Renewing the Land of Opportunity

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INNOVATIVE HOUSING INSTITUTE

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I. Introduction

As 2010 begins, we emerge from a decade of housing boom and bust. Most Americans find themselves in no better shape (in terms of jobs, incomes, and household wealth) than they were when the new century dawned a decade ago.[1] Poor and working Americans endured an especially bitter decade, where the benefits of the housing boom too often passed

1. Median income household income is lower; a greater percentage of Americans live in poverty and without health insurance; the stock market fell and took retirement savings with it, and for many, home values are also lower. *See* Andy Serwer, *The '00s: Goodbye (at Last) to the Decade from Hell*, Time, Nov, 24, 2009, *available at* www.time.com/time/nation/article/0,8599,1942834,00.html (last visited Jan. 15, 2010).

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them by while the ramifications of the housing bust swamped them like a tsunami. Few would categorize the first decade of the twenty-first century as a time of expanding opportunity and prosperity.

The causes of the bust can be found in numerous places, some quite infamous, such as the mortgage brokers who made "liar loans," the co-opted credit rating agencies that endorsed toxic products, the financiers who floated collateralized debt obligations and peddled derivatives, and the lenders that failed to underwrite mortgages. But less visible forces were also at play—a national obsession with homeownership, a national delusion that home prices never fall, the long-standing national failure to invest in affordable rental housing, and the long-standing national refusal to pursue policies that can create affordable homes for working people in safe neighborhoods near jobs, transit, good schools and other key sources of opportunity. As a new decade dawns, this article aims to highlight positive policies at the state and local level that can inform a new direction for national housing policy—a new direction that can restore our nation's legacy as a land of opportunity.

As we sort through the wreckage of the housing bust, three key facts emerge. One, our nation still needs to create and preserve more affordable housing.[2] Two, our nation needs to create and preserve more affordable housing in locations of opportunity—near jobs, transit, good schools, and essential amenities like high-quality banks, hospitals, parks and grocery stores. Three, we need to do both of these things in a coordinated way so that we can create communities that are livable for everyone—that are sustainable, economically competitive, and full of opportunity. In fact, one could argue that we cannot successfully confront and overcome our national challenges in energy policy, protecting the environment, supporting families, caring for our elderly, or restoring our economic competitiveness without taking these three steps.

Unfortunately, the federal government took a vacation from leading on these issues over the past thirty years. From the late 1970s until the present, federal investment in housing and community development decreased significantly and federal policy leadership in these areas was almost nonexistent.[3] Into this policy vacuum stepped state and local governments compelled by pressing circumstances to innovate.

2. Recent studies demonstrating this need, include: Rob Collinson & Ben Winter. *U.S. Rental Housing Characteristics: Supply, Vacancy, and Affordability*, HUD PD&R Working Paper 10-01 (Jan. 2010 Washington, D.C.); Harvard Joint Center for Housing Studies, The State of the Nation's Housing, 2009 (2009); Keith Wardrip, Danilo Pelletier, & Sheila Crowley, Out of Reach 2009: Persistent Problems, New Challenges for Renters (Nat'l Low-Income Housing Coalition 2009).

3. For one study documenting this trend, *See* Cushing Dolbeare, Irene Basloe Saraf, & Sheila Crowley, Changing Priorities: The Federal Budget and Housing Assistance. 1976-2005 (Nat'l Low-Income Housing Coalition 2004).

This article focuses on two kinds of state and local government innovations: (1) inclusionary housing efforts to create and preserve affordable housing in mixed-income communities and in good locations; and (2) state and local efforts to generate new public and private investment for affordable housing.

Without inclusionary housing policies, our society will fail to create enough affordable housing in the right locations so that we can effectively deal with many of the issues intertwined with the affordable housing crisis—such as traffic congestion, concentrated poverty, regional economic competitiveness, sustainable development, clean air and water, and school quality. Without public dollars or public incentives to entice private dollars to the task, the private market will fall short in producing enough decent, safe, and affordable homes and apartments for all who need them. Without both tools acting together, we have little hope of moving closer to the goal of a nation where every community is a safe, vibrant, and sustainable place to live.

To recover from the chaos of the last decade, we will need a revitalized federal role and continued aggressive efforts at the state and local level, all in partnership with the private and not-for-profit sectors. This article examines inclusionary housing efforts at the state and local level, efforts to generate new public and private investment for affordable housing at the state and local level, and then makes the case for a new direction in national policy in order to renew our nation as the land of opportunity in the decades to come.

II. Inclusionary Housing

Inclusionary housing refers to the practice of requiring the inclusion of affordable homes in the development or redevelopment of market rate housing or mixed use communities. In most cases, this takes the form of a local ordinance or policy that requires all developments of a certain size (e.g., ten or more units) or all developments that meet certain characteristics (e.g., developments that require a special permit) to include some percentage of affordable housing. For purposes of this article, inclusionary housing policies include those state and local policies that require or create incentives for the inclusion of affordable housing within market rate developments.

There are a few programs (Boulder, Colorado; Davidson, North Carolina; and Irvine, California, for example) that require essentially all residential development to include some affordable housing; however, most designate a threshold size (e.g., all developments of ten or more units).[4] Many programs include so-called "cost offsets" that are meant to help

4. Nicholas Brunick, *Inclusionary Housing: Lessons from the National Experience* (Nov. 5, 2007) (prepared for the New Jersey Council on Affordable Housing (COAH)), *available at* http://www.state.nj.us/dca/affiliates/coah/regulations/thirdroundregs/597f.pdf.

defray the cost of creating the affordable housing in the market rate developments. These cost offsets often include density bonuses (which allow a developer to build more homes or apartments on a parcel of land than would otherwise be allowed under the base zoning); zoning or design flexibility; parking reductions; fee waivers; an expedited review or approval process; tax breaks; or local, state, or federal subsidies.[5] Many programs allow developers to pay a fee in lieu of including affordable housing in the market rate development (or to donate land in lieu of including affordable housing). These fees are then typically deposited into a local housing trust fund and used to help subsidize the creation, preservation, or operation of affordable housing in the community.

Since the 1970s, more than 300 local governments and numerous states have implemented inclusionary housing programs resulting in the production and preservation of hundreds of thousands of affordable homes and apartments, many without the direct investment of any public tax revenues.[6] These programs have added to the amount of affordable housing that otherwise would have been produced over the past thirty years; they have created many of these homes and apartments in unlikely and extremely desirable locations near jobs and opportunity and in affluent communities where state and federal housing subsidies have not been historically used. They have done so largely without the need to generate a new public funding stream for housing.

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5. *Id*. (review of cost offsets from programs nationwide).

6. Although there is no definitive account of the number of state and local programs and their levels of production, the number and impact of these programs can be estimated by referring to a number of studies and organizations, many of which have conducted extensive interviews with program administrators. *See, e.g.*, Brunick, *supra* note 4; Inclusionary Housing in California: 30 Years of Innovation (Calif. Coalition for Rural Housing & Non-Profit Housing Ass'n of N. Calif 2003), *available at* www.calruralhousing.org/sites/default/files/Inclusionary30Years.pdf; *Affordable by Choice: Trends in California Inclusionary Housing Programs* (Non-Profit Housing Ass'n of N. Calif. 2007), excerpt *available at* www.calruralhousing.org/sites/default/files/SampleIHReport.pdf; Radhika K. Fox & Kalima Rose, Expanding Housing Opportunity in Washington, D.C.: The Case for Inclusionary Zoning (Policy Link 2003), *available at* www.oaklandnet.com/BlueRibbonCommission/PDFs/BlueRibbon30-DCIZ.pdf; Karen Destorel Brown, Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area (Brookings Inst. 2001), *available at* www.brookings.edu/~/media/Files/rc/reports/2001/10metropolitanpolicy_brown/inclusionary.pdf; Bonnie Heudorfer, Update on 40B Housing Production (Mar. 2007 (a report prepared for the Citizens' Housing & Planning Ass'n), *available at* www.chapa.org/files/f_122089067040BUpdate2007.pdf; Clark Ziegler, Introduction to *Inclusionary Housing: Lessons Learned in Massachusetts*, 2 Affordable Housing Pol'y Rev. 1 (Jan. 2002), *available at* www.nhc.org/pdf/pub_ahp_01_02.pdf; Jessica L. Webster, Success in Affordable Housing: The Metro Denver Experience (Bus. & Prof'l People for the Public Interest 2005), *available at* www.bpichicago.org/documents/Denver_Report.pdf.

Furthermore, these programs are products of state and local governments acting as the nation's "laboratories of democracy." Faced with challenging problems and limited resources, these governments created policies that harnessed or drew strength from residential and commercial market activity, and they helped to change the face of affordable housing. Finally, these programs hold great promise as a crucial component to addressing the interrelated issues of residential segregation, economic competitiveness, and sustainable growth.

In short, inclusionary housing programs are productive, innovative, and promising.

A. Local Inclusionary Housing Policies

Inclusionary housing programs can take the form of state or local programs. Let's start our journey in Montgomery County, Maryland, at the local level with the story of the nation's most famous inclusionary housing program.

1. Montgomery County

Encompassing 495 square miles, Montgomery County, Maryland, is located north and west of the District of Columbia. In the words of David Rusk, it is a "big box" suburban county, which means that it has a centralized county government in Rockville that provides most civic services to the population centers within its borders, which include both incorporated municipalities and unincorporated suburban growth areas.[7] In the 1950s and 1960s, Montgomery County began the transformation from a sprawling bedroom community outside Washington, D.C., into a job-rich community of its own. Federal highway construction, federal policies supporting suburbanization, and suburban federal installations such as Bethesda Naval Hospital and the National Institute of Health brought jobs and home seekers to the county. What had previously been distinct rural agricultural towns and suburban retreats such as Rockville, Gaithersburg, Chevy Chase, and Takoma Park became surrounded by newer developments in the unincorporated parts of Montgomery County with place names like Silver Spring, Bethesda, Wheaton, and Potomac.

From 1950 to 1960, the population of Montgomery County doubled to 340,928. By 1970, the population had increased by over 50 percent to 522,809. These economic and demographic changes were accompanied by

7. The term *big box county* is a formulation of David Rusk, a consultant in urban and suburban policy who is a former federal official and served as mayor of Albuquerque. Many locations in the United States are characterized by fragmented local governments—municipalities, counties, townships, special service districts, etc. that all enjoy local fiefdoms over various services in their various areas. The big box county centralizes more services at the county level without as much fragmentation. David Rusk, Cities Without Suburbs–Census 2000 (Woodrow Wilson Center Press 2003).

political changes. In 1966, a reform-minded County Council took office, which took immediate steps to address issues of racial discrimination in housing, employment, and public accommodations.[8]

At the same time, a series of reports that made up the Montgomery County Community Renewal Program[9] identified significant gaps between household income levels and affordability in the county and observed,

> Events over recent years have called attention to the fact that we can no longer expect the urban center or any one isolated suburban community to continue to provide virtually all the housing for one segment of our population-the poor and socially disadvantaged. In the past, each suburban area, in seeking its own share of the regional growth, has geared its development towards its own economic and social well-being. Zoning, building codes, subdivision ordinances, and past Federal housing policies may have indeed improved living conditions for those whose economic circumstances have permitted them to take advantage of the higher standards imposed by these restrictions, but they have also disenfranchised those who could not carry the financial burden.

In 1971, the regional focus highlighted in the report led to the Metropolitan Washington Council of Governments adopting a Fair Share Plan to redistribute HUD housing subsidies so that suburban jurisdictions such as Montgomery County and Fairfax County, Virginia, received a larger share of the affordable housing for the region, and Washington, D.C., the traditional bastion of the poor, received less. While this plan anticipated a dispersal of the region's poor, most of those helped were already residents of the suburban jurisdictions.

New demographic trends, new political trends, a growing awareness of the issue of affordable housing, and this initial reform to try to address racial and economic segregation all helped to pave the way for the organizing work of local residents. A committed cadre of Montgomery County citizens, representing groups such as Suburban Maryland Fair Housing, the League of Women Voters, and the Washington Metropolitan Planning and Housing Association, led the campaign that resulted in the enactment of the Moderately Priced Dwelling Unit Ordinance by the Montgomery County Council in 1973. The law became effective after the county board overrode the county executive's veto in 1974. This law required that all developments of fifty or more units in zones served by public water and sewer provide 15 percent of the total units as moderately priced dwelling units. A density bonus of up to 20 percent was permitted to be added to the base density in

8. Norman L. Christeller, *Political and Institutional History of Montgomery County in the 20th Century* (1997) (Montgomery County archives).

9. City Planning Assoc., *Relocation and Housing Needs, Supply and Demand, Montgomery County, Maryland* (October 1968) (Montgomery County archives) (financed in part by HUD Renewal Assistance Admin.).

the standard single family and townhouse zones.[10] In higher density town sector and planned neighborhood zones, the affordability requirement increased to 20 percent. Remarkably, the law also granted an option to the county's housing authority to purchase or rent one-third of the moderately priced dwelling units. In addition to the density bonus provided by the law and in recognition of the fact that housing affordability is linked to affordable construction, the law and related amendments to the zoning code allowed duplexes and townhouses to be constructed in what previously had been strictly single family detached zones.

The creators and administrators of the law took three steps that were crucial to its successful passage and implementation. As a first step, the administrators of the law approached the question of producing affordable homes from the supply side. At what price could homes be produced by the development industry taking into consideration the structure of the law? This approach assumed that the cost of raw land was eliminated through the provision of the density bonus, and that the price of construction would be reduced by limiting livable area and amenities within each type and size of moderately priced dwelling unit.[11]

> The approach underlying the evaluation and revision of maximum sales prices and rental limits for the Moderately Priced Housing Law is tied to the development of sales prices and rents that would actually permit the production of moderately priced units without financial loss to builder/developers. While one solution to the original pricing evaluation in 1975 could have been to simply apply cost of living or other indices to the original legally adopted limits, it was thought essential that the repricing effort evolve in the same manner which a builder/developer must derive sales prices or rents for conventionally priced dwellings.[12]

Using actual construction data from the region, the county developed criteria for five housing types (single family detached, duplex, townhouse, nonelevator apartments, and elevator apartments) and twenty variations on unit size. These criteria were then converted into concept plans, which were priced by a professional cost estimator whose considerations included land development and direct costs of construction as well as indirect costs including overhead and profit, construction loan interest, marketing and selling fees, and closing costs. This ensured that the program would actually be able to produce affordable homes.

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10. The density bonus provision provided developers with the ability to build 20 percent more housing than would have otherwise been allowed under the zoning code.

11. Montgomery County Dep't of Cmty. & Econ. Dev., *Report on the Evaluation of Current Sales Price and Rental Limits for Moderately Priced Dwelling Units and Recommendations for Revised Sales Price Limits* (Feb. 1977) (Montgomery County archives).

12. *Id*.

Second, the county included prominent local builders and developers in the deliberations leading up to the enactment of the ordinance and in the administrative challenges facing its implementation. An article by Charles Phillips, senior vice president of Kettler Brothers, a prominent Montgomery County building and development firm speaks to this effort.[13]

> We think the McKendree MPDU project has been successful mainly because it has met a real need. In Montgomery County today almost all of the housing available is priced over $45,000 and the income requisite to buy such a home with a minimum down payment is between $21,000 and $22,000. Our MPDUs start at $30,950 enabling a family with around $15,000 annual income to qualify for financing, with as little as 5% down. This provides housing for that large number of people, reported to be as much as 45% of Montgomery County's population, with family incomes of $15,000 to $20,000. . . As for most new programs, there are many bugs to be worked out. We would like to see the idea succeed, because there is such a need for housing of this type.

The Office of Housing maintained an advisory group, the MPDU Committee that consisted of involved agencies, homebuilders, and council staff that met on a regular basis and addressed administrative issues as needed.

Third, these initial efforts began a long standing and continuing practice of program evaluation, analysis, and consideration of solutions, including adjustments to program regulations and amendments to the law. To date, the law has been amended numerous times and, while not perfected, many of the programmatic issues have been addressed and resolved.

Today, over thirty years later, more than 12,000 affordable homes have been created by the ordinance and over 1,000 of these have been purchased by the Housing Opportunities Commission and made available to very low-income households as affordable rental homes. Many of these 12,000 plus homes are no longer controlled by price and have become a part of the regular market in Montgomery County. Others remain under price control, which has now been extended to a thirty-year term. These homes are located in every part of the county, with the greatest numbers in areas that have seen the greatest residential growth over the last three decades. The program has attracted over $500 million in private investment into affordable homes, improved (not dampened) property values in the county, and created a more diverse and vibrant community.[14]

2. Growth of Local Inclusionary Housing Policies

Since Montgomery County's inclusionary enactment in 1973, hundreds of counties and municipalities have adopted inclusionary housing policies. According to extensive research conducted by David Rusk, there are now

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13. Charles V. Phillips, *The Impossible Dream?*, ACTION MAG., Sept. 1976.

14. JOYCE SIEGEL, THE HOUSE NEXT DOOR (Innovative Housing Inst. 1999), *available at* www.inhousing.org.; BROWN, *supra* note 6, at 14.

more than 396 local jurisdictions with mandatory inclusionary housing policies.[15] Rusk's total includes 170 jurisdictions in California, 184 jurisdictions in New Jersey, and 42 jurisdictions in a wide variety of states and communities. An estimated 33.3 million residents, or almost 11 percent, of the 304.6 million residents in America now live in jurisdictions with inclusionary policies. These include booming suburbs, thriving college towns, mid-sized cities, affluent bedroom communities near jobs, large urban centers, resort towns (like Mammoth Lakes, California, and Jackson, Wyoming), and even rural areas (a number of the California programs are in rural communities). They can be found in every part of the country: from states like California, Colorado, New Mexico, and Wyoming in the West; to Illinois and Wisconsin in the heartland; to Florida and North Carolina in the South; to Virginia, Maryland, Massachusetts, Connecticut, New Jersey, and Vermont on the East Coast. Most programs nationwide are (1) mandatory; (2) provide an affordable housing component in the range of 10 percent to 15 percent of the total development; (3) include some cost offsets for the developer; (4) include some "in lieu of" options for compliance (e.g., paying a fee, donating land, or building affordable homes in another location as an alternative means of compliance); and (5) target households in the range of 80 percent of the Area Median Income (AMI).[16]

As the adoption of inclusionary housing programs has extended to many different parts of our nation, four major housing and progressive policy organizations are collaborating in an effort to disseminate best practices, convene key stakeholders, and promote the adoption and implementation of effective programs. In fact, the Innovative Housing Institute, the National Housing Conference, Business and Professional People for the Public Interest, and PolicyLink have initiated a National Inclusionary Housing Conference.[17]

B. Statewide Inclusionary Housing Policies

The push for inclusionary housing and inclusionary communities is not just a story about local policy. It is also a story about state policy. Over the

15. Rusk's research acknowledges that his count is not exhaustive and that it is, in fact, an undercount because it does not capture programs in a variety of places, including Florida, New York, and Illinois and does not capture all the programs in certain places, such as California. Rusk's count and the research cited in Brunick, *supra* note 4, give a sense of the breadth of the expansion of inclusionary housing programs. David Rusk, *Growth of the IZ Movement* (unpublished research memo available from author).

16. It is important to note that most programs include cost offsets and in lieu of options but many programs make these options available only at the discretion of the local government so they may not be available for every development. See note 5 *supra* for good sources to examine the characteristics of different programs around the country.

17. *See* www.inclusionary.org.

past thirty years, statewide efforts to promote inclusionary housing have grown significantly and produced positive results.

Some statewide approaches have emphasized planning and negative or positive consequences for local governments if they fail to plan for and create affordable housing.[18] To varying degrees of success, California, Florida, Oregon, Minnesota, and others have passed state laws to require or encourage local planning efforts for affordable housing.[19] California's statewide housing element law (passed in 1969) requires all communities to plan for the creation of affordable housing.[20] This central piece of legislation is buttressed by a statewide anti-NIMBY law,[21] a law that prohibits discrimination against affordable housing developments,[22] and a statewide density bonus law (enacted in 2005) that requires local communities to provide a corresponding density bonus to developers that include certain amounts of affordable housing in their developments.[23] This framework has been credited with helping to spur the development of hundreds of local inclusionary housing programs across the state as well as other creative local approaches on affordable housing.[24]

Other states have created mechanisms that empower the private market to create affordable housing in desirable communities alongside market rate housing. In Massachusetts, the presence of Chapter 40B (the Anti-Snob Zoning Act or the Massachusetts Comprehensive Permit Law) has played a major role in creating affordable housing in suburban and job-rich locations.[25] Under Chapter 40B, developers can apply for a comprehensive permit at the local level and propose the zoning on a development site

18. For a more detailed overview of state planning statutes and their impact, see Ngai Pindell, *Planning for Affordable Housing Requirements, in* Legal Guide to Affordable Housing 3–18 (Tim Iglesias & Rochelle Lento eds.) (ABA 2005).

19. Florida's statewide planning law, the Local Government Comprehensive Planning and Land Development Regulation Act, Fla. Stat. § 163.3161–3211) has helped to spur significant local action, but this has been offset by statewide laws like the Bert J. Harris Private Property Right Protection Act (also in Florida) that temper the reach of local programs and initiatives. *See also* Minn Stat. § 473.859(2)(c), 4(c).

20. Cal. Gov't Code § 65580.

21. Cal. Gov't Code § 65589.5.

22. Cal. Gov't Code § 65008.

23. Cal. Gov't Code §§ 65915–16.

24. Nico Calavita & Kenneth Grimes. *Inclusionary Housing in California: The Experience of Two Decades*, 64:2 J. Am. Planning Ass'n 150–170 (1998); Nico Calavita, Kenneth Grimes & Alan Mallach, *Inclusionary Housing in California and New Jersey: A Comparative Analysis*, 8:1 Housing Pol'y Debate (1997); Inclusionary Housing in California, *supra* note 6, at 7; *Affordable by Choice* (Executive Summary), *supra* note 6.

25. Chapter 40B has been identified as a "builder's appeal law"—Connecticut and Rhode Island have similar measures.

if they include 25 percent affordable housing. If the proposed site is located in a community with less than 10 percent affordable housing, the developer can appeal to the Massachusetts Housing Appeals Committee (a statewide appeals board) any local decision that denies the proposed development or that imposes restrictions on the development that make the development infeasible. The statewide housing appeals board has the authority to overrule the local decision and to order the local municipality to allow the development with 25 percent affordable housing to go forward (as proposed by the developer or with conditions imposed by the statewide housing appeals board). Chapter 40B has evolved into a process of negotiation between towns and developers, and most developments no longer seek relief from the housing appeals committee.

The law is still controversial, but the results are impressive. As of May 2007, 54,000 housing units had been built or approved under Chapter 40B, with over 50 percent (over 27,000 homes or apartments) of those units reserved for and affordable to households at or below 80 percent of the AMI.[26] Chapter 40B represents a large and growing share of all the affordable housing production in the state. In some years, it has produced more affordable housing than the federal allocation of low-income housing tax credits in Massachusetts. It is now responsible for well over 70 percent of the affordable housing production in the metropolitan region outside of Boston.[27] It also accounts for much of the market rate production in Massachusetts and is creating some of the most affordable market rate housing in the state.[28] In most cases, Chapter 40B has produced these affordable homes and apartments without using public funds and at density levels that are quite comparable to market rate developments. It has encouraged numerous municipalities to plan, create policies for, and develop affordable housing on their own outside of the Chapter 40B process, including the creation of numerous inclusionary housing ordinances.[29]

Chapter 40B (which is part of the state code governing zoning powers) has been complemented in recent years by Chapter 40R, which provides for the creation of smart growth zoning districts that help to create affordable housing in desirable locations, and Chapter 40S, which provides incentives in the form of additional school funding resources to local governments

26. Heudorfer, *supra* note 6.

27. *Id*.

28. *Id*.

29. Nearly two-thirds of the homeownership developments built under Chapter 40B have been built at densities of five units per acre or less, and 83 percent have been built at less than 8 units per acre or less. Of the 140 homeownership developments, densities have ranged from 0.7 units per acre to 25 units per acre. In rental developments, densities ranged from four units to fifty units per acre. Fifty percent of all rental developments have been built at a density of between ten units to nineteen units per acre. *Id*.

that approve affordable housing developments. Connecticut and Rhode Island also have anti-snob zoning laws that have produced affordable housing alongside market rate housing in desirable communities.

Some states, such as Illinois, have selected more of a middle ground between a planning requirement and a builder's-appeal law like the one in Massachusetts. In 2003, the State of Illinois adopted the Affordable Housing Planning and Appeal Act, a hybrid (part planning/part builder's-appeal) approach that was subsequently amended in 2004 and 2005.[30] The law requires all municipalities with less than 10 percent affordable housing to create an affordable housing plan that includes one of three possible goals for increasing the percentage of affordable housing and provides the municipalities with additional powers (e.g., the ability to pass mandatory inclusionary housing ordinances) to aid them in these efforts.[31]

If a municipality passes a plan and meets the goal in their plan, they are exempt from any further state action. If a municipality does not pass a plan or does not meet the goal in their plan the municipality could be subject to appeals from affordable housing developers to a state housing appeals board (as in Massachusetts). For numerous reasons, the Illinois State Housing Appeals Board is a much weaker entity than the Massachusetts Housing Appeals Committee (one of the most important reasons being that the Illinois board is still not officially up and running).[32] And yet, the law in Illinois has helped to spur a significant amount of new local and state activity on affordable housing, including a number of inclusionary housing programs, local housing trust funds, community land trusts, and the development of both affordable rental and homeownership developments in strong-market locations that are close to jobs, transit, good schools, and good amenities.

And then there is New Jersey, where the *Mt. Laurel* litigation and the New Jersey Fair Housing Act creates a statewide approach that combines

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30. *See* 310 Ill. Comp. Stat. 67 *et seq*.

31. The municipality can choose a goal of (1) reaching the 10 percent threshold; (2) increasing the percentage of affordable housing by three percentage points; or (3) making 15 percent of all new development or redevelopment affordable.

32. It is also worth noting that the 10 percent standard in the Illinois law is much easier to meet than the same standard in the Massachusetts law. Massachusetts essentially requires communities to have 10 percent of their housing stock affordable as a result of deed restrictions or because those housing units are subsidized by a government program. When the law was first passed in 1969, this meant that only two municipalities were above the 10 percent standard. In Illinois, the 10 percent test is more lenient because it is measured using census data to determine whether 10 percent of the housing units in the municipality are affordable, regardless of whether they are subsidized by a government program or deed restricted to remain affordable. When the law was first passed in Illinois in 2003, only 49 communities (based on 2000 census data) did NOT pass the 10 percent test.

rigorous planning requirements with provisions that empower the private sector to create inclusionary housing.[33] The New Jersey approach incorporates both a "planning requirement" under the supervision of the Council of Affordable Housing (COAH) as well as a builder's appeal remedy for developers under the legal framework of the *Mt. Laurel* litigation and the provisions of the Fair Housing Act. For almost two decades, under the statewide regulatory framework created by the Fair Housing Act and administered by the COAH, hundreds of towns used de facto inclusionary housing programs to create thousands of affordable units. Half of the affordable units had to be affordable to households at or below 50 percent of the AMI and half had to be affordable to households at or below 80 percent of the AMI. From 1985 to 2003, these policies resulted in the creation of over 40,000 affordable homes and apartments—with over 17,000 affordable homes and apartments created in inclusionary developments.[34]

Up until the most recent gubernatorial election, New Jersey had been engaged in a process of rewriting and adjusting the rules that govern this statewide approach. The direction of any effort to reshape the New Jersey approach is now very much in doubt under the new gubernatorial administration. Notwithstanding recent electoral events, the state's experience serves as a valuable reminder that no policy approach will ever be perfect or immutable. Good policies need ongoing evaluation, constant improvement, and adjustments to ensure that they evolve with changing conditions. New Jersey's record is impressive and its willingness to revisit its approach as the world changes is refreshing and hopeful.

C. Key Lessons from State and Local Programs

The experience from state and local inclusionary housing programs reveals a number of key lessons.

Inclusionary housing programs can produce significant numbers of affordable homes and apartments in desirable locations. In California, from 1973 to 2003, approximately 34 programs were responsible for producing over 34,000 affordable homes and apartments.[35] From 1999 to 2007 alone, 170 programs were responsible for creating 29,281 affordable homes statewide.[36] In the D.C. metro area, four programs produced over 15,000 units between 1974 and 2004.[37] In New Jersey and Massachusetts, the combination of state and local inclusionary housing policies have led to the creation and preserva-

33. *See* N.J. Stat. Ann. §§ 52:27D-301 *et seq.*

34. Lucy Vandenburg, Executive Director, and Melissa Orsen, General Counsel, N.J. Council on Affordable Housing, Presentation at the Annual Meeting of the ABA Forum on Affordable Housing and Community Development Law, Washington, D.C., May 21, 2009.

35. *Inclusionary Housing in California*, supra note 6, at 7.

36. *Affordable by Choice*, *supra* note 6.

37. Fox & Rose, *supra* note 6, at 15.

tion of tens of thousands of affordable homes and apartments in each state. In each of these locations, inclusionary housing made it possible for affordable homes and apartments to be located in areas where they had not historically been or where they are unlikely to be given high land prices and the rational propensity of developers to build higher-priced homes in such locations. Programs can also generate impressive amounts of revenue for local housing trust funds (e.g., $67 million in San Francisco from 2003 to 2007), and, in some cases, desperately needed land for additional development.

Inclusionary housing programs can help to change the face and location of affordable housing. This occurs by seamlessly incorporating affordable housing into market rate developments in desirable locations and by making affordable housing a standard part of every market rate development of a certain size. When affordable homes and apartments silently exist next to market rate single-family homes, town homes, and condominiums in places like Andover, Weston, or Lincoln, Massachusetts; in Fairfax County, Virginia; in Highland Park, Illinois; or in Palo Alto, California, the perception of affordable housing slowly begins to change.

One size does not fit all. Programs must be well-designed and effectively implemented and managed in order for these positive results to occur. All programs must be tailored to fit the local market conditions and local political climate of a particular community. Famously, Tip O'Neill, longtime member of Congress and Speaker of the House between 1977 and 1987, said, "All politics is local." When it comes to inclusionary housing, it should be said, "All success is local." This logic also applies in the case of state policies (as in New Jersey, California, or Illinois) that are meant to create incentives for local governments or the private market to act. Should a municipality adopt an inclusionary housing program? What kinds of development should it cover? Should cost offsets be included and what should they be? Should there be "in lieu of" options for developers? These kinds of questions must be answered based on what works for the market and jurisdiction involved.[38]

Management and implementation matter—a lot. A lesser known Tip O'Neill quote is apropos here: "It's easier to run for office than to run the office." In implementing and running a program, communities must be willing to invest resources in good staff; evaluate and tweak the program to address lessons learned or changing market conditions; and engage the relevant stakeholders affected by the policy—from developers and realtors to community organizations, employers, and those in need of affordable housing. Good programs continue to evolve and improve. This is true of Chapter 40B, the New Jersey approach, the local program in Montgomery County, the program in Fairfax County, Virginia (which was initially struck down

38. For a more detailed examination of national programs and their differences, see Brunick, *supra* note 4.

by the courts), and countless local programs around the country.[39] These are not simple programs to administer and often require staff expertise not typically found in the local zoning, planning, or housing office. The management responsibility encompasses development negotiation and regulation, pricing determinations, income certification and qualification, homebuyer education, program compliance, and long-term stewardship responsibilities of the affordable homes once created. Programmatic success comes about through sustained effort and consistent management.

Practicality and flexibility, not ideology, are critical. Inclusionary housing programs should not be put forth as the solution for every type of community. They work best in strong markets. The groundswell of political support necessary for passing a program is most likely to occur in markets with significant activity and high housing costs. Indeed, most of the jurisdictions with mandatory inclusionary housing programs are below 100 on the housing affordability index published by the National Association of Realtors.[40] If a community is right for inclusionary housing, be practical in crafting and implementing the program.

Inclusionary programs offer the potential for broad-based benefits beyond housing. Inclusionary housing programs create the possibility for broad-based social improvement on a range of issues. They can help to address traffic, economic competitiveness, and sustainability issues by creating more affordable homes near work and transit for a local work force. They can also help to strengthen family and community ties by allowing families to spend less income on housing and less time on commuting and by allowing important local employees to live in the community they serve (e.g., teachers, hospital employees, police and fire personnel, clergy, etc.).

Inclusionary housing programs create the possibility for greater economic and racial integration in our communities, which can lead to numerous beneficial outcomes, including, according to some recent research, improved school performance for children in poverty.[41] A recent longitudinal study followed the educational performance of low-income children in

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39. For example, a number of local governments (e.g., Cambridge, Massachusetts) have switched from voluntary to mandatory inclusionary housing programs because the voluntary programs were not producing much (if any) affordable housing. *See* Nicholas J. Brunick, *The Inclusionary Housing Debate: The Effectiveness of Mandatory Programs Over Voluntary Programs*, ZONING PRACTICE (Am. Planning Ass'n 2004), *available at* www.inclusionaryzoning.ca/wp-content/uploads/2010/01/ResourceUS_APA_IZ-PracticesSep04.pdf.

40. The index measures whether a household at median income for the region can afford the median priced home. Rusk, *supra* note 7.

41. Heather Schwartz, Do Poor Children Benefit Academically from Economic Integration in Schools and Neighborhoods? Evidence from an Affluent Suburb's Affordable Housing Lotteries (2009) (unpublished Ph.D. dissertation, Columbia University) (on file with author).

a large urban county with a long-standing inclusionary housing policy.[42] The low-income students who lived in affordable housing and who attended a "low-poverty school" (defined as an elementary school where less than 20 percent of the student body is low-income) achieved significant and substantial improvement in both math and reading skills. These significant improvements in educational performance did not materialize until after four years of attending the low-poverty school. The study illustrates the role that inclusionary housing policies can play in helping low-income children gain access to more affluent neighborhoods and schools and the much needed educational advances that can come from this access to opportunity.

III. Investment for Affordable Housing

Inclusionary housing policies, though innovative, productive, and promising, are not the answer. They are only part of the solution. They work best in locations that are blessed with strong real estate markets. Even in strong markets, they work better when they are coupled with additional resources and investment. Finally, their efficacy is greatly diminished when strong markets weaken or decline, and their impact may be nonexistent or even detrimental in locations where investment is nonexistent or markets are perpetually weak. In locations where market activity is hard to find, public and private investment must be used as a catalyst to create a diverse and sustainable community that includes both affordable and market rate housing. For all these reasons, state and local governments must generate additional public and private investment for building and rehabbing affordable housing.

A. State and Local Approaches to Generating Public and Private Capital for Affordable Housing

State and local governments already enjoy responsibility for administering, deploying, and allocating many of the federal and state resources that exist for affordable housing and community development. From HOME to CDBG to Low Income Housing Tax Credits to the use of tax-exempt bond volume cap, state and local governments play a huge role in deciding how to spend these precious resources. For this reason alone, the actions of state and local government are extremely important when it comes to addressing the affordable housing crisis and creating more equitable, sustainable, and competitive communities.

However, state and local governments can and must do more than just administer and spend these resources wisely and effectively. They must also work to generate new public and private investment for building and rehabbing affordable housing and creating healthy communities. The good news is that there are many examples to guide additional action.

42. *Id*.

B. Dedicated State Revenue Sources and Housing Trust Funds

States can create housing trust funds to help provide soft financing to build or preserve affordable housing. Thirty-eight states and the District of Columbia now have housing trust funds—many with dedicated revenue streams.[43] These dedicated funding streams include, but are not limited to, real estate transfer taxes, documentary stamp taxes, document recording fees, tobacco taxes, general obligation bond proceeds, and interest collected on title escrow amounts. The State of Florida is often identified as a model with its state housing trust fund. The passage of the Sadowksi Act in the early 1990s resulted in the largest state-level dedicated revenue stream in the country (a documentary tax stamp). It regularly generated over $500 million annually during the real estate boom years for affordable housing. Unfortunately, the State of Florida has exhibited a disturbing habit of raiding these funds for other purposes.[44] Nevertheless, the state's accomplishments in this arena are a source of inspiration for those looking to generate significant resources for affordable housing at the state level.

In the State of Illinois, half of the state's real estate transfer tax is dedicated to the Illinois Affordable Housing Trust Fund, which generated about $50 million annually during the real estate boom years. In addition, thanks to the Rental Housing Support Program Act,[45] passed in 2005, a $10 surcharge on the county recordation fee serves as a dedicated funding stream for the Rental Housing Support Program Fund. The program fund provides assistance to building owners and developers to create affordable rental apartments for households at or below 15 percent of the AMI and 30 percent of the AMI. This assistance comes in two forms: (1) operating subsidies to landlords and property owners, or (2) an upfront development grant that is used to write-down debt for new developments. During the initial years of existence, the funding stream for this new initiative generated over $30 million annually for affordable rental housing, making it the largest state-funded rental subsidy program in the country.

C. State Capital Budgets

Dedicated revenue streams can help to avoid annual political battles over appropriations, but they are not a panacea. Even if secured, the amount generated may be grossly inadequate to the task. Or the revenue stream may be based on a revenue source such as real estate transfer tax receipts

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43. *See* Center for Community Change's Housing Trust Fund website, *available at* www.communitychange.org/our-projects/htf/housing-trust-funds (last visited Oct. 15, 2009); for a complete list of the states with housing trust funds, *see* www.communitychange.org/our-projects/htf/other-media/HTFunds%20in%20the%20US%202009pdf (last visited Oct. 15, 2009).

44. *See* Tim Padgett, *Despite the Crash in Prices, Affordable Housing Still Lacking*, Time, Feb. 25, 2009.

45. 310 Ill. Comp. Stat. 105 *et seq.*

that fails to produce much revenue during economic downturns. However, states can diversify and expand their funding sources by including affordable housing in their capital budgets, i.e., those budgets that are created when states issue general obligation bonds to raise cash for long-term assets and infrastructure investment. California recently included $2 billion in its capital budget for affordable housing; Massachusetts included over $1 billion for affordable housing in a housing bond issuance in 2008, and the State of Washington has used its capital budget to provide funding for its state housing trust fund.[46]

The rationale is simple. Capital budgets are usually passed in order to: (1) build or rehab infrastructure (roads, bridges, transit, schools, universities, etc.) that the private market will not undertake without public revenues; (2) create jobs and stimulate the economy; and (3) generate tax revenues, new tax base, and a foundation for long-term economic growth.

Affordable housing fits the bill on all three counts. Affordable housing is social and economic infrastructure; and the private sector will not build or rehab enough affordable housing without public investment. Building and rehabbing affordable housing creates a wide array of blue collar, white collar, and green collar jobs—from dry-wallers, roofers and carpenters to architects, lawyers, surveyors, and realtors. It stimulates the economy—$1 of housing investment generates over $2 worth of additional economic activity.[47] It generates not only new tax base and tax revenue (through the job creation and economic stimulus) but in many states, it also directly generates real estate transfer taxes and property tax revenues, which most public works projects do not. According to a model developed by the National Association of Homebuilders, on average, building 100 affordable apartments generates 151 jobs, $7.3 million in new local income, and over $3 million in taxes in the first year as well as ongoing benefits each year in these categories.[48]

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46. California dedicated $2 billion out of a $40 billion capital plan; Massachusetts dedicated $1.275 billion. *See* Press Release, Office of the Governor, State of Massachusetts, Governor Patrick Signs $1.275 Billion Housing Investment Bill (May 29, 2008), *available at* www.mass.gov (last visited May 1, 2009); *see also* Alex Ruiz, *Massachusetts' Governor Files $1.1 Billion Housing Production and Preservation Bond Bill*, 1(1) J. Tax Credit Housing 29–30 (Jan. 2008).

47. See Oregon Housing & Community Services, *Housing As An Economic Stimulus*, at 3,5, *available at* http://www.oregon.gov/OHCS/DO_EconomicStimulus.shtml (referring to the IMPLAN (Impact Analysis and Planning) professional software developed by the University of Minnesota). Not only does the construction and rehab and operation/existence of the housing generate benefits, but the housing itself often generates a permanent, economic stimulus payment for incoming families whose housing expenses may decrease from 50 percent to 30 percent.

48. *See* Nat'l Ass'n of Homebuilders, *The Local Economic Impact of a Typical Tax Credit Project: Income, Jobs, and Taxes Generated*, *available at* www.nahb.org/fileUpload_

With affordable housing, the social and economic benefits extend to energy and the environment, to taxpayers, and to those most in need. Because residential and commercial buildings use nearly 40 percent of our energy and are responsible for 38 percent of our greenhouse gas emissions, capital dollars for affordable housing can also help to reduce carbon footprints and increase energy efficiency.[49] Because the disabled, the homeless, and other vulnerable populations are often housed in state-run or state-financed homeless shelters, mental institutions, emergency rooms, or prisons, building affordable housing where they are able to live more independently can save money for taxpayers over the long run.[50] Last but not least, affordable housing provides an economic boost to those most in need—from seniors choosing between rent and medicine to working families struggling to make ends meet.

In the early morning hours of June 1, 2009, thanks to the persistent and strategic efforts of a determined group of religious organizations, housing advocates, and civic groups, the Illinois General Assembly voted unanimously for a capital bill that included approximately $140 million for building and rehabbing affordable housing—$100 million for building and rehabbing affordable housing generally; $30 million for building and rehabbing supportive housing specifically; and the balance for specific affordable housing projects.[51] These capital dollars will be administered by the state's housing finance agency, the Illinois Housing Development Authority, and will help to replace the real estate transfer tax receipts, which are absent in a moribund real estate market, that would normally be funding the state's Housing Trust Fund. The $130 million for to-be-determined projects represents about three to four years worth of real estate transfer tax receipts that would normally be appropriated from the trust fund.

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details.aspx?contentTypeID=3&contentID=35601&subContentID=119693; *see also* Helen Fei Lui & Paul Emrath, *The Direct Impact of Home Building and Remodeling on the US Economy*, Oct. 7, 2008, *available at* http://www.nahb.org/generic.aspx?sectionID=734&genericContentID=103543&channelID=311.

49. According to the US Department of Energy, commercial and residential buildings use 40 percent of the nation's energy and are responsible for 38 percent of its carbon emissions. Rehabbing and "greening" our multi-family housing stock (while making or keeping it affordable) can make a significant contribution. U.S. Energy Info. Admin., Annual Energy Outlook (2007), *available at* www.eia.doe.gov/oiaf/aeo/index.html.

50. There many examples of this, *e.g.*, D.P. Culhane, S. Metraux & T. Hadley, *Public Service Reductions Associated with Placement of Homeless Persons with Severe Mental Illness in Supportive Housing*, 13(1) Housing Pol'y Debate (2002).

51. The campaign was led by United Power for Action and Justice, Business and Professional People for the Public Interest, Housing Action Illinois, the Illinois Housing Council, the Supportive Housing Providers Association, and the Chicago Coalition for the Homeless.

D. State Tax Incentives

States can also use the tax code to generate additional private investment for affordable housing. At least fifteen states now have state tax credit programs that help to generate private equity for building and rehabbing affordable housing.[52]

Some of these states have modeled their programs with some adjustments on the federal low-income housing tax credit program. Under these programs, an investor that provides equity to an affordable housing development receives tax credits that can be used to offset income tax liability (similar to the federal low-income housing tax credit). In a number of states, the credit period is less than ten years (the length of the federal credit period), thereby making it a more attractive option for investors. In North Carolina, the state has added a unique twist to the program. The state's tax credit is refundable, which means that it can be converted into a no-interest loan from the North Carolina Housing Finance Agency. This ensures that if no investor wants to buy the state tax credits, there will be equity for the affordable housing deal. The North Carolina approach has garnered the approval of the IRS and has allowed the state to accomplish greater affordability in tax credit deals. The state tax credit is only available to developers that also have an allocation of federal low-income housing tax credits for their project. To date, according to the North Carolina Housing Finance Agency, the state credit has financed 18,333 apartments in 360 properties in 77 counties in North Carolina and has leveraged $6.72 of affordable rental housing for every $1 of the refundable credit.[53]

In a few states, such as Illinois, Missouri, and New Mexico, the state tax credit program is a donation credit program, where donors of land, dollars or services to affordable housing projects can receive a credit of some value against their state income tax liability. The Illinois Affordable Housing Tax Credit Program[54] provides a tax credit against state income tax liability for entities or individuals that donate cash or property to a qualified nonprofit entity that in turn uses the donation for an affordable housing development.[55] The State Donations Tax Credit Program provides a $0.50 tax credit for every dollar of value donated to a qualifying affordable housing development. The credit is also freely transferable and therefore may be sold to generate additional equity for affordable housing develop-

52. *See* www.novoco.com/low_income_housing/lihtc/state_lihtc.php.

53. North Carolina Housing Finance Agency, *Facts on the State Housing Credit, available at* http://www.nchfa.com/About/facts/shtcfactsheet.pdf (last visited Oct. 31, 2009).

54. 20 Ill. Comp. Stat. Ann. 3805/7.28.

55. For a more detailed explanation of the Illinois state donation credit, *see* Kelli Harsch et al, *Initiatives and Tools for the Preservation of Affordable Housing in Illinois*, 18(4) J. Affordable Housing & Cmty. Dev. L. 403–37 (2009).

ments. The Illinois program generates well over $40 million in donations and private equity annually for affordable housing.

E. Local Funding Sources

Like the states, local governments can also create housing trust funds and establish dedicated funding streams for housing. Over 550 city and county housing trust funds are now generating more than $1.6 billion annually for affordable housing. Examples of local dedicated funding streams include, but are not limited to, real estate transfer taxes, teardown taxes, development linkage fees and development impact fees, fee in lieu payments, rental or condo conversion fees, local excise taxes, and bond revenues.[56]

Local governments can also use tax increment financing (TIF) dollars creatively to help support the rehab, construction, or (in some cases) operation of affordable housing. Tax increment financing uses the anticipated increase in property values and the growth in property tax revenues from a development district to capitalize needed public improvements. The City of Chicago has created TIF districts on an ambitious scale (158 active TIFs to date). These TIF dollars have served as a much-needed source of gap financing for affordable housing transactions. Most often, these TIF dollars are bridged by a private lender that is repaid over time by the city from TIF revenues.

However, a review of public records by housing policy and advocacy groups in Chicago revealed that from 1995 to 2007, less than 5 percent of annual TIF funds were spent on affordable housing.[57] As of 2007, approximately $1 billion in available TIF funds were present in TIF districts across the city.[58] In 2007 alone, those TIF funds generated approximately $550 million in new revenue.[59] These compelling facts, coupled with the ongoing need for more affordable housing in Chicago, led an array of community-based, religious, labor and civic organizations to launch an advocacy campaign called Sweet Home Chicago in July 2009 to increase the amount of TIF dollars that are dedicated to the construction and rehab of affordable housing. The campaign's goal is for the City of Chicago to dedicate 20 percent of annual TIF funds to affordable housing construction and preservation, which could result in an increase of $100 million annually for affordable housing investment in Chicago.

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56. *See* www.communitychange.org/our-projects/htf/housing-trust-funds (list of dedicated revenue sources for local housing trust funds).

57. Julie Dworkin, Tax Increment Financing Funding and Affordable Housing: An Analysis of Current TIF Resources and City of Chicago TIF-Funded Housing 1995-2008 (June 2009) (prepared by the Chicago Coalition for the Homeless for the Sweet Home Chicago Coalition), *available at* http://www.chicagohomeless.org/files/images/CCH_TIF_Report_Ka.pdf

58. *Id*.

59. *Id*.

In addition to the Sweet Home Chicago campaign, a coalition of community organizations in the Rogers Park neighborhood in Chicago have proposed to create the first TIF completely dedicated to preserving and rehabbing rental housing.[60] If successful, this TIF would create a new stream of investment for preserving and upgrading the affordable, multi-family housing stock in one of Chicago's most diverse, lakefront neighborhoods.

F. Inclusionary Housing and More Investment—Two Sides of the Same Coin

All too often, we discuss inclusionary housing policies and efforts to increase investment in affordable housing as separate subjects. But it is only through using these two tools in concert that we can hope to create an America of sustainable, equitable, and livable communities.

Operating on their own, inclusionary housing policies will not directly address the challenges of communities that are desperately trying to attract new investment. An inclusionary housing policy in the Bronx in the early 1980s, or in Camden, New Jersey, in the 1990s, or in certain neighborhoods on Chicago's West Side, for instance, would have minimal impact because private developers are not building in these areas. It is true that inclusionary housing policies can indirectly help disinvested communities by relieving them of the burden of serving as host to an overconcentration of poverty and low-cost housing. But that alone is not sufficient to reverse the decline of locations that need new investment.

New York City provides a good example. In the early 1980s, the city was plagued with over 12,000 city-owned vacant lots and properties, poor fiscal health, and countless neighborhoods in need of new investment. The city invested billions of dollars in those vacant lots and properties, worked collaboratively with community organizations and with both nonprofit and for-profit developers, and produced or rehabbed over 200,000 homes and apartments (most of them affordable). New York City now owns fewer than 1,000 vacant parcels (in comparison, Chicago has more than 15,000 city-owned parcels and the number is increasing), and the city has largely rebuilt and repopulated neighborhoods long regarded as unsalvageable.[61] These kinds of necessary efforts, of which there are many, are only possible with public resources and incentives for private investment that pave the way for rejuvenated market activity. Gentrification became a problem in many unlikely spots in the late 1990s because of the success of community development corporations using affordable housing dollars to revive struggling neighborhoods. However, these efforts to rebuild disinvested

60. A number of community organizations and the local alderman are pursuing a neighborhood-based TIF for parts of the Fiftieth Ward in the Rogers Park neighborhood on Chicago's far North Side. The neighborhood is racially and economically diverse and rich in traditional Chicago apartment buildings.

61. Dennis Hevesi, *Transforming City's Housing: Act 2*, N.Y. Times, May 2, 2004.

communities need concurrent efforts in stronger markets to produce more affordable homes and apartments in those locations as well.

It is often only because of inclusionary housing policies that one can use public dollars to build affordable housing in more affluent communities or stronger markets. And, in stronger markets, the impact of inclusionary housing is significantly enhanced when combined with public or private resources to subsidize affordable housing. Inclusionary housing programs often target households at or above 60 percent of the AMI. In some cases (in extremely expensive markets), the income targeting is even higher (upwards of 120 percent of AMI in some locations). However, by layering in public subsidies with an inclusionary housing requirement, a local jurisdiction can create more affordable homes at a more affordable price than would normally be required under the inclusionary program. Furthermore, they can accomplish this while using less public subsidy than would be required for a conventional affordable housing development without an inclusionary requirement.

In New Jersey, local inclusionary requirements have been successfully combined with federal, state, or local funding sources to create affordable and mixed-income developments. In California, inclusionary housing ordinances have spurred for-profit developers to partner with not-for-profit developers to complete successful mixed-income developments, which often use public investment to make housing units more affordable than they otherwise would be under the inclusionary housing ordinance.[62]

In Boulder, Colorado, the local housing authority, Boulder Housing Partners, has successfully used the local inclusionary housing ordinance in conjunction with public subsidies to create an ambitious and exciting new mixed-income development. The Holiday Neighborhood is a 27-acre development which consists of 333 homes and apartments (195 market rate; 138 affordable), small local businesses, a two-acre park, community gardens, and an extremely diverse mix of much-needed affordable housing. If the Holiday Neighborhood had been developed as a basic project under Boulder's inclusionary housing law, it would have created about 66 affordable apartments (20 percent of the total), all of which would have been targeted at households earning somewhere between 60 percent and 80 percent of the AMI. Instead, this project includes twice as many affordable units, i.e., 138 affordable homes and apartments, which amounts to 40 percent of the Holiday Neighborhood. Fifteen percent of the units serve households at or below 50 percent (with some of the units affordable to households below 40 percent of AMI, and some affordable to households below 30 percent of AMI). As a result the project provides a true mix of incomes and housing types. Finally, the housing authority generated funds from the sales proceeds of the land to help finance additional development activities.

62. E.g., Home Builders Ass'n of N. Cal. and Non-Profit Housing Ass'n of N. Cal., *On Common Ground: Joint Principles on Inclusionary Housing Policies*, July 2005 (Joint policy brief), *available at* www.nonprofithousing.org/pdf_pubs/Inclusionary_Principles.pdf.

In Montgomery County, the Housing Opportunities Commission (HOC), which is the public housing agency, has the right of first refusal to purchase up to one-third of the affordable homes or apartments in any inclusionary development. The HOC has used low-income housing tax credits and other state and local housing programs as a financing source for purchasing these affordable town homes at the affordable sales price. Without the HOC's efforts, these developments would provide affordable homeownership only to households at or above 60 percent of the AMI. With the HOC's efforts and its creative use of housing programs, some of the town homes they purchase serve households at or below 30 percent of the AMI. Far fewer public dollars are used by the HOC to acquire these town homes than would be used to create affordable apartments as part of a new construction or acquisition/rehab tax credit deal.

The bottom line is that both inclusionary housing policies and robust public and private investment are needed to create sustainable and equitable communities across America. And we need to use these tools together to maximize the impact of our actions.

IV. Federal Policy for a More Sustainable, Equitable, and Competitive America

State and local government action is essential but not sufficient to creating sustainable, equitable, and competitive communities. The federal government must be the leader when it comes to providing additional dollars for building and rehabbing affordable housing. And, the federal government must demand inclusionary innovation from state and local governments when they receive federal funds for housing, transportation, or the environment.

A. Obama Administration

The Obama administration has taken a number of positive steps. It has proposed to increase funding for the HOPE VI program, expand its scope, and rename it as the Choice Neighborhoods program. This would allow federal resources to be used to build and rehab affordable housing and revitalize communities in need of new investment. HUD has proposed a Catalytic Investment Competition Grants program to fund innovative economic development initiatives in areas in need of new investment and is suggesting that these new funds be used in concert with affordable housing development dollars (e.g. Choice Neighborhoods) to maximize the potential positive impact of creating both jobs and housing in areas of need. It has announced the creation of a Sustainable Communities Initiative to stimulate state, regional, and local action to link land use, housing, and transportation investments and to promote affordable housing and sustainable growth. HUD has already begun to act cooperatively with the Department of Transportation and the Environmental Protection Agency to promote the shared goals of affordable housing, community development, sustainable development, and mass transit. It has proposed new revenues in both the FY 2010 and FY 2011 budget to capitalize the National Housing Trust Fund at the level of $1 billion and to launch the Choice Neighborhoods program. Finally, in addition to all of these proposals, the administration has actually delivered on increased resources for affordable housing and community development through the American Recovery and Reinvestment Act. A decent beginning, but the real work remains to be done.

B. Inclusionary Innovation: Toward a National Inclusionary Housing Policy

We cannot just throw more money at our housing and community development challenges and expect all to be made right. We are emerging from an era in our history where trillions of public and private dollars were poured into the housing industry (mostly on the homeownership side). These dollars largely carried our economy through the weak growth years of the Bush administration but left an extremely painful reckoning for this spending spree.[63] In addition, federal money for transportation, housing, and community development at times has served to exacerbate sprawl and to increase the concentration of poverty. Our investment must be focused and disciplined–to areas of sustainable growth and opportunity, to locations with transparent and ethical governments, and to locations and developments supported by social capital.

The federal government should target and focus more of its investments in housing and community development in metropolitan areas. According to the Brookings Institution, the nation's 363 metro areas represent 83 percent of our population and generate more than 90 percent of our gross domestic product. The top 100 metro areas, although covering only 12 percent of our nation's acreage, include two-thirds of our population and generate 75 percent of our gross domestic product.[64] In short, our metro regions house most of our population, talent, entrepreneurial activity, and the economic industries that are critical to our nation's future prosperity. More (though certainly not all) of our federal investments should be targeted toward metro areas, and federal policy should encourage state and local governments to invest more and to concentrate those investments near jobs, transit, and opportunity.

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63. It is worth pointing out that the foreclosure rates for state housing finance agency homeownership programs, where homeownership assistance and counseling are provided, are extremely low.

64. Bruce Katz, Mark Muro & Jennifer Bradley, *Miracle Mets: Our fifty states matter a lot less than our 100 largest metro areas*, DEMOCRACY, J. OF IDEAS, Spring 2009, at 22–35, *available at* www.brookings.edu/articles/2009/0311_metro_katz.aspx; Bruce Katz, What Comes Next for Our Metro Nation: The New Forces Driving Regionalism, Remarks Prepared for the Regional Policy Conference, Univ. of Minnesota (Sept. 23, 2009), *available at* www.brookings.edu/speeches/2009/0923_regionalism_katz.aspx.

The federal government should use its resources, both financial and otherwise, to reward and invest in those state and local governments whose policies and practices are transparent and efficient and that promote inclusive and sustainable development. Federal education, transportation, housing, and environmental dollars should be contingent upon local, regional and state actions to plan for and require affordable housing in new developments in locations near jobs, transit, and opportunity. Specific inclusive changes in local and regional land use plans and practices should be a predicate for federal investment. For example, Senator Dodd's proposed Livable Communities Act, which promises new federal investments in communities that work to integrate affordable housing, transportation, and the environment, should require the inclusion of affordable housing.

Innovation and inclusion should not be limited to planning for sustainability. The federal government should refuse to fund corrupt state or local governments. If state or local governments exhibit a continual practice of corrupt behavior, then the federal government should consider administering housing funds directly in those locations or not making investments in those locations at all.

The federal government should fund affordable housing investments that are buttressed by significant social capital. Whether the developer is for-profit or not-for-profit, whether the housing development is located in a thriving suburb or an inner-city neighborhood or rural town that is trying to claw its way back to better days, the federal government should invest in housing developments where success is enhanced by the presence of strong institutions, such as supportive community organizations, churches, synagogues, thriving neighborhood schools, or new employment centers. The story of the rebirth of neighborhoods in Brooklyn and the Bronx is instructive. The East Brooklyn Congregations (EBC) succeeded in building 3,000 new, affordable homes on vacant lots in neighborhoods where no one wanted to invest; some 1,500 more homes are in the works. The South Bronx Churches (SBC) and other community organizations have built thousands more homes in the Bronx under even tougher conditions.[65] These efforts have succeeded despite concerns about building affordable housing in poor neighborhoods, because the local community conceived of the initiatives and fought for their implementation. Moreover, the people who buy or rent these homes are vetted, counseled, and supported by community institutions, resulting in almost nonexistent foreclosure and vacancy rates.[66]

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65. Michael Gecan, After America's Midlife Crisis 39–40 (MIT Press Books) (2009).

66. *NPR* recently ran a story highlighting the astonishing lack of foreclosures among the thousands of Nehemiah Homes. Jim Zarroli, *Low-Cost Brooklyn Housing Sees Few Foreclosures* (National Public Radio broadcast Oct. 20, 2009), *available at* www.npr.org/templates/story/story.php?storyId=113931948. The *New York Times* also published a recent article. Michael Powell, *Old Fashioned-Bulwark in a Tide of Foreclosures*, N.Y. Times, Mar. 5, 2010.

The federal government must have the courage and the discipline to invest in areas of growth and opportunity, in states and local governments that are transparent, ethical, and focused on sustainability, and in locations where social capital is present. Without this kind of courage and discipline, we will be hard-pressed to revitalize communities down on their luck or to improve the livability of communities caught in the golden hand-cuffs of high housing prices, heavy traffic congestion, and the jobs-housing mismatch.

C. Investment

The federal government should increase, simplify, and diversify our national investment in affordable housing with a renewed emphasis on rental housing (as well as truly affordable homeownership for those who are ready). To the greatest extent possible, these increased federal resources (from public funding streams and private equity generated by tax credit programs) should be flexible and simple to use and easily mixed together for maximum impact on the same developments.

The current economic recession demonstrates the need for diversity in federal resources. Over the past 20 years, the nation became overly dependent on the Low Income Housing Tax Credit Program (LIHTC) for housing production. The program's investor base, consisting almost entirely of financial institutions and the GSEs (Fannie Mae and Freddie Mac), became dangerously narrow. As a result, at a time when housing resources were critically necessary to stimulate the economy, create jobs, and help those most in need, the financial crisis effectively disabled the nation's largest housing production program.[67]

Notwithstanding all this, the LIHTC is a strong program. Since its inception, it has generated over $75 billion of equity to build or rehab two million affordable apartments.[68] Until recently, it annually generated tens of thousands of affordable apartments, hundreds of thousands of jobs, and millions of dollars in new tax revenue.[69] The private-public partnership at the heart of the program has resulted in an astonishingly low default rate, especially

67. In 2007, the LIHTC was capable of generating $8 billion to $9 billion annually in equity for affordable housing. During the current economic crisis, it has generated only about $4 billion annually. *See, e.g.*, Terry Pristin, *Shovel-Ready, but Investor-Deprived*, N.Y. Times, May 6, 2009, *available at* http://www.nytimes.com/2009/05/06/realestate/commercial/06housing.html (last visited May 6. 2009); Ernst & Young, Low-Income Housing Tax Credit Investment Survey (Oct. 2009) (prepared for Enterprise Community Partners, Inc. and LISC), *available at* http://www.enterprisecommunity.org/public_policy/documents/lihtc_legislative_study.pdf; Donna Kimura, *Where Does the LIHTC Go?*, Affordable Housing Fin., Jan. 2009, *available at* www.housingfinance.com/ahf/articles/2009/jan/0109-housing-lihtc.htm.

68. Wilfred N. Cooper, Jr., *Protect the Public-Private Partnership*, Tax Credit Advisor, Aug. 2009, *available* at http://www.wncinc.com/Downloads/WNCOpEdTCA.pdf.

69. Joint Center for Housing Studies of Harvard University. *The Disruption of the Low-Income Housing Tax Credit Program: Causes, Consequences, Responses, and Proposed*

in this era of record foreclosures. According to Ernst & Young, the foreclosure rate for LIHTC developments is less than one-tenth of 1.0 percent, a rate much lower than the foreclosure rate for other categories of residential, commercial, and industrial property.[70] The program should be strengthened and simplified, but also needs to be augmented with more robust direct spending programs that allow an aggressive and effective response to housing issues in both good times and bad.

So, what might a robust, diverse, and flexible investment policy for affordable housing look like? One, we should dedicate additional resources to production/rehab programs—HOME, Choice Neighborhoods, the National Housing Trust Fund, etc. To the extent possible, we should make these programs more flexible in terms of their use on specific kinds of development so that they can be used for the acquisition of all kinds of properties (from vacant condos to existing buildings to foreclosed or troubled properties to vacant land) and for the development of all kinds of affordable housing. In an ideal world, we might create one large, flexible housing production source that could be used for the full spectrum of affordable housing (from homes for those with moderate-incomes to homeless veterans). Two, we should get back to investing in the *operation* of affordable housing. This could take the form of a revived project-based Section 8 program that could be coupled with revived production programs to serve lower-income households. Three, we should simplify and strengthen the LIHTC by (1) incorporating some of the affordable housing industry's recent suggestions for expanding the base of interested investors; (2) making it simpler and more efficient for investors to use the credit; and (3) continuing the process begun under HERA in 2008 to make the tax credit easier to combine with other federal, state, and local housing programs without financial penalty.[71]

Correctives. With Support from the What Words Collaborative. December 2009, p. 13. Available Online: http://www.jchs.harvard.edu/publications/government programs/disruption_of_the_lihtc_program_2009.pdf.; HUD Low-Income Housing Tax Credit database, http://www.huduser.org; National Association of Home builders; and Affordable Rental Housing A.C.T.I.O.N., http://www.rentalhousing action.org

70. Ernst & Young, Understanding the Dynamics IV: Housing Tax Credit Performance 49 (June 2007), *available at* http://www.ey.com/Publication/vwLUAssets/Tax_Understanding_the_dynamicsIV/$FILE/Tax_Understanding_the_dynamics_IV.pdf

71. Some of the basic proposals for improving the LIHTC can be found in the following documents: Ernst & Young, *supra* note 67; Federal Bank of St. Louis, *Innovative Ideas for Revitalizing the LIHTC Market* (Nov. 2009), *available at* www.federal reserve.gov/communitydev/other20091110a1.pdf. Joint Center for Housing Studies of Harvard University. *The Disruption of the Low-Income Housing Tax Credit Program: Causes, Consequences, Responses, and Proposed Correctives* (Dec. 2009), *available at* http://www.jchs.harvard.edu/publications/governmentprograms/disruption_

Such an investment policy would need to be combined with the practice of inclusionary innovation. These funds should be invested in locations (both urban and rural) of growth, with jobs, and in need of reinvestment where there is social capital to help ensure success.

This investment and targeting policy should place a priority on rehabbing and revitalizing the existing rental housing stock.[72] A priority also should be given to ensuring the long term affordability of this stock, once rejuvenated. The folly of the last decade was built largely on an obsession with unaffordable homeownership. Affordable homeownership is a bedrock piece of the American dream, but it is meaningless without an adequate supply of decent, affordable rental housing. Reinvesting in our apartment stock could be a strategy for revitalizing poor neighborhoods, making affluent neighborhoods more livable and sustainable, creating blue and green-collar jobs for people in areas of high unemployment and in areas of opportunity, increasing the energy efficiency of our housing stock, and enhancing the livability and competitiveness of many of our metropolitan regions.

V. Renewing the Land of Opportunity

> To elevate the condition of man. . . . To lift artificial weights from all shoulders; To clear the paths of laudable pursuit for all; To afford all, an unfettered start, and fair chance, in the race of life. . . . ABRAHAM LINCOLN, 1861

America has been a land of opportunity for so many—a place where the combination of liberty and hard work can create healthy families, sustainable communities, a competitive economy, and a vibrant future. Lincoln's quote from 1861 reminds us that a land of opportunity must be continually renewed and recreated by human action—by laws that protect the freedom to labor and create, by policies that promote inclusive and sustainable communities, and by common investments in education, infrastructure, and affordable housing.

We need more affordable housing. But, we also need more affordable housing in good neighborhoods near jobs, good schools, transit, and parks. If we do not accomplish both goals, we will be unable to successfully overcome the economic, energy, transportation, and environmental challenges that confront us as a nation and a human race. We will be unable to renew our future as a land of opportunity.

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of_the_lihtc_program_2009.pdf. A broad national coalition is pushing for legislation that includes some of these proposals. *See* www.rentalhousingaction.org.

72. Mike Gecan, of the Metro Industrial Areas Foundation, describes this as a "skunkworks devoted to retrofitting all American apartment buildings . . . with the boilers, windows, electrical systems, and plumbing improvements that would guarantee at least two more generations of useful life and would dramatically cut their energy use and energy costs." He points out that there are 1.6 million such units in New York City alone. GECAN, *supra* note 65, at 116–17.

Our country has a proud history of actions to promote affordable housing and community development, including land grants for households moving to and settling the American West (maybe our nation's first housing and land use subsidy for working families), the GI Bill, the Fair Housing Act, and numerous efforts to construct or rehab affordable rental housing and promote homeownership. More recently, our state and local governments have led the way with inclusionary housing policies and increased resources for housing that expand opportunity for all.

We can fulfill and renew our nation's promise as the land of opportunity by drawing on our past, learning from and building on local and state successes, and revitalizing our federal government's role.