the subsidy to them.[133]

The original subsidy was available for new construction and substantial rehabilitation projects as well as existing units, although the fair market rental ranges were slightly lower for existing units.[134] New construction and substantial rehabilitation ACCs could extend as long as forty years, while ACCs for existing units could extend to twenty years, later reduced to five years.[135] In

an effective interest rate of one percent of qualifying loans for rental housing to be occupied by lower income families. For a review of program results and problems, see HOUSING IN THE SEVENTIES, *supra* note 126, at 83-123.

128. *Id.*

129. 12 U.S.C. §§ 1715*l*(d)(3)-(4); 1715z(h)-(i); 1715z-1(*l*).

130. HOUSING IN THE SEVENTIES, *supra* note 126, at 2, 83-87.

131. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 8, 88 Stat. 633, 748 (codified at 42 U.S.C. § 1437f (2000)).

132. *Id.* § 8(f)(1)-(2).

133. *Id.* § 8.

134. *Id.* § 8(c)(1).

135. *Id.* § 8(e)(1).

1983, the new construction and substantial rehabilitation portions were repealed, primarily because of concerns about the mounting long-term financial commitment those programs required.[136] The two existing unit programs, a certificate program in which participating landlords agree to rent units only to eligible low-income or very low-income households and a voucher program through which eligible households receive vouchers and then seek out landlords willing to accept the vouchers and rent to them, later were merged into one voucher program.[137]

By 2005, the Section 8 program was providing assistance to three times as many families as lived in public housing.[138] Over two million families were utilizing Section 8 vouchers and another 1.3 million were renting units whose owners had Section 8 certificates.[139] In addition, a voucher homeownership program ("VHO") begun in 2000[140] had enabled more than 4000 families to purchase homes from over 450 LPHAs by December 2005.[141] A HUD-supported study of the effect of Section 8 vouchers on families receiving welfare assistance concluded that vouchers were effective in "reducing both homelessness and doubling-up," and, "by freeing up money for other family consumption [such as food, clothing and school supplies]," helped create "a sense of normalcy for children in the families."[142]

*5. Community Development Block Grants*

The 1974 Act also changed dramatically the method by which

136. Act of Nov. 30, 1983, Pub. L. No. 98-181, § 209(a), 97 Stat. 1185 (codified at 42 U.S.C. § 1437f (2000)).

137. 42 U.S.C.A. § 1437(o) (1990) *repealed by* Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, tit. II, § 289(b)(1), 104 Stat. 4128 (1990).

138. U.S. DEP'T OF HOUS. & URBAN DEV., PERFORMANCE AND ACCOUNTABILITY REPORT FISCAL YEAR 2005, app. at 322 (2005), http://www.hud.gov/offices/cfo/reports/2005par.pdf.

139. *Id*.

140. 42 U.S.C. § 1437f(y) (2000).

141. GRETCHEN LOCKE ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., VOUCHER HOMEOWNERSHIP STUDY at ix (2006), *available at* http://www.huduser.org/Publications/pdf/VHO_CrossSite.pdf.

142. ABT ASSOCS. INC. ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., EFFECTS OF HOUSING VOUCHERS ON WELFARE FAMILIES 170 (2006), *available at* http://www.huduser.org/Publications/pdf/hsgvouchers_1.pdf. Study authors reported no significant improvement in employment for participants in the study, noting that "in-depth interviews suggested that employment opportunities are not a high priority consideration when voucher holders consider moving." *Id.* at 171.

the federal government provided community assistance to local governments. For the previous twenty-five years, such assistance was provided through a series of federally administered categorical grants designed to focus on one particular problem, such as building code enforcement, land use planning, parks and road development, slum clearance, urban renewal, or water and sewer services.[143] Title I of the 1974 Act folded all of those programs into a new Community Development Block Grant ("CDBG") program which delegated most of the priority-setting and decisionmaking responsibilities to local governments, with the states handling these responsibilities for rural areas.[144] The CDBG program became and remains a major source of federal financial support for infrastructure, gap financing, land acquisition, and relocation costs associated with affordable housing developments.[145]

*6. Low-Income Housing Tax Credit*

Tax reform pressures that culminated in the Tax Reform Act of 1986[146] also sparked another change in direction for federal housing policy. In return for eliminating many popular real estate deductions, particularly accelerated depreciation, Congress authorized taxpayers who invest in qualified rental housing to take a dollar-for-dollar credit against their income tax obligations.[147] Taxpayers who invested in 1987 (the first year of the program) in new housing that met statutory standards of affordability, qualified for a credit of nine percent per year for ten years, while taxpayers who invested that year in federally subsidized or existing housing qualified for a four percent credit.[148] After 1987, such investments qualified for credits that are adjusted annually "to maintain a present value of 70 percent and 30 percent for the two types of credits."[149]

Credits are allocated to individual states on a population basis ($1.75 times the state's population in 2005 or $2,000,000, whichever

143. S. REP. NO. 93-693, at 1-2 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4273, 4273-74.

144. Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-21 (2000).

145. *Id.* § 5305(a) (eligible activities).

146. Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2085, 2189-208 (1986) (codified as amended at I.R.C. § 42 (2000)).

147. I.R.C. § 42.

148. *Id.* § 42(a)-(b).

149. STAFF OF THE JOINT COMM. ON TAXATION, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 154 (Comm. Print 1987).

is greater)[150] and are distributed to specific projects according to qualified allocation plans prepared by state housing agencies in accordance with regulations promulgated by the IRS.[151] Buildings to which credits are attached must meet the affordability requirements for fifteen years.[152] Failure to comply with this requirement will subject investors to recapture of any tax credits they have taken plus interest.[153]

The Low Income Housing Tax Credit ("LIHTC") program was slow to get off the ground, primarily because of its complexity (the housing tax credit law is the longest section in the Internal Revenue Code)[154] and the fact that it was designed originally as a temporary program. It was made permanent as part of the Omnibus Reconciliation Act of 1993.[155] In addition, because the program is administered by the states under the supervision of the Internal Revenue Service, housing developers and investors had to learn to work with different bureaucracies than the more familiar HUD bureaucracy. However, since its enactment, the LIHTC has been the major source of financial support for rental housing affordable to low-income families.[156]

### *B. Federal Fair Housing Legislation*

As noted earlier, regulatory approaches to housing location and quality traditionally have been the province of state and local governments.[157] However, since the late 1960s, federal statutes prohibiting discrimination in housing have been an important part of federal housing law. The twin migrations of rural African Americans to the cities and whites to the suburbs during and after World War II, and the resulting segregated housing patterns that were encouraged in part by federal policies in the administration of both the mortgage insurance and public housing programs,[158]

150. I.R.C. § 42(h)(3).

151. *Id.* § 42(m).

152. *Id.* § 42(i)(1).

153. *Id.* § 42(j).

154. Salsich, *supra* note 25, at 486 n.80.

155. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13142(a), 107 Stat. 312, 437-38 (1993) (codified at I.R.C. § 42 (2000)).

156. Rochelle E. Lento, *Federal Sources of Financing*, *in* THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 215, 218-19 (Tim Iglesias & Rochelle E. Lento eds., 2005).

157. *See supra* notes 18-24 and accompanying text.

158. *See, e.g.*, DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); GAIL RADFORD, MODERN HOUSING FOR AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA 199-200 (1996); Arnold R. Hirsch, *Searching for a "Sound Negro Policy": A*

triggered a memorable warning from the Kerner Commission in 1968 that the "[n]ation is moving toward two societies, one black, one white—separate and unequal."[159] After years of debate and bitter controversy, Congress enacted legislation prohibiting discrimination in housing.[160]

The statute prohibits a wide range of discriminatory acts concerning the sale or rental of housing to persons of a particular race, color, religion, sex, or national origin.[161] In 1988, again after years of contentious debate, the statute was amended to add two additional protected classifications for familial status (defined as children under eighteen domiciled with a parent or guardian)[162] and handicap.[163] The statute also includes a requirement that local regulations make "reasonable accommodation" for the housing needs of persons with disabilities[164] and strengthened enforcement provisions.[165] The statute imposes an affirmative duty on HUD to promote fair housing in federally assisted programs, establishes an administrative enforcement procedure within HUD, and authorizes individual lawsuits by aggrieved persons as well as suits by the Justice Department to stop discriminatory housing practices.[166]

Courts have adopted a four-part prima facie standard in Title VIII cases.[167] Under this standard, a plaintiff states a cause of action by establishing that a particular action had a discriminatory impact.[168] The burden then shifts to the defendant to rebut the plaintiff's case by establishing that the action complained of was motivated by legitimate business reasons and not by considerations of race or other protected categories.[169] If the defendant succeeds, the plaintiff is given an opportunity to prove that the defendant's reasons are a mere pretext.[170]

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*Racial Agenda for the Housing Acts of 1949 and 1954*, 11 HOUSING POL'Y DEBATE 393, 430-31 (2000).

159. KERNER REPORT, *supra* note 49.

160. Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601-3619, 3631 (2000)).

161. 42 U.S.C. § 3604.

162. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 800, 102 Stat. 1619, 1620 (codified at 42 U.S.C. § 3602(k)).

163. *Id.* (codified at 42 U.S.C. § 3604(f)).

164. *Id.* (codified at 42 U.S.C. § 3604(f)(3)(B)).

165. *Id.* § 810, 102 Stat. 1619, 1625 (codified at 42 U.S.C. §§ 3610-14).

166. *Id.*

167. Selden Apartments v. U.S. Dep't of Hous. & Urban Dev., 785 F.2d 152, 159 (6th Cir. 1986).

168. *Id.* at 160.

169. *Id.*

170. *Id.*

However, despite such legislation and companion state and local laws, housing patterns at the beginning of the twenty-first century remained characterized by separation rather than integration. The Kerner Commission's warning[171] remained relevant, as predominantly black ghettos and predominately white suburban communities were the rule rather than the exception.[172]

### *C. Federal Efforts to Encourage or Mandate Local Land Use Planning and Regulation*

In addition to the federal government's efforts in the 1920s and 1930s to promote local zoning,[173] federal housing and community development statutes since 1949 have encouraged, and since 1954 have required, local communities to engage in some form of land use planning process as a condition precedent to receipt of federal housing and community development funds.[174] The Housing Act of 1954 added the requirement that a local government adopt "a workable program (which shall include an official plan of action . . . for the establishment and preservation of a well-planned community with well-organized residential neighborhoods of decent homes and suitable living environment for adequate family life)."[175] The Senate report accompanying the 1954 Act asserted that the Workable Program for Community Improvement requirement was designed to engage localities in the process of developing a "bona fide and practical expression of the community's own projected program to deal with its own problems, presented in good faith and with the firm resolve to carry that program through to accomplishment."[176]

171. KERNER REPORT, *supra* note 49, at 1.

172. *See, e.g.*, SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM (2004).

173. *See supra* notes 36-57 and accompanying text.

174. *See* Shelby D. Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 FORDHAM URB. L.J. 69, 110-11 (1998).

175. Housing Act of 1954, Pub. L. No. 560, § 303, 68 Stat. 590, 623 (codified at 42 U.S.C. § 1451 (2000)) (authority terminated by Supplemental Housing Authorization Act of 1977, Pub. L. No. 95-24, Tit. I, § 105(a), 91 Stat. 55, 56). But, as Charles Rhyne notes in his history of the Workable Program, a "congressional declaration of policy" in 1949 (Section 101(a) of the Housing Act of 1949) that the Administrator of the Housing and Home Finance Agency (a forerunner of the present HUD), when allocating funds authorized by the 1949 Act, "give consideration" to the extent of local efforts to adopt and/or modernize local building and housing codes was "a prologue to the Workable Program concept adopted in 1954." Charles S. Rhyne, *The Workable Program—A Challenge for Community Improvement*, 25 LAW & CONTEMP. PROBS. 685, 686 (1960).

176. S. REP. NO. 83-1472 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2723, 2759.

One of the requirements of the Workable Program was "an official plan of action."[177]

Although many local officials probably viewed the Workable Program requirement as a bureaucratic hoop to jump through in order to get federal funds,[178] it represented another attempt by the federal government, similar to the zoning push discussed earlier,[179] to rethink their land use regulations, as well as building and housing codes. As President Hoover did while secretary of commerce, President Eisenhower established in 1953 a President's Advisory Committee on Government Housing Policies and Programs, a subcommittee which prepared the recommendation for the Workable Program after examining studies from a number of cities and concluding that federal assistance should be used to "help the cities help themselves eliminate their slums."[180]

Further evidence that the drafters of the 1954 Act were interested in local zoning as well as slum clearance and building and housing regulations was the inclusion in the Act of federal assistance for local land use planning, the predicate for the original concept of zoning,[181] through the 701 planning program.[182] The 701 program provided grants and technical assistance to state and local planning agencies for the development of comprehensive plans.[183] Both the 701 program and the Workable Program were active for twenty years before being absorbed by the CBDG program in the 1974 Housing and Community Development Act.[184]

In lieu of the Workable Program requirement, the 1974 Act mandated preparation of a Housing Assistance Plan ("HAP") as a

177. *Id.*

178. The author recalls hearing comments to that effect during his time in state government and private practice in the 1960s.

179. *See supra* notes 41-60 and accompanying text.

180. Rhyne, *supra* note 175*,* at 687 & nn.6-7 (citing and quoting PRESIDENT'S ADVISORY COMM. ON GOV'T HOUS. POLICIES AND PROGRAMS, RECOMMENDATIONS ON GOVERNMENT HOUSING POLICIES AND PROGRAMS: A REPORT OF THE PRESIDENT'S ADVISORY COMMITTEE ON GOVERNMENT HOUSING POLICIES AND PROGRAMS 109, 113-22, 151-54 (1953)).

181. Secretary Hoover's advisory committee, in its 1922 publication, A ZONING PRIMER, asserted that "[a] zoning ordinance needs to be based on a comprehensive and detailed study of the precise *local conditions*, both present and prospective." ADVISORY COMM. ON ZONING, *supra* note 60, at 5.

182. Housing Act of 1954, Pub. L. No. 83-560, §701, 68 Stat. 590, 640 (codified at 40 U.S.C. 461 (1958), *repealed by* Pub. L. No. 97-35, tit. III, § 313(b), 95 Stat. 398 (1981)).

183. *Id*.

184. *See supra* notes 143-45 and accompanying text.

condition to receipt of CDBG funds.[185] This requirement, coming at a time when "HUD's 'production programs' (those that subsidized new projects)[186] were expected to continue to operate at high levels," imposed for the "first time . . . a truly comprehensive analytically-based strategy."[187] Of particular significance to affordable housing concerns, the HAP program had several goals:

> link the provision and location of subsidized housing to community development activities; cause local governments to develop genuine strategies in the context of their market conditions for assisting low-income poorly housed residents to obtain adequate housing; and, provide the underpinnings for a *national housing strategy* that would reflect the aggregate of local strategies.[188]

A key element of the HAP process was the requirement that housing needs of *both* current residents and those *expected to reside* in the community be evaluated.[189]

A separate but related planning process, the Comprehensive Homeless Assistance Plan ("CHAP"), was introduced with enactment in 1987 of the McKinney Act to provide assistance in responding to homelessness.[190] CHAP was folded into the Comprehensive Housing Affordability Strategy ("CHAS") program upon its activation in 1990.[191] The CHAS program accompanied a new housing block grant program, the HOME Investment Partnership Program,[192] designed to provide local governments with

185. Housing and Community Development Act of 1974, Pub. L. No. 93-383, §§ 104, 213, 88 Stat. 633, 718-22, 762-64 (codified at 42 U.S.C. §§ 5304 & 1439 (2000)).

186. *See supra* notes 126-35 and accompanying text.

187. MARGERY AUSTIN TURNER ET AL., THE URBAN INST., PLANNING TO MEET LOCAL HOUSING NEEDS: THE ROLE OF HUD'S CONSOLIDATED PLANNING REQUIREMENTS IN THE 1990S 2-3 (2002).

188. *Id.* at 2-2 to 2-3 (quoting Raymond J. Struyk & Jill Khadduri, *Saving the Housing Assistance Plan: Improving Incentives to Local Governments,* 46 J. AM. PLAN. ASS'N, at 387, 387 (1980)) (emphasis added). Turner et al. note that use of HAPs as a basis for developing a national strategy "simply did not work out as hoped," primarily because of pressure on HUD to allocate all appropriated funds annually and because of program dependence on developer participation, something that "could not be controlled nationally." *Id.* at 2-5.

189. 42 U.S.C. § 5304(a)(2) (2000).

190. Stuart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, tit. IV, 101 Stat. 494 (1987) (codified at 42 U.S.C. § 11361 (2000)).

191. Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, tit. I, §§ 105-06, 104 Stat. 4079, 4088-91 (1990) (codified at 42 U.S.C. § 12705 (2000)).

192. *Id.*, tit. II, § 211, 104 Stat. 4096 (codified at 42 U.S.C. § 12741).

"considerable latitude" in making decisions about use of such funds for supply-side purposes (housing production or rehabilitation) and/or demand-side purposes (homeowner or renter assistance).[193] CHAS brought considerably more programs under its wing (although public housing and Section 8 were not formerly included) and, based on experiences with HAPs, focused additional attention on availability of data, public participation, coordination of public agencies, and management of funds.[194] Further refinement came in 1993 with the development by HUD through regulations of the Consolidated Plan ("ConPlan") to consolidate a number of planning requirements for community development programs[195] and the 1998 requirement that PHAs develop their own annual plans.[196]

In reviewing these developments, Turner et al. conclude that Congress and HUD have exhibited consistent interest in developing a planning system that emphasizes (1) "fact-based assessment of housing needs," (2) "an explicit strategy for addressing the needs as assessed," (3) "involve[ment of] citizens and interest groups meaningfully," and (4) "coordination among relevant agencies in both planning and implementation."[197]

## IV. HOUSING FOR PERSONS WITH DISABILITIES AND HOMELESS PERSONS

### *A. The Deinstitutionalization Movement*

During the period of greatest federal involvement in affordable housing activities, a parallel effort, also supported by the federal government, radically altered the housing situations for millions of persons with mental disabilities. Dubbed the "deinstitutionalization" movement for its emphasis on "mov[ing] away from large-scale institution-based care to small-scale community-based facilities,"[198] the movement had its greatest influence on the development of mental health policy and the federal role in that policy during the period from the mid-1950s to the early

193. TURNER ET AL., *supra* note 187, at 2-5.

194. *Id.* at 2-7 to 2-8.

195. *Id.* at 2-8 to 2-12. CHAS regulations, which include ConPlan, are found at 24 C.F.R. pt. 91. *Id.* at 2-9.

196. Quality Housing and Work Responsibility Act ("QHWRA") of 1998, Pub. L. No. 105-276, § 511, 112 Stat. 2461, 2531-39 (codified as amended at 42 U.S.C. § 1437 (2000)).

197. TURNER ET AL., *supra* note 187, at 2-14.

198. MICHAEL J. DEAR & JENNIFER R. WOLCH, LANDSCAPES OF DESPAIR: FROM DEINSTITUTIONALIZATION TO HOMELESSNESS 16 (1987).

1980s.[199] The introduction of Thorazine in 1955, described as "the first effective antipsychotic medication," is credited as the beginning of the deinstitutionalization movement through which more than ninety percent of severely mentally ill persons were moved out of large state institutions over the next forty years in what has been described as "one of the largest social experiments in American history."[200] During that time, populations in state hospitals declined by about seventy percent, from approximately 560,000 to near 160,000.[201] A coalition of forces was responsible for this dramatic shift in policy, including the development of new psychoactive drugs, increased evidence of the harm caused by indiscriminate institutionalization, the experience gained during World War II with men who were rejected for service because of mental disabilities, and the optimism generated by a strong economy and the inauguration of President John F. Kennedy.[202]

### *B. The Community Mental Health Centers Act of 1963*

The centerpiece of this movement, at least from the federal government perspective, was the Community Mental Health Centers Act of 1963.[203] Drawing inspiration from the findings of a comprehensive report to Congress in December 1960 by the congressionally created Joint Commission on Mental Health and Illness[204] and the vision of President Kennedy, the first President to take "specific cognizance of the problems of mental illness and retardation,"[205] the Act authorized the Secretary of Health,

199. DAVID MECHANIC, MENTAL HEALTH AND SOCIAL POLICY: THE EMERGENCE OF MANAGED CARE 87 (4th ed. 1999) (citing Gerald N. Grob, *The Forging of Mental Health Policy in America: World War II to New Frontier*, 42 J. HIST. MED. & ALLIED SCI. 410 (1987)).

200. E. FULLER TORREY, OUT OF THE SHADOWS: CONFRONTING AMERICA'S MENTAL ILLNESS CRISIS 8-9 (1997).

201. MURRAY LEVINE, THE HISTORY AND POLITICS OF COMMUNITY MENTAL HEALTH 78 (1981).

202. MECHANIC, *supra* note 199, at 93-95.

203. Community Mental Health Centers Act, Pub. L. No. 88-164, tit. II, 77 Stat. 282, 290 (1963) (originally codified at 42 U.S.C. §§ 2681-2688j), *amended by* Community Mental Health Centers Amendments of 1975, Pub. L. No. 94-63, 89 Stat. 304, 309, *repealed by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 560.

204. JOINT COMM'N ON MENTAL ILLNESS & HEALTH, ACTION FOR MENTAL HEALTH (1961), *discussed in* LEVINE, *supra* note 201, at 45-48.

205. LEVINE, *supra* note 201, at 51 (discussing President Kennedy's Message to Congress on February 5, 1963. Special Message to the Congress on Mental Illness and Mental Retardation, 1963 PUB. PAPERS 126 (Feb. 5, 1963), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=9546).

Education, and Welfare to make grants to states for "construction of public and other nonprofit community mental health centers."[206] To obtain the funds, states were required to prepare and submit to the Secretary state plans that proposed construction of community mental health centers "based on a statewide inventory of existing facilities and survey of need."[207] State plans were developed by all fifty states and were based on the "catchment area" concept of organizing decentralized service delivery through "geographic areas serving populations of no less than 75,000 and no more than 200,000, ranked according to their need for mental health services."[208]

For about ten years the community mental health center movement grew, but at the same time it became increasingly entangled in what Levine calls "the politics of medicine, . . . legislative compromise, and . . . the realities of the matrix of services and local government interests."[209] The deinstitutionalization movement triggered by President Kennedy and Congress accelerated during this period, as noted above.[210] But, as Dear and Wolch note, serious funding, planning, and coordination problems plagued the community care approach, which they argue, "was never sufficiently validated, despite its emergence as the conceptual and ideological basis for mental health policy nationwide."[211] Writing thirty years after the deinstitutionalization movement began, they quote an article from the *Hospital and Community Psychiatry* journal:

> With the advantage of hindsight, we can see that the era of deinstitutionalization was ushered in with much naivete and many simplistic notions . . . [t]he importance of developing . . .

206. Community Mental Health Centers Act, 42 U.S.C. § 201 (2000), 77 Stat. 290. Levine notes that funds for staffing the centers initially were not provided because of opposition from the American Medical Association. LEVINE, *supra* note 201, at 53.

207. § 204(a)(4), 77 Stat. at 291-92.

208. LEVINE, *supra* note 201, at 53-54. Levine notes that the catchment area concept was "useful for many purposes, [but] was not based on any view of a community as an organic entity with its own life and with resources that could be brought to bear in some integrated fashion." *Id.* at 54. Transportation became an issue with large rural catchment areas, while in urban areas catchment boundaries "sometimes violated natural neighborhood boundaries, necessitating the accommodation of different racial and ethnic groups." *Id.*

209. *Id.* at 77.

210. *See supra* notes 198-202 and accompanying text.

211. DEAR & WOLCH, *supra* note 198, at 171 (citing Richard D. Lyons, *How Release of Mental Patients Began*, N.Y. TIMES, Oct. 30, 1984, at C1).

> supportive living arrangements was not clearly seen, or at least not implemented. ["]Community treatment["] was much discussed, but there was no clear idea as to what it should consist of, and the resistance of community mental health centers to providing services to the chronically mentally ill was not anticipated. Nor was it foreseen how reluctant many states would be to allocate funds for community-based services.[212]

From this experiment came a significant portion of the chronically homeless men and women whose housing and service needs we struggle to meet even today.[213] Other legacies were the group home[214] and the independent living movement, also known as permanent supportive housing,[215] supporters of which have had to resort to the courts to achieve their goal of providing housing within single family neighborhood environments.[216]

212. *Id.* at 170 (quoting H. Richard Lamb, *Deinstitutionalization and the Homeless Mentally Ill*, 35 HOSP. & COMMUNITY PSYCHIATRY, 899, 899-900 (1984)).

213. *See, e.g.*, Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. §§ 11431-11433 (2000) (authorizing programs for the education of homeless children and youth); FEDERAL TASK FORCE ON HOMELESSNESS AND SEVERE MENTAL ILLNESS, OUTCASTS ON MAIN STREET: REPORT OF THE FEDERAL TASK FORCE ON HOMELESSNESS AND SEVERE MENTAL ILLNESS (1992) (discussing the continuing needs of the mentally ill homeless); THE URBAN INST., HOMELESSNESS: PROGRAMS AND THE PEOPLE THEY SERVE (1999) (reporting the findings of the National Survey of Homeless Assistance Providers and Clients).

214. *See* Sandra L. Friedrich, *Group Homes*, *in* I THE GALE ENCYCLOPEDIA OF MENTAL DISORDERS 463-66 (Ellen Thackery & Madeline Harris eds., 2003), *available at* http://www.minddisorders.com/Flu-Inv/Group-homes.html (discussing the history of group homes).

215. *See* CORP. FOR SUPPORTIVE HOUS., SUPPORTIVE HOUSING WORKS TO END HOMELESSNESS, http://www.csh.org/index.cfm?fuseaction=Page.viewPage&pageID=344 (last visited Feb. 10, 2007).

216. *See, e.g.*, City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 730 (1995) (reasoning that the restrictive definition of "family" does not constitute "a 'reasonable . . . restrictio[n] regarding the maximum number of occupants permitted to occupy a dwelling'" exempt from Fair Housing Act coverage under 42 U.S.C. § 3607(b)(1)); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (finding special permit requirement applicable only to homes for mentally retarded violated Equal Protection Clause of the Fourteenth Amendment); Marbrunak, Inc. v. City of Stow, 974 F.2d 43, 45, 47 (6th Cir. 1992) (agreeing that the zoning ordinance imposing excessive safety requirements on home for mentally retarded adult women violated "reasonable accommodations" requirement of the Fair Housing Act, 42 U.S.C. § 3604(f)(3)(B)).

### *C. The Group Home Movement*

Group homes developed as a logical alternative to residential institutions. A Government Accounting Office ("GAO") study in the early years of the movement characterized the typical group home as "a community-based living facility offering a family or home-like environment and supervision or training for 4 to 16 live-in clients, some or all of whom are mentally retarded or mentally ill."[217] The GAO found that one of the features of the group home movement was the residential neighborhood setting.

> Group homes were usually single-family, detached houses located in residential neighborhoods where the estimated household incomes approached the national median level. The conditions and maintenance of these facilities and their properties were reported to be as good as or slightly better than those of surrounding properties. The neighborhoods were stable and safe and provided easy access to public transportation and a variety of community services.[218]

Despite the fact that group homes typically were detached single-family houses, sponsors faced restrictive land use ordinances in many communities. As a 1985 American Planning Association ("APA") survey reported, "overly restrictive zoning regulations" had been "a major stumbling block to the deinstitutionalization movement."[219]

The federal government responded. First, the Supreme Court invalidated the use of a local zoning ordinance to block a group home in *City of Cleburne v. Cleburne Living Center*.[220] Later, Congress amended the Fair Housing Act to restrict cities' abilities to exclude group homes through local land use regulations,[221] but permitted

217. U.S. GEN. ACCT. OFF., AN ANALYSIS OF ZONING AND OTHER PROBLEMS AFFECTING THE ESTABLISHMENT OF GROUP HOMES FOR THE MENTALLY DISABLED 1 (1983) (excluding facilities for alcoholics or drug abusers and those without supervision or training, such as boarding homes, from the study).

218. *Id.* at 2.

219. Peter W. Salsich, Jr., *Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 REAL PROP. PROB. & TR. J. 413, 419 (1986) (quoting Am. Planning Ass'n, *Homes for the Developmentally Disabled*, ZONING NEWS, Jan. 1986, at 1, 1).

220. *Cleburne*, 473 U.S. at 450.

221. 42 U.S.C. § 3604(f)(1), (3)(B) (2000) (defining discrimination to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such [handicapped] person equal opportunity to use and enjoy a dwelling"). For a review of the cases interpreting this requirement, see Advocacy Ctr. for Perss. with Disabilities, Inc. v. Woodland Estates Ass'n, 192 F. Supp. 2d 1344, 1348-50

them to continue to impose reasonable occupancy regulations.[222] These moves prompted states to enact their own group homes protective legislation.[223]

The key provision affecting group homes in the Fair Housing Amendments Act of 1998 is the requirement that local regulations, including zoning and subdivision regulations, make "reasonable accommodations" for the housing needs of persons with disabilities.[224] This provision, while a compromise in a continuing effort to offer persons with disabilities the same opportunities to live in stable residential neighborhoods as persons without disabilities, was a welcome advancement.[225] The fact that it was a compromise is evident from the considerable amount of litigation triggered by the inherent ambiguity of the words, "reasonable accommodation."[226]

(M.D. Fla. 2002); Donald L. Elliott, *The Fair Housing Act's "Reasonable Accommodations" Requirement*, LAND USE L. & ZONING DIG., Apr. 2000, at 3.

222. 42 U.S.C. § 3607(b)(1) (2000); City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 738 (1995) (reasoning the restrictive definition of "family" was a land use regulation not entitled to the occupancy regulation exemption of the FHA); Fair Hous. Advocates Ass'n v. City of Richmond Heights, 998 F. Supp. 825, 830 (N.D. Ohio 1998) (upholding an occupancy restriction tied to unit size).

223. *See, e.g.*, MO. ANN. STAT. § 89.020 (1998). *See generally* Michael J. Davis & Karen L. Gaus, *Protecting Group Homes for the Non-Handicapped: Zoning in the Post*-Edmonds *Era*, 46 KAN. L. REV. 777, 789-96 (1998) (discussing the Kansas group home statute and those from other states).

224. Referred to as persons with "handicap[s]" in the statute, 42 U.S.C. §§ 3602(h), 3604(f)(1) (2000).

225. A coalition of advocates and other stakeholders came together in November of 1998 and organized the Building Better Communities Network (BBCN) to monitor implementation of the reasonable accommodations provision and to offer non-adversarial dispute resolution services to local communities. *See, e.g.*, Peter W. Salsich, Jr., *Affordable Housing: Can NIMBYism be Transformed into OKIMBYism?*, 19 ST. LOUIS U. PUB. L. REV. 453, 459-60 (2000). A major player in the BBCN effort has been the Judge David L. Bazelon Center for Mental Health Law, which publishes periodic reviews of case law and statutory developments. Judge David L. Bazelon Center for Mental Health Law, http://www.bazelon.org (last visited Feb. 11, 2007).

226. *See, e.g.*, Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775, 783 (7th Cir. 2002) (reviewing cases imposing a burden-shifting approach "requir[ing] a plaintiff to make an initial showing that an accommodation is reasonable, but then plac[ing] the burden on the defendant [city] to show that the accommodation is unreasonable"); Lapid-Laurel, L.L.C. v. Zoning Bd. of Adjustment, 284 F.3d 442, 457 (3d Cir. 2002) (explaining that different issues impose different burden standards); *Advocacy Ctr.*, 192 F. Supp. 2d at 1348-50 (reviewing cases). *See generally* Elliott, *supra* note 221 (discussing the "reasonable accommodation" standard); Robert L. Schonfeld, *"Reasonable Accommodation" Under the Federal Fair Housing Amendments Act*, 25 FORDHAM URB. L.J. 413, 425-38 (1998) (analyzing circuit court decisions interpreting the "reasonable accommodation" clause of the FHA).

Group homes are not the answer for all persons with disabilities and the homes have their own managerial problems.[227] The lack of truly independent living opportunities in group homes has led advocates for persons with disabilities to continue their search for such opportunities. The most recent opportunity to become available uses the universal design principle, which requires all residential units in a particular development to be designed and built in such a way so that they are as accessible to persons with disabilities as they are to persons without disabilities.[228] The goal of acceptance by local land use regulations remains a major element of the advocates' search.

## V. A NATIONAL POLICY TO ENCOURAGE LOCAL ACCEPTANCE OF AFFORDABLE HOUSING

In the 1920s, the "Roaring Twenties," then U. S. Department of Commerce Secretary, and later President, Herbert Hoover championed zoning as an important part of a national effort to "supply[] the greatest social need of the country—more and better housing."[229] The move to zoning, Secretary Hoover asserted, was prompted by a desire to prevent "business and factory encroachment into residential areas."[230] The Supreme Judicial Court of Massachusetts, in a pre-*Euclid* opinion approving a zoning amendment creating a single family residence district, acknowledged the role of zoning in encouraging development of "modest single-family dwellings within the reach as to price of the thrifty and economical of moderate wage earning capacity."[231] In approving the amendment, the Massachusetts Court identified two plausible reasons for adopting zoning as a land use strategy—prevention of fire and promotion of family well-being.[232] Two years later, Justice Sutherland's dicta in *Euclid* characterizing apartment buildings as "parasite[s]"[233] cast an unfortunate and unnecessary pall on multi-family housing, which for many "thrifty and

227. For example, a tragic fire that killed eleven persons at a group home in Joplin, Missouri on November 27, 2006 prompted investigations concerning the health and safety of residents in Missouri's 635 licensed care residential facilities. David A. Lieb, *1,500 Fire Violations at Missouri's Care Facilities in 4 Years*, ST. LOUIS POST-DISPATCH, Jan. 7, 2007, at D4.

228. *See, e.g.*, Lisa Chamberlain, *Design for Living, Disabled or Not*, N.Y. TIMES, Jan. 7, 2007, at 14.

229. HOOVER, *supra* note 41, at 92.

230. *Id.* at 94.

231. Brett v. Bldg. Comm'r of Brookline, 145 N.E. 269, 271 (Mass. 1924).

232. *Id.*

233. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926).

economical [but] moderate wage earning"[234] families is an important and often necessary form of affordable housing.

In the early years of the twenty-first century, some eighty-plus years after Secretary Hoover's campaign for national acceptance of zoning as a technique to encourage more housing to be developed for moderate-income families, zoning again is at the center of a debate over affordable housing. This time, the debate is over the practice in many communities of requiring single family houses to be built on relatively large lots, one-quarter acre or larger, a mandate that, wittingly or unwittingly, makes production of housing affordable to moderate-income households more difficult.[235]

The price of land can have a significant impact on the cost of housing. A common rule of thumb holds that land costs should not exceed fifteen to twenty percent of a house's selling price.[236] A family making $50,000, slightly more than eighty percent of the estimated national median family income,[237] can expect to be able to afford a house costing in the $125,000 to $150,000 range.[238] Applying the above rule of thumb, land costs for such houses should not exceed a range of $20,000 to $30,000 per dwelling unit.

But land in popular communities tends to increase significantly in value. For example, in two rapidly growing communities on the northwestern edge of the St. Louis metropolitan area, land values reported in late 2006 were more than $130,000 an acre (Wentzville, Missouri) and more than $300,000 an acre (St. Peters, Missouri).[239] Applying the land to cost ratio, houses could be affordable to our hypothetical family in Wentzville at four or five units per acre, but would require a density of eight to ten units per acre to be affordable in St. Peters. Such a density almost invariably provokes controversy. For example, in a nearby part of the same county (St. Charles County, Missouri), a proposed 510 unit residential development on a 151 acre tract of land (about 3.3 houses per acre)

234. *Brett*, 145 N.E. at 271.

235. *See infra* notes 239-42 and accompanying text.

236. DIANE R. SUCHMAN, DEVELOPING SUCCESSFUL INFILL HOUSING 48 (2002).

237. *See supra* note 1.

238. John P. Segala, *Redlining: An Economic Analysis*, 66 ECON. REV., Nov./Dec. 1980, at 3, 8, *available at* http://www.richmondfed.org/publications/economic_research/economic_review/years.cfm/1980 (stating that a home purchased should not exceed two and one-half times the borrower's gross annual income and mortgage payments should not exceed one-fourth of buyer's gross monthly income).

239. Nancy Cambria, *It Isn't Easy Being Green: Priced Out: Communities Struggle to Acquire Land for Parks*, ST. LOUIS POST-DISPATCH, Dec. 26, 2006, at B5.

was opposed by county planning officials as "too dense for the surrounding area."[240] And in Lancaster County, Pennsylvania (within commuting distance of New York City and Philadelphia), county planning officials were reported to be seeking an average residential density of 7.5 dwellings per acre in urban growth areas, but developers were skeptical that such a dwelling/land ratio could be achieved because only about seventeen percent of the municipalities within the county had modified, or considered modifying, their zoning ordinances to permit such densities.[241]

The impact of land costs on housing prices and the role of zoning in regulating the type of housing that may be built in a given community give credence to the argument that the growing disparity between job opportunity and affordable housing availability is a matter of national concern.[242] Is it time for another Hoover-like federal government initiative? What form might such a federal initiative take?

### *A. Regulatory Precedents*

While Congress, over thirty years ago, rejected an effort to establish a national land use regulatory system,[243] it has been willing to limit the regulatory authority of state and local government when doing so was perceived to be necessary to implement important national policies. A case in point is the Telecommunications Act ("TCA") of 1996,[244] enacted "to promote competition and higher quality in American telecommunications services and to 'encourage the rapid deployment of new

240. *Housing Complex Called Too Dense*, ST. LOUIS POST-DISPATCH, Dec. 28, 2006, at B3.

241. Sana Siwolop, *Building Densely in Farm Country*, N.Y. TIMES, Dec. 24, 2006, at 12.

242. *See* discussion *infra* Part V.A-D.

243. Senate Bill 3354, introduced by Senator Henry Jackson (D-Wash.) on January 29, 1970, would have established a "National Land Use Policy." S. 3354, 91st Cong. (1970); 116 CONG. REC. 1757, 1757-60 (1970) (statement of Sen. Jackson introducing the bill). Senate Report 91-1435 shows that the formally proposed "National Land Use Policy" was deleted from the bill, however, and the Water Resources Planning Act, 79 Stat. 244, was amended by including a "provision for a national land use policy by broadening the authority of the Water Resources Council and river basin commissions." S. REP. NO. 91-1435 (1970) (as reported by Sen. Jackson Dec. 14, 1970); 116 CONG. REC. 41285 (1970).

244. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (amending the Communications Act of 1934) (codified at 47 U.S.C. §§ 151-615b (2000)).

telecommunications technologies.'"[245] While the Conference Report stressed that the TCA did not permit the Federal Communications Commission ("FCC") to preempt generally local and state land use decisions,[246] the statute does prohibit local governments from "unreasonably discriminat[ing] among providers of functionally equivalent services" or "prohibiting the provision of personal wireless services."[247] Requests to locate wireless facilities must be acted on "within a reasonable period of time,"[248] and denials of such requests must "be in writing and supported by substantial evidence contained in a written record."[249] Nor may placement of wireless facilities be limited "on the basis of the environmental effects of radio frequency."[250]

Do not affordable housing and homelessness problems present matters of national concern—ones that would support legislation preempting local and state land use decisions that "unreasonably discriminate among providers"[251] of such housing? Should not requests to locate affordable housing be acted upon "within a reasonable period of time"?[252] And should not denials of such requests "be in writing and supported by substantial evidence contained in a written record"?[253]

### *B. Charles Daye's "One America Act"*

In 1977, Charles Daye, now the Henry P. Brandis Professor of Law at the University of North Carolina School of Law, proposed comprehensive legislation which he called the "One America Act."[254] Twenty-three years later he reprised his proposal in slightly modified form.[255] The proposal established national policies

245. City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 115 (2005) (quoting Pub. L. No. 104-104, 110 Stat. 56, 56).

246. H.R. REP. NO. 104-458, at 207-08 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 124.

247. 47 U.S.C. § 332(c)(7)(B)(i)(I)-(II) (2000).

248. *Id.* § 332(c)(7)(B)(ii).

249. *Id.* § 332(c)(7)(B)(iii).

250. *Id.* § 332(c)(7)(B)(iv).

251. *See supra* text accompanying note 247.

252. *See supra* text accompanying note 248.

253. *See supra* text accompanying note 249.

254. Charles E. Daye, *The Race, Class and Housing Conundrum: A Rationale and Proposal for a Legislative Policy of Suburban Inclusion*, 9 N.C. CENT. L.J. 37, 95 (1977).

255. Charles E. Daye, *Whither "Fair" Housing: Meditations on Wrong Paradigms, Ambivalent Answers, and a Legislative Proposal*, 3 WASH. U. J.L. & POL'Y 241, 267-94 (2000).

prohibiting exclusionary land use practices[256] and mandating inclusionary land use practices,[257] authorized private enforcement actions with liberal standing and prima facie evidence rules,[258] and established the federal government as "houser of last resort."[259]

The proposed act was directed at "exclusionary land use practices," defined as "any land use practice of a governmental body which results in, or causes, the exclusion of a disproportionate number of [minorities or lower-income classes] from residing within the geographic or political jurisdiction of that governmental body."[260] Once a determination was made that a governmental body engaged in an exclusionary land use practice, it became ineligible to receive federal financial assistance from any federal agency unless or until either state legislation is enacted prohibiting such exclusionary practices or the offending governmental body has ceased the exclusionary activity, has taken steps "to remove any continuing effects" of the exclusionary activity, and has submitted an "inclusionary land use plan" that has received federal approval.[261] The premise of this "administrative enforcement provision" was that "in the vast majority of instances federal funding would constitute enough of a carrot that using a stick would not be necessary."[262]

The second part of Professor Daye's proposal would establish a legislative policy mandating inclusion by tying it to continued

256. *Id.* at 273-78, 288-89 (setting out and discussing §§ 4 and 5 of the proposed "One America Act").

257. *Id.* at 278-79, 288-89, 292-94 (setting out and discussing §§ 5(c)(2) and 8(c) of the proposed "One America Act").

258. *Id.* at 280-84, 290-92 (setting out and discussing § 7 of the proposed "One America Act").

259. *Id.* at 278-79, 292-94 (setting out and discussing § 8 of the proposed "One America Act").

260. *Id.* at 286 (setting out § 3(b)(1) of the proposed "One America Act"). A two-step process would be used to determine whether a "disproportionate" number of persons is excluded by a land use practice: (1) compare the ratios of the number of persons of a particular race, ethnic group, etc. in the applicable metropolitan area or housing market area with the number of persons of the applicable group within the jurisdiction of the governmental body in question; (2) if the ratio of applicable residents is below, "by fifty percent (50%), or more, the ratio of such persons residing in the metropolitan area or housing market area as applicable, in which that governmental body is included," the number of excluded persons is disproportionate, and the land use practice is deemed "exclusionary." *Id.* (§ 3(b)(3) of the proposed "One America Act").

261. *Id.* at 288-89 (setting out § 5(c)(1)-(2) of the proposed "One America Act").

262. *Id.* at 277-78. Noting that "federal funds are pervasive in the lives of governmental bodies," Professor Daye argued that "[a]t a minimum," the threat of funds cutoff "would spur a wide measure of desirable conduct." *Id.* at 278.

receipt of federal funds and by making the federal government "houser of last resort" for those situations in which effective inclusion would require housing subsidies.[263] The local government would be given the first opportunity to determine the appropriate way to use federal housing subsidies made available through this "houser of last resort" procedure, but after a reasonable interval,[264] if such housing has not been made available, the federal government would be authorized to make the necessary housing available "consistent with sound planning concepts, but without regard to the local land use practices of the governmental body."[265]

Professor Daye's proposal was designed to "subordinate" both the "tradition of local land use autonomy" and the "desire for unrestricted freedom of individuals to associate . . . when municipal action becomes the vehicle for effectuating that desire," but "only to the limited extent clearly necessary."[266] He acknowledged that his proposal, as written, "most likely could not be enacted," but he advanced it to "illustrate the dimensions of the solution needed in light of the magnitude of the problems the nation faces."[267]

### *C. New Congressional Interest in Affordable Housing*

#### *1. The Bringing America Home Act*

The Democratic majority in Congress, following the 2006 midterm elections, includes new leadership expected to make affordable housing a priority, within the limits of a tight budget.[268]

263. *Id.* at 278-79 (discussing § 5(c) of the proposed "One America Act").

264. This period could be as short as twelve months or as long as thirty-six months. *Id.* (§ 8(c)(5)-(7) of the proposed "One America Act").

265. *Id.* at 279.

266. *Id.* at 268.

267. *Id.* at 267-68. In the earlier portion of his article, Professor Daye discussed the pervasiveness of segregated housing patterns, despite almost forty years of legislative and judicial efforts to combat them. His review of these efforts led him to conclude "that America is ambivalent about integration of housing" and that any serious effort at establishing a housing desegregation policy would need "both a social thrust and an economic thrust." *Id.* at 243-66. His "One America Act" proposal was one aspect of a recommended social thrust, but he acknowledged that a "multifaceted approach" likely would be necessary because of the "pervasiveness" of residential segregation. *Id.* at 266. For a multifaceted approach featuring state-level recommendations with special emphasis on Oregon's statewide land use regulatory system, see Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877 (2006).

268. *Housing Is Expected to Be Priority For New Democratic Majority, But Tight Funding May Limit Action*, 34 Hous. & Dev. Rep. (West) 707 (Nov. 20,

Likely to be included in the deliberations are provisions from a bill introduced in 2006, the "Bringing America Home Act of 2006" (House Bill 2897),[269] which included some elements of both the economic and social thrusts advocated by Professor Daye.[270]

On the economic side, the bill establishes a national housing trust fund,[271] something that has been sought at least since 1987,[272] that would be free from "the vagaries of the annual appropriations process."[273] A major goal of trust fund advocates is to restore a national source of direct financial support for the production of additional new or substantially rehabilitated housing units–something that has been missing from national housing policy since the late 1970s.[274] Other economic thrusts of the proposed act include a ten year plan to add 1.5 million new Section 8 vouchers,[275] a requirement that federally assisted demolition activities result in "no net loss" of housing units,[276] and reauthorization of the McKinney-Vento[277] homeless assistance programs for five years.[278]

A limited social thrust also is included. The bill prohibits cities receiving CDBG[279] and/or HOME[280] funds from enacting land use regulations "that have the effect of preventing the siting of facilities designed to serve [people who are homeless]" or to provide housing

2006) [Hereinafter *Housing Priority*].

269. H.R. 2897, 108th Cong. (2003) (as introduced by Rep. Julia Carson (D-Ind.), Jul. 25, 2003); H.R. 4347, 109th Cong. (2005) (as introduced by Rep. Carson, Nov. 16, 2005).

270. Daye, *supra* note 255.

271. H.R. 4347, § 221.

272. *See, e.g.*, S. SUBCOMM. OF COMM. ON BANKING, HOUS., AND URBAN AFFAIRS & H.R. SUBCOMM. OF COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 100TH CONG., A NEW NATIONAL HOUSING POLICY: RECOMMENDATIONS OF ORGANIZATIONS AND INDIVIDUALS CONCERNED ABOUT AFFORDABLE HOUSING IN AMERICA, 127 (Joint Comm. Print 1987).

273. *Housing Priority*, *supra* note 268, at 707.

274. While the Reagan administration generally has been blamed for/credited with the demise of direct federal housing production subsidies, the federal withdrawal from such efforts actually began during the Carter administration. *See, e.g.*, John Charles Boger, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C. L. REV. 1289, 1332 n.188 (1993) (quoting PAUL A. LEONARD ET AL., A PLACE TO CALL HOME: THE CRISIS IN HOUSING FOR THE POOR 6 (1989)).

275. H.R. 4347, § 301.

276. H.R. 4347, § 222.

277. 42 U.S.C. §§ 11431-11433 (2000).

278. H.R. 4347, § 223.

279. 42 U.S.C. §§ 5301-5321 (2000).

280. 42 U.S.C. §§ 12741-12756 (2000).

for low-income people.[281] In addition, cities receiving CDBG and/or HOME funds may not enact ordinances "that have a disparate impact on homeless persons or that punish homeless persons for carrying out life-sustaining practices in public spaces when no alternative public spaces are available."[282]

*2. Federal Housing Financial Reform Act of 2007*

A major reorganization of the regulatory structure of the secondary mortgage market agencies discussed earlier[283] is proposed in the Federal Housing Finance Reform Act of 2007, House Bill 1427, introduced on March 9, 2007[284] and approved, as amended, by the House Committee on Financial Services on March 29, 2007.[285] The bill, introduced by Rep. Barney Frank (D-MA), committee chair, creates a new independent agency, the Federal Housing Finance Agency, whose director will have "general supervisory and regulatory authority over each regulated entity" (Fannie Mae, Freddie Mac and the federal home loan banks).[286]

One of the goals of the bill's sponsors is to direct more attention to the types of mortgages the regulated entities purchase. This would be accomplished by a requirement that the Director establish annual housing goals for single family mortgage purchases on loans to low-income families, families residing in low-income areas, and very low-income families,[287] as well as for multi-family mortgage purchases financing dwelling units for low-income and very low-income families and units receiving low-income housing tax credits.[288]

The bill also contains another effort to establish a national housing trust fund, called the Affordable Housing Fund.[289] Moneys for the fund would come from Fannie Mae and Freddie Mac for five years (2007–2011) in amounts "equal to 1.2 basis points for each dollar of the average total mortgage portfolio of the enterprise during the preceding year."[290] Supporters estimate that

281. H.R. 2897, 108th Cong. § 310 (2003).

282. *Id.*

*283. See supra* notes 88-106 and accompanying text.

284. Federal Housing Finance Reform Act of 2007, H.R. 1427, 110th Cong. (2007).

285. CONG. REC. D442 (daily ed. Mar. 29, 2007).

286. Federal Housing Finance Reform Act of 2007, *supra* note 284, § 101 (amending § 1311 of the Housing and Community Development Act of 1992).

287. *Id.* § 125 (amending §§ 1331-34).

288. *Id.* § 1333.

289. *Id.* § 128 (adding a new § 1337).

290. *Id.* § 1337(b).

approximately $500 million per year would be available from this source.[291] During the first year (2007) all funds would be allocated to the Louisiana Housing Finance Agency (seventy-five percent) and to the Mississippi Development Authority (twenty-five percent) for use in Hurricane Katrina and Hurricane Rita disaster areas.[292] Thereafter, funds would be distributed to states and Indian tribes on a formula basis.[293] Grants from the fund could be used for "production, preservation, and rehabilitation of rental housing . . . for extremely low- and very low-income families," as well as housing intended for homeownership.[294] Grants may also be used for programs to increase effective demand, including "downpayment assistance, closing cost assistance, and assistance for interest rate buy-downs" for the principal residence of extremely low- and very low-income families and first-time home buyers.[295]

*3. Expanding Homeownership Act of 2007*

An additional $300 million authorization for a national housing trust fund is contained in the Expanding Homeownership Act of 2007, House Bill 1852, introduced on March 29, 2007, by Rep. Frank and Rep. Maxine Waters (D-CA), Housing and Community Opportunity Subcommittee Chair.[296] The bill, which makes numerous changes in the FHA mortgage insurance program, includes a provision requiring that any savings resulting from enactment of modernization proposals affecting FHA insurance on reverse mortgage loans be dedicated to the housing trust fund for use in making grants to support production of affordable multi-family and single family housing.[297]

### *D. A Proposal for Federal Leadership to Encourage Local Communities to Accept Affordable Housing*

I began this essay with a hypothetical[298] designed to illustrate some contemporary approaches to affordable housing and homelessness issues that likely would face difficulty in receiving authorization under local land use regulations in many

291. NAT'L LOW INCOME HOUS. COAL., MAJOR STEPS ADVANCE PROGRESS TOWARD A NATIONAL HOUSING TRUST FUND, MEMO TO MEMBERS vol. 12, no. 13 (2007), *available at* http://www.nlihc.org/detail/article.cfm?article_id=4039.

292. Federal Housing Finance Reform Act of 2007, *supra* note 284, at § 1337(c)(1).

293. *Id.* § 1337(c)(2).

294. *Id.* § 1337(g).

295. *Id.*

296. NAT'L LOW INCOME HOUS. COAL., *supra* note 291.

297. *Id.*

298. *See supra* text accompanying notes 1-8.

communities, particularly in growing metropolitan areas.[299] The pervasiveness of the affordable housing/homelessness problem,[300] the limitations of a solely market-based approach,[301] and the role played by the federal government in the creation of segregated housing patterns[302] provide ample reasons for a renewed federal response—but one that is implemented through a process that respects local planning goals to a reasonable extent[303] and uses the local planning and regulatory process the federal government helped create,[304] rather than through a return to the top-down, HUD-directed system of categorical housing grant programs in vogue during the 1960s

299. *See supra* note 17 and text accompanying notes 9-23.

300. Paul Farmer, Executive Director and CEO of the American Planning Association ("APA"), in introducing the APA's second focused "super-topic," Housing Choice and Affordability, opined that "[o]ur failure to fulfill [the] 1949 congressional pledge [of a decent home and a suitable living environment for every American family] . . . is shameful." Paul Farmer, *A Decent Home for All Americans*, PLANNING, Dec. 2006, at 4, 4.

301. For example, the original federal public housing policy limited eligibility for housing assistance to families "who could not afford what private enterprise was willing and able to build." FRIEDMAN, *supra* note 108, at 105. This originally was defined in an income/rental ratio that limited eligibility to persons making less than five times the applicable rental or less than six times the applicable rental for families with three or more minor dependents. *Id.* at 110. That concept has been carried forward, but with a more precise effort to link assistance eligibility to percentage of area median income. The U.S. Code defines "low-income families" as those making eighty percent or less than the area median income, with adjustments for family size and high cost areas, and "very-low-income families" as those making fifty percent or less, with similar adjustments. 42 U.S.C. § 1437a(b)(2) (2000).

302. *See supra* text accompanying notes 103-06; *see also* Daye, *supra* note 255*,* at 270 (citing James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L.J. 547 (1979)); Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617 (1999).

In fairness, the federal government has addressed the problem of regulatory barriers to affordable housing for over fifteen years. *See, e.g.*, ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., "NOT IN MY BACK YARD:" REMOVING BARRIERS TO AFFORDABLE HOUSING (1991), available at http://www.huduser.org/publications/pdf/NotInMyBackyard.pdf (analyzing the impact of the "Not In My Back Yard" ("NIMBY") syndrome, as expressed in restrictive local land use and housing regulations, on affordable housing efforts and recommending greater attention be paid to the issue). For a number of years, HUD has maintained a web site dedicated to "[s]olutions that support affordable housing." Regulatory Barriers Clearinghouse, http://www.huduser.org/rbc/index.asp (last visited Apr. 5, 2007).

303. Daye, *supra* note 254*,* at 85.

304. *See supra* text accompanying notes 174-80.

and 1970s.[305]

The quarter-century withdrawal of the federal government from direct support[306] of affordable housing production has spurred impressively creative efforts by state and local governments and the private sector, both for-profit and not-for-profit elements.[307] An example of the creativity and complexity of current state and local affordable housing development efforts is the Quality Hill development in Kansas City, Missouri. Eighty-four apartment units that were developed in 1993 with assistance from the LIHTC program[308] will be converted to affordable condominiums in 2008 when the fifteen-year LIHTC compliance period expires and the original developers can dispose of their investments.[309] Under a private letter ruling of the IRS,[310] sixty one-bedroom and twenty-four two-bedroom units will be sold to buyers with maximum incomes of $30,780 (one-bedroom) and $36,960 (two-bedroom). Sale prices will be $79,500 for one-bedroom units and $89,500 for two-bedroom units.[311] The Missouri Housing Development Commission, the state's housing finance agency, will oversee the conversion project for the next thirty years to ensure that the units remain affordable to persons in the lower income range in accordance with the LIHTC statute.[312] Bank of America was reportedly willing to help current

305. *See supra* text accompanying notes 126-30. An example of the top-down philosophy in a land use regulatory context is the late Senator Henry Jackson's (D-Wash.) unsuccessful efforts during the early 1970s to establish a national land use regulatory system. *See supra* note 26.

306. The Low Income Housing Tax Credit ("LIHTC"), *supra* notes 146-56 and accompanying text, which celebrated its 20th anniversary in 2006, *see, e.g.*, Andre Shashaty, *Tax Credits at 20: A Tale of Survival*, AFFORDABLE HOUSING FIN., Oct. 2006, at 6, is an indirect subsidy through the Tax Code that depends on state agencies for administration. The Section 8 voucher program, *supra* notes 131-42 and accompanying text, is a demand-side program that provides rental assistance and depends on private owners of existing housing.

307. These efforts have been catalogued in numerous ways. *See, e.g.*, NAT'L COUNCIL OF STATE HOUS. AGENCIES, STATE HFA FACTBOOK: 2005 NCSHA ANNUAL SURVEY RESULTS (2005); EDWARD T. WHEELER, GOVERNMENT THAT WORKS: INNOVATION IN STATE AND LOCAL GOVERNMENT 115-50 (1993) (discussing state and local housing programs); DOUGLAS R. PORTER & SUSAN COLE, AFFORDABLE HOUSING: TWENTY EXAMPLES FROM THE PRIVATE SECTOR (1982).

308. *See supra* notes 146-56 and accompanying text.

309. Lisa R. Brown, *Stogel, Baron Win IRS Ruling on Affordable Housing,* ST. LOUIS BUS. J. , Apr. 6, 2007, at 5.

310. I.R.S. Priv. Ltr. Rul. 200703024 (Oct. 17, 2006). The IRS approval is contingent on existing tenants being given the option to purchase their unit at loan and condominium fee amounts that do not exceed maximum LIHTC unit rental rates. *Id.*; Brown, *supra* note 309.

311. *Id.*

312. Brown, *supra* note 309; 26 U.S.C § 42(h)(6) (2000).

tenants of Quality Hill obtain affordable thirty year fixed-rate loans at below-market interest rates.[313] The conversion program offers a creative answer to two vexing questions–how to permit LIHTC investors to recoup their investments at the end of the LIHTC compliance period without having the units taken out of the affordable housing inventory, and how to make home ownership opportunities available to the lower income cohort.[314]

State housing finance agencies have matured into sophisticated sources of housing development,[315] but their dependence on tax-exempt revenue bonds creates some important limitations.[316] Spurred on by the continuing presence of homelessness, coalitions of local organizations have come together to prepare plans to end homelessness, particularly for those defined as "chronically homeless" because they have been on the streets for more than a year.[317] But both state housing finance agencies and local homelessness coalitions agree that creating additional permanent affordable housing resources is a major need, and that the federal government needs to resume an active role in providing those

313. Brown, *supra* note 309.

314. St. Louisan Steve Stogel, one of the developers along with Richard Baron, also of St. Louis, and SunAmerica Affordable Housing Partners of Los Angeles, stated that "[conversion of LIHTC rental units to affordable condominiums] is a way to continue affordability, improve property values, share the American dream of homeownership and create urgently needed work-force and affordable housing." *Id.*

315. *See generally* National Council of State Housing Agencies, http://www.ncsha.org/section.cfm/5 (last visited Jan. 30, 2007) (discussing NCSHA's work in Washington to promote and improve HFA-administered housing programs).

316. For example, a decision by Missouri Governor Matt Blunt to use up to one-third of Missouri's private activity bond allocation, 26 U.S.C. § 146 (2000), as part of a complex plan to secure additional capital improvements funding for state colleges and universities, dramatized the fact that state housing finance agencies have to compete with other state agencies for the resources they obtain through the private activity bond market. Lisa R. Brown, *Housing Developers Put on Hold*, ST. LOUIS BUS. J., Jan. 26, 2007, at 1.

317. *See, e.g.*, Notice of Funding Availability for the Collaborative Initiative to Help End Chronic Homelessness, 68 Fed. Reg. 4018, 4019 (Jan. 27, 2003) (defining a chronically homeless person as "an unaccompanied homeless individual with a disabling condition who has either been continuously homeless for a year or more OR has had at least four (4) episodes of homelessness in the past three (3) years"). The National Alliance to End Homelessness, a self-described network of more than 5000 public and private organizations that has prepared a plan to end homelessness within ten years, reports that over 200 communities have agreed to create such plans and close to 100 are in place. Nan Roman, *A Vision to End Homelessness*, AFFORDABLE HOUSING FIN., Jan., 2007, at 46.

resources.[318]

A recommitment to the Section 8 voucher program, and an effectively funded national housing trust fund, along the lines of the "Bringing Home America Act,"[319] and the bills introduced in 2007[320] would go a long way toward providing the economic support for affordable housing necessary to enable an effective response to the needs identified by state and local entities. On the social side, the Act's inclusionary condition attached to receipt of CDBG and HOME funds is a step in the right direction, but it does not go far enough. Too many communities, particularly growing ones on the suburban fringe where the new jobs are, could well be tempted to forego the relatively small amount of CDBG and HOME funds available under current budget levels in order to maintain exclusionary land use policies.[321]

The inclusionary policy in Charles Daye's "One America Act"[322] has the teeth—all sources of federal funds—to be effective. Although, as he acknowledged, enactment of such a draconian measure would be difficult at best,[323] an inclusionary policy modeled after his proposal, coupled with preemption provisions similar to those contained in the Telecommunications Act,[324] could and should

318. The 2007 president of the National Council of State Housing Agencies ("NCSHA"), Kim Herman, executive director of the Washington State Housing Finance Commission ("WSHFC"), described his top priority as "convinc[ing] the public and members of Congress that we have an affordable housing crisis, and we have to act now before it gets worse." Donna Kimura, *The State of HFAs: NCSHA President Aims to Focus on How Affordable Housing Helps Communities*, AFFORDABLE HOUSING FIN., Jan. 2007, at 22. Local plans to end homelessness increasingly are emphasizing the importance of creating permanent affordable housing. Almost 200,000 such units are called for in the local plans adopted to date, with about 86,000 of those units featuring supportive services for the "hardest-to-house disabled people." Roman, *supra* note 317, at 47.

319. *See supra* notes 268-82 and accompanying text.

320. *See supra* notes 283-97 and accompanying text.

321. *See, e.g.*, Mikal J. Harris, *St. Peters Officials Increase Required Lot Sizes for Homes: Many Say Law Will Force Out Moderate- to Low-Income Families*, ST. LOUIS POST-DISPATCH, St. Charles County Edition, Jan. 15, 2001, at 1 (reporting aldermanic decision to increase minimum lot sizes for new homes from 7,500 square feet to 12,000 square feet).

322. *See supra* notes 254-67 and accompanying text.

323. *See supra* note 267 and accompanying text.

324. *See supra* notes 244-50 and accompanying text. This is not that far removed from the Commission on Regulatory Barriers' recommendation that Congress "authorize HUD to condition assistance to State and local governments based upon their barrier-removal strategies." ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., *supra* note 302, at 10.

be appended to any national housing trust fund legislation. A major portion of the need for new affordable housing is in the growing suburban communities that historically have opted for restrictive residential zoning.[325] Exclusionary land use policies in those communities would blunt the effectiveness of new housing development initiatives made possible through a national housing trust fund.

A land use condition attached to a new federal affordable housing trust fund could provide effective support for increased state inclusionary land use programs. While New Jersey,[326] Massachusetts,[327] Rhode Island,[328] Connecticut,[329] California,[330] Oregon,[331] and Washington[332] have had strong state legislative inclusionary affordable housing policies in place for a number of years, and Illinois' housing appeals board statute recently has become operational,[333] state-level inclusionary land use policies have been the exception rather than the rule. Professor Tim Iglesias' Housing Impact Assessment proposal[334] offers another approach to states. Federal recognition of the critical role local land use policies have in influencing the location and type of affordable housing that may be produced in a given community can provide significant impetus for greater state concern about this issue.

The introduction of major national housing legislation offers hope that Congress soon will return to the housing issue.[335] But

325. *See supra* notes 61-77 and accompanying text.

326. N.J. STAT. ANN. §§ 52:27D-301 (LexisNexis 2007) (enacted in 1985 to implement the *Mount Laurel* "fair share" requirement); S. Burlington County NAACP v. Twp. of Mount Laurel, 456 A.2d 390 (N.J. 1983); S. Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713 (N.J. 1975).

327. MASS. GEN. LAWS ch. 40b, §§ 20-23 (LexisNexis 2007) (specialized Housing Appeals Board with jurisdiction to override local land use decisions rejecting qualified affordable housing developments).

328. R.I. GEN. LAWS §§ 45-53-1 (LexisNexis 2007) (Housing Appeals Board).

329. CONN. GEN. STAT. § 8-30(g) (LexisNexis 2007) (authorizing judicial override of local land use decisions rejecting qualified affordable housing developments), discussed in Terry J. Tondro, *Connecticut's Affordable Housing Appeals Statute: After Ten Years of Hope, Why Only Middling Results?*, 23 W. NEW ENG. L. REV. 115 (2001).

330. CAL. GOV'T CODE §§ 65580-65589.8 (LexisNexis 2007) (mandatory local land use planning must include a detailed affordable housing element).

331. OR. REV. STAT. §§ 197.295-197.314 (LexisNexis 2007).

332. WASH. REV. CODE § 36.70A.115 (LexisNexis 2007).

333. 310 ILL. COMP. STAT. § 67/1 (LexisNexis 2007).

334. *See* Iglesias, *supra* note 25.

335. *See supra* notes 283-97 and accompanying text. Also, budget resolutions for the 2008 fiscal year passed by the Senate on March 23, 2007, and by the House on March 29, 2007 contain increased authorizations for housing programs as well as authorizations for "deficit-neutral" housing trust funds. Differences in the two resolutions were scheduled for conference committee discussion in late April, 2007. NAT'L LOW INCOME HOUS. COAL., *supra*

without an inclusionary policy, any new legislation would be seriously weakened.

## VI. CONCLUSION

Housing in a very real sense is "central to individual and family well-being,"[336] but it remains a dream for millions of Americans.[337] The opening hypotheticals illustrate some of the creative energy being poured into local efforts to address affordable housing and homelessness problems throughout the country. The experimentation that has been triggered by the persistence of the homeless phenomenon, the growing affordable housing gap, and the Hurricane Katrina disaster have resulted in a variety of promising approaches that offer real hope to persons and families in need of affordable permanent housing.

The federal government has an important role to play, not only because of the resources at its command, but especially because of its role in the creation of exclusionary residential development in America's suburbs.[338] Preemption of local land use regulations, when necessary to enable affordable housing to be developed, is not a new idea but one that is consistent with contemporary concepts of federalism.[339] We know how to respond to affordable housing and homelessness concerns. Cooperation among the three levels of government is the ideal way, but when exclusionary local land use policies thwart that cooperation, those policies should give way.[340]

note 291.

336. Rachel G. Bratt, *Housing and Economic Security*, *in* A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 416 (Rachel G. Bratt et al. eds., 2006).

337. *See* NAT'L LOW INCOME HOUS. COAL., *supra* note 9.

338. *See supra* notes 79-106 and accompanying text.

339. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987) (upholding legal drinking age condition attached to receipt of a portion of a state's allocation of federal highway funds).

340. Paul Farmer, APA head, expresses the point as a dream: "Let's allow higher density, attached, mixed use developments by-right." Farmer, *supra* note 300.