

Empty Laws Make for Empty Stomachs: Hollow Public Housing Laws in Utah and Other States Force the Nation's Poor to Choose Between Adequate Housing and Life's Other Necessities

I. INTRODUCTION

Section 8, the projects, vouchers, rental assistance, affordable housing, the tax credit, low-income housing and moderate-income housing are all words or terms used to describe forms of public housing. Public housing programs are designed to provide housing or housing assistance to persons and families with very low to moderate income, to elderly persons, and to persons with disabilities.¹ Public housing units range anywhere from high-rise apartments to single family houses. The United States has roughly 1.3 million households living in public housing units.² These public housing units are managed by about 3,300 Housing Authorities.³ These Housing Authorities are able to fund public housing through aid received from the federal government. With these federal funds, and private funds contributed through various housing programs, Housing Authorities generally subsidize rent payments by distributing funds to either landlords or tenants of these housing units, according to plans whereby the tenants pay no more than 30 percent of their adjusted annual income for housing.⁴

While federal law encourages states to address the need for public housing, states, in turn, may require as much from their

1. United States Department of Housing and Urban Development [hereinafter HUD], HUD's Public Housing Program, <http://www.hud.gov/renting/phprog.cfm> (last visited Feb. 2, 2007). Some of these terms, particularly lower-income and public housing, are used interchangeably throughout this article.

2. The United States Department of Housing and Urban Development ("HUD") estimates that there are an additional 2.7 million renter households who receive housing assistance. See JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY [hereinafter JCHS], THE STATE OF THE NATION'S HOUSING 2006 29 (2006), <http://www.jchs.harvard.edu/publications/markets/son2006/son2006.pdf> (last visited Feb. 9, 2007). In addition to rental assistance programs, HUD has a number of programs to assist qualifying families in purchasing and owning their own homes. For a complete list of HUD's housing assistance programs, see HUD, Homes and Communities, <http://www.hud.gov/> (last visited Feb. 2, 2007).

3. See JCHS, *supra* note 2, at 29.

4. *Id.*

municipalities.⁵ Under 42 U.S.C. § 1437 (“the Housing Act”), the federal government uses its authority, based on the general welfare rationale, to legislate on local housing matters, an area traditionally left to states’ police power.⁶ The purpose of this article is to describe the nation’s need for public housing and demonstrate that, aside from California and Massachusetts whose laws provide a concrete framework whereby developers or cities desiring to build public housing may do so, state laws are insufficient at making certain that public housing is actually erected unless the city and the developer both share a goal to do so. Part II gives a brief background of how the United States’ rapid development was a substantial factor in the need to create the very first public housing laws and that rapid development continues to press lawmakers to address housing issues. Part III discusses government programs that provide funds for the erection or redevelopment of public housing, including the HOPE VI and Low Income Housing Tax Credit programs that encourage private parties to work with government agencies to help with such funding. Part IV discusses various techniques that can be employed by the government to encourage the construction of public housing. Part V discusses how a few specific state and municipal laws affect the actual development of lower-income housing, including how state laws in both California and Massachusetts have the highest likelihood of actually affecting the erection of public housing by providing a framework under which the development of affordable housing is not only more worthwhile and plausible, but more lucrative and beneficial. Part VI demonstrates how municipalities implement state requirements though a discussion of Utah’s state and municipal housing codes. Utah’s laws are particularly telling because even though some municipalities in Utah actually claim to have no shortage of public housing, statistical studies show that many residents lack adequate housing and could benefit drastically from more specific state housing laws. Finally, Part VII gives a brief evaluation of how

5. See 42 U.S.C. § 1437 (2000); U.S. CONST. amend. X.

6. See 42 U.S.C. § 1437; see also *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (All local zoning ordinances “must find their justification in some aspect of the police power, asserted for the public welfare.”). Though the federal government cannot require states to enact specific housing ordinances, it is the policy of the federal government “to promote the general welfare of the Nation by employing the funds and credit of the Nation . . . [and] to assist States and political subdivisions of States to address the shortage of housing affordable to low-income families.” 42 U.S.C. § 1437(a)(1). Thus, because the federal government has the authority to utilize the nation’s funds to encourage the development of lower-income housing, by implication, it may withhold the nation’s funds to those states and political subdivisions of states who do not address the shortage of affordable housing. So while the federal government does not necessarily have the “authority” to legislate on local housing matters, it has such authority to legislate on general welfare matters, and correspondingly encourage local legislation on housing matters through either disbursing or withholding federal funds.

and whether state and municipal laws affect the development of public housing.

II. BACKGROUND

The rapid development of the United States has always been a contributing factor to the need for public housing. Public housing policies in the United States can, for the most part, be traced back to the rapid expansion of the late 19th century.⁷ In a nation fast developing, due in large part to transient immigrants working to improve their social status in an era of economic uncertainty, the government passed aggressive anti-vagrancy laws to curtail some of the increasing social difficulties related to the nation's rapid growth.⁸ One such law went so far as to make homelessness a crime punishable by incarceration.⁹ In response to such far-reaching laws, trade unions and other workers lobbied local governments to build some of the nation's earliest public housing.¹⁰

A few decades later, the Great Depression created new and more severe problems with homelessness and again evoked a governmental response, which became the backdrop for today's public housing policies.¹¹ As "massive layoffs were swiftly followed by widespread evictions," unemployed councils emerged and advocated not only improved social and economic conditions, but cooperation between social groups and political powers to strike at the core of housing problems.¹² When the Depression made it difficult for vagrant workers and entire families alike to find suitable housing, President Franklin Roosevelt's "New Deal" allowed Congress to pass a series of acts aimed at alleviating such difficulties. One such Act was the Housing Act of 1937, which was designed in part to aid low-income families in their search for suitable housing.¹³ Seventy years later, the Housing Act is still part of the United States Code.¹⁴ This law continues to have as one of its stated goals, the assistance of "[s]tates and political

7. See Maria Foscarinis et al., *The Human Right to Housing: Making the Case in U.S. Advocacy*, 38 CLEARINGHOUSE REV. 97, 112 (2004).

8. See *id.*

9. *Id.*

10. See *id.* (citing DAVID MONTGOMERY, *CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY* 87-89 (1993)).

11. See generally HARRELL R. RODERS, *PUBLIC POLICY AND SOCIAL INSTITUTIONS*, (JAI Press 1984).

12. See Foscarinis, *supra* note 7, at 112.

13. 42 U.S.C. § 1437f (2000).

14. *Id.*

subdivisions of [s]tates to address the shortage of housing affordable to low-income families."¹⁵

More recently, another area of rapid development has had a huge affect on the need to address public housing in the United States: the housing market. With housing costs booming and household incomes on the decline, it is as difficult or more difficult today for a low- to moderate-income family to purchase a house than ever before.¹⁶ While "the generally accepted definition of affordability is for a household to pay no more than thirty percent of its annual income on housing,"¹⁷ thirty-three percent of all American households spend more than thirty percent of their annual income on housing¹⁸ and ninety-five percent of homeowners with yearly incomes less than \$20,000 have to exceed the thirty percent benchmark.¹⁹ With shortages of affordable housing, these families may be left to choose between paying rent and paying for other necessities such as "food, clothing, transportation and medical care."²⁰ So how do these persons afford housing without sacrificing other necessities of life? Realistically, many do not. Although the American dream of home ownership is at an all-time high in the United States,²¹ this dream is often intertwined with sleepless nights brought about because many homeowners sacrifice life's other necessities to achieve it.²² While some persons and families decide to sacrifice food, insurance, housing location, and other wants or needs in order to live this American dream, others turn to public housing.

15. 42 U.S.C. § 1437 (a)(1)(b) (2000).

16. See Stephen Ohlemacher, *Housing Costs Taking Bigger Bite*, DESERET MORNING NEWS (Salt Lake City), Oct. 3, 2006, at A02 (asserting that it is much more difficult now for buyers to get into the housing market because median home values have gone up thirty-two percent over the last five years while household income has declined 2.8% in that same time period).

17. HUD, *Affordable Housing*, <http://www.hud.gov/offices/cpd/affordablehousing/index.cfm> (last visited Feb. 2, 2007).

18. See JCHS, *supra* note 2, at 25.

19. See Haya El Nasser & Paul Overberg, *Traffic, Housing Costs Force Commuters to Alter Routine*, USA TODAY, Oct. 3, 2006, at A4, available at http://www.usatoday.com/news/nation/2006-10-02-commuter-routine_x.htm (last visited Mar. 7, 2007).

20. HUD, *supra* note 17 ("Families who pay more than 30 percent of their income for housing are considered cost burdened and may have difficulty affording necessities such as food, clothing, transportation and medical care."); see also JCHS, *supra* note 2, at 26.

21. Noelle Knox, *Fewer families can afford a home*, USA Today, March 21, 2006, available at http://www.usatoday.com/money/economy/housing/2006-03-21-families-real-estate-usat_x.htm (last visited Mar. 5, 2007) ("Nearly 70% of Americans own their homes, a record high, but the rate of homeownership for working families with children is lower than in 1978.").

22. See HUD, *supra* note 17 ("An estimated 12 million renter and homeowner households now pay more than 50 percent of their annual incomes for housing The lack of affordable housing is a significant hardship for low-income households preventing them from meeting their other basic needs, such as nutrition and healthcare, or saving for their future and that of their families.").

Currently, individuals and families qualify for public housing if they have very low- or low-income.²³ HUD defines very low-income individuals and families as those who earn less than fifty percent of the median income in the area in which they live and low-income individuals and families as those who earn fifty to eighty percent of the median income in their area.²⁴ However, just because a family *qualifies* for public housing doesn't necessarily mean they will receive assistance. Though there are roughly 16 million very low-income households who rent housing in the United States, only about 4 million of these households receive housing assistance.²⁵ With the rapid rise in the real estate market and lack of a corresponding rise in income,²⁶ many individuals and families simply close their eyes to the American dream of purchasing and owning their own home and turn to local, state, and federal governments for assistance in finding suitable housing. Some scholars believe that without financial support from the government, "it might well be that decent housing is simply beyond the reach of the poor."²⁷ Thus, the increase in home prices creates the motivation for local governments to provide housing assistance so people can meet even their most basic need of shelter. Accordingly, states and municipalities attempt to introduce ways to provide public housing for those low- to moderate-income individuals and families who have been priced out of suitable housing and who qualify for housing assistance, but are still denied adequate housing not simply because federal funding is unavailable,²⁸ but because there are not enough affordable housing units.

23. See HUD, HUD's Public Housing Program, <http://www.hud.gov/renting/phprog.cfm> (last visited Feb. 2, 2007).

24. See *id.*

25. See JCHS, *supra* note 2, at 29 ("HUD estimates that over four million renter households with incomes less than half of area medians now receive housing assistance, but this number represents only about a quarter of renters with incomes that low.").

26. See Ohlemacher, *supra* note 16, at A02.

27. JESSE DUKEMINIER ET AL., PROPERTY 449 (6th ed. 2006).

28. Though insufficient funding is an obstacle to providing public housing, the limited scope of this article does not cover these funding concerns in depth.

III. GOVERNMENT PROGRAMS COORDINATE HOUSING FUNDS

A variety of government-sponsored programs assist lower-income persons and families in finding adequate housing. Although there are literally dozens of programs,²⁹ only those most often employed are discussed here in detail.

A. Section 8

Section 8, which gets its name and authority from Section 8 of the United States Housing Act of 1937,³⁰ is a project-based program that currently assists more than 1.3 million persons in obtaining suitable housing.³¹ Under Section 8, the United States Department of Housing and Urban Development ("HUD") contracts with owners of multi-family housing developments to provide housing to very low- to low-income individuals and families.³² Typically, these very low- to low-income individuals and families pay the highest of either thirty percent of their adjusted income, ten percent of their gross income, or the allotted amount of their welfare payments to the housing owners, and the federal government makes up the difference for whatever the fair market value of the unit may be.³³

29. See generally HUD, PROGRAMS OF HUD (2005), <http://www.huduser.org/whatsnew/ProgramsHUD05.pdf> (providing a comprehensive overview of all HUD's major programs).

30. See *id.* at 74 ("Legal Authority: Section 8 of the U.S. Housing Act of 1937 (42 U.S.C. 1437(f).").

31. See *id.* at 72.

32. See *id.*

33. See HUD's Public Housing Program, <http://www.hud.gov/renting/phprog.cfm> (last visited on Mar. 5, 2007) ("The Total Tenant Payment (TTP) in this program, would be based on your family's anticipated gross annual income less deductions, if any. HUD regulations allow HAs to exclude from annual income the following allowances: \$480 for each dependent; \$400 for any elderly family, or a person with a disability; and some medical deductions for families headed by an elderly person or a person with disabilities. Based on your application, the HA representative will determine if any of the allowable deductions should be subtracted from your annual income. Annual income is the anticipated total income from all sources received from the family head and spouse, and each additional member of the family 18 years of age or older.

The formula used in determining the TTP is the highest of the following, rounded to the nearest dollar:

- (1) 30 percent of the monthly adjusted income. (Monthly Adjusted Income is annual income less deductions allowed by the regulations);
- (2) 10 percent of monthly income;
- (3) welfare rent, if applicable; or
- (4) a \$25 minimum rent or higher amount (up to \$50) set by an HA.").

B. Vouchers

Two types of vouchers, also known as Certificates, currently serve as Section 8's main programs for funding lower-income housing: project- and tenant-based vouchers.³⁴ The federal government provides funding for vouchers to local Public Housing Authorities ("PHAs"). PHAs then distribute these funds in the form of vouchers to either landlords or tenants of lower-income housing.³⁵ *Project-based* vouchers provide rental subsidies for lower-income persons and families "who live in specified housing developments or units,"³⁶ while *tenant-based* vouchers provide similar subsidies while allowing the qualified individual or family to choose their housing from the private market.³⁷ Vouchers can also come in the form of home-ownership voucher assistance and enhanced voucher assistance.³⁸ Through home-ownership vouchers and enhanced vouchers respectively, PHAs distribute vouchers to help with monthly expenses incurred by first-time homeowners and families who have been adversely affected by a HUD housing decision, such as a decision to terminate a project-based voucher for the housing project in which the family lived.³⁹

While vouchers have served as the main avenue for funding public housing, federal funding for public housing has dropped dramatically over the last thirty years.⁴⁰ With the drop in federal financing, the federal government has initiated programs aimed at encouraging private individuals and organizations (profit and not-for profit) to invest in developing lower-income housing. The most significant such programs today are HOPE VI and the Low-Income Housing Tax Credit.⁴¹

34. *See id.* at 73-77.

35. *Id.*

36. *See* HUD, *supra* note 29, at 76.

37. *See id.* at 73-75. (At least seventy-five percent of funds granted to Public Housing Authorities for vouchers must go to families with incomes less than thirty percent of the area median income. Up to twenty percent of these funds may be distributed through project-based vouchers.)

38. *See id.* at 74.

39. *See id.*

40. *See* Foscarinis, *supra* note 7, at 103 (citing CUSHING DOLBEARE & SHEILA CROWLEY, NATIONAL LOW-INCOME HOUSING COALITION, CHANGING PRIORITIES: THE FEDERAL BUDGET AND HOUSING ASSISTANCE 1976-2007 (2002), <http://www.nlihc.org/doc/changingpriorities.pdf>) ("Between 1976 and 2002 budget authority for federal housing assistance dropped by \$28.1 billion. In January 1977 the Ford administration submitted to Congress a budget request for the U.S. Department of Housing and Urban Development (HUD) that would have funded 506,000 additional low-income housing units. Subsidized housing commitments dropped to 60,590 in 1982, to 33,491 in 1995, and to 8,493 in 1996.")

41. *See* HUD, ABOUT HOPE VI, at <http://www.hud.gov/offices/pih/programs/ph/hope6/about/index.cfm> (last visited Mar. 7, 2007) ("The HOPE VI program serves a vital role in the Department of Housing and Urban Development's efforts to transform Public Housing.");

C. HOPE VI

HOPE VI is a program that encourages PHAs to form “partnerships with private entities to establish mixed-finance and mixed-income affordable housing.”⁴² In 1989, in response to the growth of ghettos caused by the grouping of lower-income housing developments together, Congress established the National Commission on Severely Distressed Public Housing (“the Commission”) and invited the Commission to develop a plan to eradicate severely distressed public housing by the year 2000.⁴³ Shortly thereafter, the Commission introduced the HOPE VI program. Under HOPE VI, the federal government gives grants to aid PHAs⁴⁴ for a variety of projects aimed at renovating and rejuvenating downtown and main street areas of distressed cities.⁴⁵ “The activities permitted under HOPE VI include, but are not limited to: the capital costs of demolition, major reconstruction, rehabilitation, and other physical improvements; the provision of replacement housing; management improvements; planning and technical assistance; and the provision of supportive services (including the funding, beginning in Fiscal Year 2000, of an endowment trust for supportive services).”⁴⁶ Since its inception, HOPE VI has been the source of over five billion dollars in grants.⁴⁷ As of 2006, the HOPE VI program continues to play a “vital role” in transforming the image and placement of public housing from ghettos and slums to non-poverty neighborhoods and mixed-income communities.⁴⁸

HUD USER, Low-Income Housing Tax Credits, <http://www.huduser.org/datasets/lihtc.html> (last visited Feb. 2, 2007) (“The Low-Income Housing Tax Credit (LIHTC) is the most important resource for creating affordable housing in the United States Today.”).

42. HUD, *supra* note 29, at 80.

43. *See id.*

44. PHAs match at least five percent of funds given through such grants. *Id.*

45. *See id.*

46. *Id.*

47. *See* HUD, Revitalization Grants, <http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/> (last visited Feb. 3, 2007); HUD, HOPE VI REVITALIZATION GRANTS 16 (2006), http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/rev_grants_all.pdf.

48. HUD, About HOPE VI, <http://www.hud.gov/offices/pih/programs/ph/hope6/about/index.cfm> (last visited Feb. 3, 2007); *see also* HUD, BEAUMONT, TX FY 2006 HOPE VI REVITALIZATION GRANT AWARDS 1 (2006), <http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/06/beaumont.pdf> (outlining the Beaumont, Texas Housing Authority’s HOPE VI grant and its uses); HUD, EASTON, PA FY 2006 HOPE VI REVITALIZATION GRANT AWARDS 1 (2006), <http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/06/easton.pdf> (outlining the Easton, Pennsylvania Housing Authority’s HOPE VI grant and its uses); HUD, KINGSPORT, TN FY 2006 HOPE VI REVITALIZATION GRANT AWARDS 1 (2006), <http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/06/kingsport.pdf>

D. The Low-Income Housing Tax Credit

The low-income housing tax credit (the "Tax Credit") program was created by the Tax Reform Act of 1986 and stands today as the most important resource for providing lower-income housing in the United States.⁴⁹ The Tax Credit program is a joint effort made by the Internal Revenue Service ("IRS") and state housing agencies to provide an incentive for taxpayers to invest in lower-income housing.⁵⁰ The Tax Credit is a dollar for dollar credit that lowers a taxpayer's federal income tax liability in exchange for a promise to provide lower-income housing for at least thirty years—fifteen under the jurisdiction of the IRS and fifteen under the jurisdiction of the state agency.⁵¹ The Tax Credit can be given to support the full range of lower-income housing projects and has been used to attract investments from banks, utility companies, and other corporate and individual investors as a means of fostering good community relations and "seek[ing] an attractive return on equity."⁵² Together with the HOPE VI program, the Tax Credit program has been effective in providing housing to the lower-income housing market⁵³ in a way that the government can no longer afford to do on its own.⁵⁴ As effective as these programs have been over the last

(outlining the Kingsport, Tennessee Housing Authority's HOPE VI grant and its uses); HUD, NIAGARA FALLS, NY FY 2006 HOPE VI REVITALIZATION GRANT AWARDS 1 (2006), <http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/06/niagara.pdf> (outlining the Niagara Falls, New York Housing Authority's HOPE VI grant and its uses); HUD, BURRILLVILLE, RHODE ISLAND, MAIN STREET REDEVELOPMENT 1, <http://www.hud.gov/offices/pih/programs/ph/hope6/grants/fy06/burrillville.pdf> (describing the effects of a HOPE VI grant upon the Burrillville community); HUD, National Fact Sheet, Fiscal Year 2006 HOPE VI Revitalization Grant Awards, <http://www.hud.gov/offices/pih/programs/ph/hope6/grants/revitalization/06/06nationalfactsheet.pdf> (last visited Mar. 5, 2007) (Municipalities and developers currently have plans to demolish 659 severely distressed housing units and erect 799 new affordable housing units with 2006 HOPE VI funds.).

49. See HUD USER, *supra* note 41; Wayne H. Hykan, *Pricing the Equity of a Tax Credit Project: An Institutional Investor's Perspective*, Handout distributed at the Real Property, Probate and Trust Law Section's Fourth Annual Fall CLE Meeting held in Denver, Colorado (Oct. 2006) (on file with author).

50. See Internal Revenue Service, IRC § 42: the Low-Income Housing Credit in Summary, Low Income Housing Credit Newsletter Issue No. 22 (Sep. 2006).

51. *See id.*

52. *Id.* ("The credit supports a variety of housing opportunities. The taxpayer can build new housing, or acquire and rehabilitate existing housing. The housing can be apartments, single-family housing, single-occupancy rooms, or even transitional housing for the homeless. The property may be mixed affordable and market rate rental units or a portion of the property may be for commercial use."); *see also* Hykan, *supra* note 49.

53. See HUD USER, *supra* note 41.

54. JCHS, *supra* note 2, at 29 ("Prospects for a turnaround are bleak. After nearly 20 years of increases, growth in federal housing assistance ground to a halt in the second half of the 1990s. The federal government, which has historically provided the lion's share of subsidies, now faces a massive budget deficit and is looking for ways to fund the rising costs of international and

twenty years, however, they simply have not been enough to provide housing for the majority of lower-income families who qualify for housing assistance.⁵⁵ This is evidenced by the fact that roughly seventy-five percent of very-low income individuals and families do not receive any form of housing assistance.⁵⁶

Although the Section 8, Vouchers, Tax Credit and HOPE VI programs have made important contributions to the lower-income housing market, unless more efforts are made by states, municipalities, and developers to bolster the market's shortage of housing affordable to persons and families with low to moderate income, such shortage will remain and these persons and families will be left to choose between adequate housing and other necessities of life.⁵⁷ The remainder of this article focuses on how housing laws enacted by states and municipalities affect the amount and location of available public housing units.

IV. THE EFFECT OF HOUSING LAWS ON THE ERECTION OF PUBLIC HOUSING

A. Authority to Create Housing Laws

Most states have enacted housing laws that give their municipalities an obligation to provide a realistic opportunity for the development of affordable housing.⁵⁸ This obligation includes the responsibility to "promulgat[e] appropriate land use ordinances under which a developer can be expected to construct" affordable housing.⁵⁹ The obligation and authority to enact such land use ordinances at the federal and state levels derive from federal law⁶⁰ and from state police power,⁶¹

domestic security.").

55. See JCHS, *supra* note 2, at 29.

56. See *id.* ("HUD estimates that over four million renter households with incomes less than half of area medians now receive housing assistance, but this number represents only about a quarter of renters with incomes that low. The low-income housing tax credit has helped to meet some of this shortfall by stimulating the production or rehabilitation of about 1.8 million affordable rentals since 1987. But even the scale of this program has not been enough to keep the affordable rental inventory from shrinking.").

57. See *supra* note 41 and accompanying text.

58. See 83 AM. JUR. 2D *Zoning and Planning* § 78 (2006).

59. *Id.*

60. See 42 U.S.C. § 1437 (2000); see also Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (1968) (exemplifying how the federal government can exercise the authority to enact laws for the general welfare of its citizens).

61. DAVID A. CALLIES ET AL., *CASES AND MATERIALS ON LAND USE* 537 (4th ed. 2004) ("[A] municipality exercises the state's police power, not its own"); see also *Euclid v. Amber Realty Co.*, 272 U.S. 365, 387 (1926) (All local zoning ordinances "must find their justification in

respectively. With such obligation and authority, municipalities, under the direction of states, generally utilize one or more techniques to accomplish housing objectives ranging from combating discrimination effected by exclusionary zoning practices to affirmatively requiring the development of low- to moderate-income housing through inclusionary and incentive zoning.⁶²

B. Exclusionary and Inclusionary Zoning.

1. Exclusionary zoning

Exclusionary zoning is land use planning that has as its purpose, result, or effect "a form of economic segregation by restricting land usage . . . to block, or at least limit, the influx . . . of persons having low or moderate incomes" into a community or municipality.⁶³ Often this entails blocking or limiting the influx of racial minorities, as "issues of racial segregation are not always completely separable from those of economic segregation, particularly when it is taken into account that a very large percentage of lower income families are members of racial minorities."⁶⁴ Exclusionary zoning generally occurs when a municipality enacts an ordinance that either sets a minimum lot or house size, which increases the cost of housing, or restricts or prohibits the erection of multi-family housing or manufactured homes.⁶⁵ Courts have recognized the danger of this type of discrimination since the introduction of land use controls,⁶⁶ but have not completely eliminated exclusionary zoning because many exclusionary techniques can be justified by an appeal to public health, safety, morals, welfare, or even aesthetic considerations,⁶⁷ which theories, coincidentally, are

some aspect of the police power, asserted for the public welfare.").

62. See CALLIES ET AL., *supra* note 61, at 548-49.

63. J. R. Kempler, Annotation, *Exclusionary Zoning*, 48 A.L.R.3D 1210 § 1[a] (1973).

64. *Id.*

65. See CALLIES ET AL., *supra* note 61, at 535-36.

66. See *id.* at 534 (citing *Ambler Realty Co. v. Village of Euclid*, 297 Fed. 307, 316 (D.C. Ohio 1924) *rev'd* 272 U.S. 365 (1926)) (municipal ordinance was invalidated in part because it segregated the population according to income or status); see also *Clinard v. City of Winston-Salem*, 6 S.E.2d 867, 870 (N.C. 1940) ("We are presently concerned . . . with municipal restrictions upon the use and occupancy of property as affected solely by the racial status of the proposed occupant.")

67. See Kempler, *supra* note 63, § 1[b]; see also *Pierro v. Baxendale*, 118 A.2d 401, 407 (N.J. 1955) (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)) ("The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations

loosely related to the rationale under which the federal government justifies its legislation on public housing matters.⁶⁸

In addition to these exclusionary justifications, two other notable obstacles make challenging exclusionary zoning difficult. First, the requirement that plaintiffs have standing often bars litigation brought by anyone not holding a legal or equitable interest in property that is adversely affected by the ordinance.⁶⁹ Second, legislative deference, creates a presumption that the ordinance is valid and constitutional and will be upheld as such unless a challenging party satisfies a very high burden of proof.⁷⁰

In spite of these obstacles, plaintiffs have successfully challenged zoning ordinances as exclusionary on numerous occasions. The most notable challenges are *Mount Laurel I*⁷¹ and *Mount Laurel II*,⁷² which together established the "fair share" doctrine, under which not only is exclusionary zoning prohibited, but municipalities must demonstrate that they provide their fair share of the necessary low- to moderate-income housing in the area.⁷³ The *Mount Laurel* cases rejected "an ordinance permitting only single-family detached dwellings" and restricting "minimum lot area, lot frontage and building size requirements so as to preclude single-family housing" for moderate and lower-income families because it was contrary to the general welfare.⁷⁴

In *Mount Laurel I*, the New Jersey Supreme Court established "the doctrine requiring that municipalities' land use regulations provide a

that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." (citations and internal quotations omitted)).

68. See 42 U.S.C. § 1437.

69. See Kempler, *supra* note 63, § 2.

70. See *id.*; *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003) (courts determine whether an action is legislative by considering four factors: (1) whether the act involves ad hoc decision making, or the formulation of policy; (2) whether the act applies to a few individuals, or to the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears all the hallmarks of traditional legislation. The act is generally considered legislative if it formulates policy, applies to the public at large, is formally legislative, and bears hallmarks of traditional legislation. (citing *Bechard v. Rappold*, 287 F.3d 827, 829 (9th Cir.2002)).

71. *S. Burlington County N.A.A.C.P. v. Mount Laurel Twp. (Mt. Laurel I)*, 336 A.2d 713 (N.J. 1975) (Holding that "a developing municipality may not, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for various categories of persons who need and want it.").

72. *S. Burlington County N.A.A.C.P. v. Mount Laurel Twp. (Mt. Laurel II)*, 456 A.2d 390 (N.J. 1983) (Holding that municipalities have an obligation to provide a realistic opportunity for housing, not simply for the opportunity to litigate for public housing.).

73. See *Mt. Laurel I*, 336 A.2d at 724.

74. See *Mt. Laurel I*, 336 A.2d 713; *Mt. Laurel II*, 456 A.2d 390.

realistic opportunity for low- and moderate-income housing.”⁷⁵ After eight years of virtual non-compliance with the *Mount Laurel I* decision, the New Jersey Supreme Court revisited Mount Laurel in an attempt to “put some steel into” its earlier holding.⁷⁶ In *Mt. Laurel II*, the court noted that not a single lower-income housing unit had been built since its earlier decision.⁷⁷ In response to such inaction, the court established, in explicit detail and by way of a 120-page opinion, what New Jersey municipalities must do to fulfill their responsibility of providing a realistic opportunity for building low-income housing.⁷⁸ The decision not only gave trial courts the authority to revise a municipality’s zoning ordinance upon the determination that the municipality had not fulfilled its regional fair-share obligation, but also the authority to require affirmative planning and zoning devices such as lower-income density bonuses and mandatory set-asides.⁷⁹ Thus, not only had legislative deference been overcome in the courts, but courts (in New Jersey) could now exercise authority over legislation to require it to abide by judicial standards.⁸⁰ Only a handful of states, however, have followed New Jersey’s aggressive jurisprudence.⁸¹

75. *Mt. Laurel II*, 456 A.2d at 409–10.

76. *Id.* at 410 (“The *Mount Laurel* case itself threatens to become infamous. After all this time, ten years after the trial court’s initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel’s determination to exclude the poor. . . .

To the best of our ability, we shall not allow it to continue. This Court is more firmly committed to the original *Mount Laurel* doctrine than ever, and we are determined, within appropriate judicial bounds, to make it work. The obligation is to provide a realistic opportunity for housing, not litigation. We have learned from experience, however, that unless a strong judicial hand is used, *Mount Laurel* will not result in housing, but in paper, process, witnesses, trials and appeals. We intend by this decision to strengthen it, clarify it, and make it easier for public officials, including judges, to apply it.

This case . . . involve[s] questions arising from the *Mount Laurel* doctrine . . . [and] demonstrate[s] the need to put some steel into that doctrine. . . . The waste of judicial energy involved at every level is substantial and is matched only by the often needless expenditure of talent on the part of lawyers and experts.”).

77. See 13 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79D.07[3][b], 79D-367 (Michael Allen Wolf ed., Matthew Bender 2000) (citing *Mt. Laurel II*, 456 A.2d at 461) (“Nothing has really changed since the date of our first opinion, either in Mount Laurel or in its land use regulations. The record indicates that the Township continues to thrive with added industry, some new businesses, and continued growth of middle, upper middle, and upper income housing. As far as lower income housing is concerned, from the date of that opinion to today (as far as the record before us shows) no one has yet constructed one unit of lower income housing—nor has anyone even tried to. Mount Laurel’s lower income housing effort has been either a total failure or a total success—depending on its intention.” (citations omitted)).

78. See *Mt. Laurel II*, 456 A.2d 390.

79. See *id.* at 445.

80. *Mt. Laurel II*, 456 A.2d 390.

81. See, e.g., *Britton v. Chester*, 595 A.2d 492, 496 (N.H. 1991) (court found ordinance restricting development of multi-family housing invalid and unconstitutional because it ran afoul of

In response to the *Mt. Laurel II* decision, the New Jersey Legislature implemented the *Mt. Laurel* doctrine by enacting the Fair Housing Act and establishing the Council on Affordable Housing.⁸² Other states soon followed, enacting statutes requiring municipalities to provide their fair-share of lower-income housing.⁸³ Included in many of these ordinances were some of the affirmative devices suggested by the New Jersey Supreme Court in *Mt. Laurel II*, such as lower-income density bonuses and mandatory set-asides.⁸⁴ These affirmative zoning devices, which are calculated to encourage and often require a municipality to provide for its fair-share of lower-income housing, are commonly referred to as "inclusionary zoning."⁸⁵

2. Inclusionary zoning

Inclusionary zoning can generally be broken down into two types: incentive zoning, under which municipalities offer one or more incentives to entice developers to erect lower-income units within or very near to the municipalities, and mandatory set-asides, also known by the generic title "inclusionary zoning," under which developers must set aside a number of lower-income housing units in order to develop within a municipality.⁸⁶

a. Incentive zoning. Incentive zoning generally takes the form of "the relaxation of certain restrictions in a zoning ordinance in return for the provision by a developer of a specified amount of lower-income housing units."⁸⁷ An example of such zoning would be when a specific area of the municipality is zoned to have a maximum density of ten multi-family housing units per acre. Without incentive zoning, a developer would be able to develop one hundred such units within a ten-acre area. Under incentive zoning, however, a municipality relaxes the maximum density to allow a developer to erect one-hundred twenty-five units, provided that twenty of those units are set aside as lower-

the statutory requirement that ordinances promote general welfare of community); *Save a Valuable Env't v. Bothell*, 576 P.2d 401, 405 (Wash. 1978) (court found action of city in rezoning parcel from farmland to permit construction of shopping center arbitrary and capricious because the city failed to serve the welfare of community as a whole); *Willistown v. Chesterdale Farms, Inc.*, 341 A.2d 466, 468 (Pa. 1975) (court found zoning ordinance which provided for apartment construction in only 80 of the 11,589 acres in township was unconstitutionally exclusionary).

82. See Fair Housing Act, N.J. STAT ANN. § 52:27D-301 (West 1985).

83. See *infra* Part VI and accompanying notes and citations.

84. See *id.*

85. 2 EDWARD H. ZIEGLER ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING, §§ 22.22-22.23 (4th ed. West 2006).

86. See *Id.*

87. *Id.* at § 22.22.

income housing units.⁸⁸ Under this example, the developer has the option of building the additional 20 lower-income units, along with five bonus market-rate units, whereas under mandatory inclusionary zoning, discussed shortly, the developer must construct the lower-income units in order to erect any units in the municipality.

The theory behind incentive zoning is that allowing a developer to erect additional market-rate units will compensate him for the erection of lower-income units.⁸⁹ The key issue here is striking the balance between offering too little incentive to developers, who then refuse to develop lower-income units, and offering too much incentive to developers, whereby planning and zoning principles that have been established for the health, safety, and general welfare of the people are violated for the sake of providing affordable housing for a minority of the population.⁹⁰ While any exception to zoning criterion technically violates zoning principles that are calculated to best promote the health, safety, and general welfare of the community as a whole, smaller exceptions, while affecting zoning principles and the general welfare negatively to some extent, might have greater general welfare benefits that outweigh the resulting negatives.⁹¹ If municipalities over-incentivize, however, there is a decreasing marginal benefit gained by such a drastic increase of affordable housing and the resulting gains might not outweigh the negative effects to general welfare.⁹²

Even though a developer may be able to construct more market-rate units, disincentives may dissuade him from doing so, especially in light of the fact that incentive zoning is voluntary. Clearly, when lower-income housing units are erected, other market-rate units erected alongside such units will not be as enticing to non lower-income persons and families, making the value of the otherwise market-rate units fall below market rate. Though incentive zoning may be successful at erecting public housing if both municipality and developer share such a goal, if only one of the parties, usually the municipality, has the desire to erect lower-income housing, it is unlikely that such housing will be built. In fact, some scholars have deemed incentive zoning "totally unsuccessful" because developers will not leave their comfort zone (and likely their zone of expertise) of traditional

88. *See id.*

89. *See id.*

90. *See id.* at n.3 (California's plan successfully combines regulatory and financial incentives by requiring "local governments [to] grant a twenty-five percent housing density bonus or similar incentive to developers of five or more units who set aside at least twenty-five percent of their units for low and moderate income persons.").

91. *Id.* at §22:22.

92. *Id.*

development and take the risks that can be associated with an uncertain area of development.⁹³ Thus, municipalities seeking to develop lower-income housing without sacrificing more health, safety, or general welfare goals than necessary, can turn to firmer policies, commonly known as mandatory inclusionary zoning.

b. Mandatory inclusionary zoning. Mandatory inclusionary zoning, which usually comes in the form of set-asides, requires developers to commit to constructing a certain number of lower-income units or otherwise providing for lower-income units in a municipality before they are able to develop in the municipality.⁹⁴ Residential developers are generally required to set aside anywhere from ten to twenty-five percent of a development for lower-income housing.⁹⁵ Commercial developers are often required to contribute to a lower-income housing fund that is used to develop lower-income housing units.⁹⁶ As with incentive zoning, municipalities try to soften the blow to developers by providing some sort of compensation to assist in constructing these lower-income units. This compensation can come in numerous forms, including a waiver of fees (park, subdivision, processing, or other), exemption from utility connection charges, expedition of permit processing, waiver or relaxation of zoning requirements such as density, lot coverage, frontage, or height and setback requirements, or waiver of other zoning or subdivision laws or building codes.⁹⁷ Additionally, developers may have alternatives to constructing lower-income units along with their market-rate units, such as erecting off-site lower-income housing, dedicating land for lower-income units, or making cash payments that will ultimately be used to fund the construction of lower-income units.⁹⁸ Finally, in some cases, a developer who has constructed more than the required lower-income units in the development may receive a lower-income unit credit, which may be applied to another development or sold or transferred to another developer to reduce the new development's required number of lower-

93. *Id.* See also *Mt. Laurel II*, 456 A.2d at 445-46 (citing Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015, 1060-62 (1976)) ("Incentive zoning leaves a developer free to build only upper income housing if it so chooses. Fox and Davis, in their survey of municipalities using inclusionary devices, found that while developers sometimes profited through density bonuses, they were usually reluctant to cooperate with incentive zoning programs; and that therefore those municipalities that relied exclusively on such programs were not very successful in actually providing lower income housing.").

94. See ZIEGLER ET AL., *supra* note 85, at § 22.23.

95. See *id.*

96. See *Holmdel Builders Ass'n v. Twp. of Holmdel*, 583 A.2d 277, 284 (N.J. 1990).

97. ZIEGLER ET AL., *supra* note 85, at §§ 22.22 n.2, 22.23.

98. See *id.* at § 22.23.

income housing units.⁹⁹

Two important issues arise under mandatory inclusionary zoning plans that do not arise under incentive programs: the denial of due process and the taking of private property without just compensation. When a governmental entity requires a private property owner to give up part of his or her land, the red flags of takings and due process are raised in a hurry. However, there are ways that municipalities can design zoning laws to avoid such claims. As with zoning ordinances that are potentially exclusionary,¹⁰⁰ those ordinances that may be challenged on takings or due process grounds will be given more deference in the courts when they qualify as legislative actions.¹⁰¹ Additionally, a municipality may avoid takings and due process issues if it carefully drafts its inclusionary zoning ordinance as a legislative action designed to accomplish legitimate state objectives through legitimate means.¹⁰²

Courts are generally consistent in their treatment of due process and takings issues; a municipal ordinance will generally be upheld as not a taking and not a denial of due process when (1) the ordinance is established for a legitimate public purpose and is "a reasonable means to accomplish [such] purpose" and (2) the ordinance "advance[s] a legitimate state interest and the developer [is] not denied substantially all economically viable use of the property."¹⁰³ Applying this test to affordable housing, courts will generally deny due process and takings claims because the erection of affordable housing is usually seen as a legitimate state interest and because the required inclusion of affordable housing still allows a developer to profit from selling market-rate units and often times also from the affordable units.¹⁰⁴ Most states follow this test when a land-use ordinance does not deprive a landowner of substantially all the value of his or her property,¹⁰⁵ although there are some exceptions; for example, Oregon's recently adopted Measure 37 requires local governments to compensate landowners for any devaluation of the fair market value of the property through a land-use

99. *See id.*

100. *See supra* Part IV(B)(1).

101. *See* Brian R. Lerman, Comment, *Mandatory Inclusionary Zoning—The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383 (2006).

102. *Id.* at 394.

103. *Id.* at 394-95; *see also*, *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978) (a court must evaluate a regulatory takings claim based on (1) the economic impact of the regulation, (2) the owner's reasonable investment-backed expectations, and (3) the character of the regulatory action).

104. *See* Lerman, *supra* note 101, at 394-95.

105. *See Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978).

regulation.¹⁰⁶

Another concern that arises under mandatory inclusionary zoning ordinances is whether such statutes are an effective solution to the long-term problem of affordable housing. Some scholars argue, albeit without empirical data, that mandatory inclusionary zoning actually makes housing less affordable because it decreases the supply of new housing by turning away developers who do not want to develop lower-income housing units, correspondingly causing the demand and cost of existing housing to rise.¹⁰⁷ Such a system can cause a chain reaction. The municipality enacts a mandatory inclusionary zoning ordinance and as a result, developers decide not to develop in the municipality because selling lower-income housing units is not as profitable as selling market-rate units.¹⁰⁸ Fewer new homes are built in the municipality, making the demand, and ultimately the price, on existing homes increase. Lower-income persons and families are still unable to afford housing. Ultimately, moderate-income persons and families are priced-out of housing that would otherwise be affordable were it not for the heightened demand on current housing.¹⁰⁹ Proponents of inclusionary zoning, however, argue that many housing markets already exclude low to moderate-income residents and that increasing housing costs brought about by existing exclusionary laws will make the situation worse unless inclusionary techniques are instituted.¹¹⁰ Though this argument also lacks supporting empirical data for its future projections, much of the argument is historical and contains statistics on the existing state of housing and the need to make improvements.¹¹¹

Regardless of which argument a municipality agrees with it must take into account numerous factors when enacting its housing laws, including exclusionary and inclusionary zoning methods and their potential consequences. If the municipality believes that inclusionary zoning will be the best source for providing its fair share of lower-income housing, it must decide between incentive and mandatory inclusionary zoning. The municipality must also ensure that the

106. See STATE OF OREGON, VOTERS' PAMPHLET: VOLUME 1-STATE MEASURES 103 (2004), available at <http://www.sos.state.or.us/elections/nov22004/guide/pdf/vpvol1.pdf> (last visited December 30, 2006).

107. Benjamin Powell & Edward Stringham, "The Economics of Inclusionary Zoning Reclaimed": How Effective are Price Controls?, 33 FLA. ST. U. L. REV. 471, 492 (2005) ("Cities should only enact inclusionary zoning if the goal is to make the vast majority of housing less affordable.")

108. See *id.*

109. For an in-depth critique of mandatory inclusionary zoning ordinances, see *id.*

110. See Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971, 971 (Summer 2002).

111. For an in depth look at historical statistics supporting inclusionary zoning, see *id.*

ordinance has and accomplishes a legitimate public purpose that does not take away all economically viable use of a property owner's land so that the municipality avoids takings and due process challenges. Finally, a municipality must take into account the individual state law from which it derives its authority to zone so as to ensure that the ordinance attempts to fulfill a legitimate state purpose.

V. MOST STATE LAWS ENCOURAGE, BUT DO NOT REQUIRE, THEIR MUNICIPALITIES, TO ESTABLISH PLANS THAT REQUIRE LOWER-INCOME DEVELOPMENTS

Municipalities that are encouraged or required to develop housing laws must do so within the larger frame of their individual states' laws. While municipalities in any of the states may adopt aggressive housing laws aimed at the construction of affordable housing, when state laws do not establish a framework that could supersede municipal decisions adverse to affordable housing, municipalities have little incentive to do so. Fifteen states encourage or require their municipalities to address the need for low-income housing generally,¹¹² while a few other states' housing laws are more specific and require, among other things, that each municipality create a "housing element . . . designed to achieve the goal of access to affordable housing to meet present and prospective housing needs, with particular attention to low and moderate income housing."¹¹³ Such discussion of the housing element must usually include, among other things, an inventory of current lower-income housing, a projection of the stock of lower-income housing for the next few years, an analysis of the municipality's demographics and probable future employment characteristics, a determination of the municipality's fair share of lower-income housing along with its present and prospective housing needs, and "a consideration of the lands that are most appropriate for construction of [lower-income] housing, including a consideration of lands of developers who have expressed a commitment to provide [lower-income] housing."¹¹⁴

Thus, of the states that do encourage or require municipalities to

112. See COLO. REV. STAT. ANN. § 30-28-106 (2006); CONN. GEN. STAT. § 8-23 (2006); 310 ILL. COMP. STAT. ANN. 67/25 (2005); ME. REV. STAT. ANN. tit. 30-A, § 5248 (2006); MD. CODE ANN. Art. 66B, § 3.05 (2006); MINN. STAT. ANN. § 473.859 (2006); N.M. STAT. ANN. § 6-27-8 (2006); R.I. GEN. LAWS § 45-22.2-6 (2005); S. C. CODE ANN. § 6-29-510 (2005); UTAH CODE ANN. § 10-9a-403 (2006); VT. STAT. ANN. tit. 24, §4345a (2005); WASH. REV. CODE ANN. § 36.70A.020 (2006); WIS. STAT. § 66.1001 (2005); VA. CODE ANN. § 15.2-2224 (2006).

113. N.J. ADMIN CODE § 5:92-1.4 (2006); *see also* CAL. GOV'T. CODE § 65, 583 (1997); DEL. CODE ANN. tit. 9, § 2656 (1995); FLA. STAT. ANN. § 163.3177 (2006).

114. N.J. ADMIN CODE § 5:92-1.4.

address the housing issue, most only request general attention. The remaining few require specific attention to current and future lower-income housing needs in the context of the municipalities' current and projected demographics. Though states may encourage or require municipalities to give either general or specific attention to the housing element, states do not generally require municipalities to enact inclusionary zoning plans or otherwise establish mechanisms, such as requiring sufficient incentives or an expedited permit process, to ensure that lower-income housing is actually developed and thus do not provide the framework necessary to ensure that affordable housing is actually erected.

Most states have specific reasons for requiring their municipalities to address lower-income or public housing.¹¹⁵ One scholar distinguishes the approach of western states with that of eastern states, stating that the western approach typically requires each state to address the need for affordable housing by zoning through a comprehensive plan, "requir[ing] more [than eastern states] from municipalities in their planning and zoning" so that the state can more "easily implement affordable housing requirements."¹¹⁶ Eastern states, on the other hand, generally tailor their state plans either to eliminate specific exclusionary zoning practices or to construct lower-income housing developments.¹¹⁷ While requiring municipalities to create a strong plan can create clear direction for the future, it can also make adaptations to the plan more difficult. Additionally, while encouraging municipalities to tailor plans to specific exclusionary practices allows municipalities to maintain flexibility in developing applicable ordinances, the municipalities may not recognize the need to provide for lower-income housing. Regardless of how states decide to incorporate the housing element into their statutory law, whether it be to eliminate exclusionary zoning practices, to ensure that the people working in the municipality can live where they work, or to eliminate downtown blight and ghettos by dispersing the concentration of lower-income housing, municipalities must come up with a plan that addresses the need to provide affordable housing to individuals and families with lower incomes.

Although state housing laws typically have similar goals concerning the development of lower-income housing—ensuring that municipalities

115. See Lerman, *supra* note 101, at 399.

116. *Id.* at 404; see also *infra* Part V(A) (discussing how California's plan requires strong municipal involvement in the planning and zoning of lower-income housing).

117. See *id.* at 399-404; see also *infra* Part V(B) (discussing how Massachusetts' plan does not require strong municipal involvement in the planning and zoning of lower-income housing but instead allows the state to specifically override municipal plans that are not in the public's best interest with regard to such housing).

address the current and future need for lower-income housing—the two most specific state laws, California's and Massachusetts', differ greatly on who, the municipality or the developer, has the power to ensure that lower-income housing is developed. California's housing laws favor a very strong municipality, which leaves the door open for municipal plans whereby developers with plans to develop within a municipality have little to no say about whether they will develop lower-income housing.¹¹⁸ Massachusetts' housing laws favor a very strong developer, whereby the municipality has little to no authority to limit the development of lower-income housing.¹¹⁹ Typical state laws, however, do not demand a strong hand from either the municipality or the developer. Instead, most states' laws simply encourage municipalities and developers to work together to develop an appropriate amount of lower-income housing, but do not require municipalities to establish any concrete mechanisms that will ensure the development of lower-income housing.¹²⁰ Thus, while California gives municipalities the authority to require the development of public housing, and Massachusetts gives developers such power, the remaining states that actually address the housing element do not have stringent laws empowering either, and by default fall closer to the Massachusetts standard.¹²¹ In those states, if public housing is to be developed, developers must take the initiative because municipalities have little incentive to ensure the development of low-income housing once they have satisfied state requirements of addressing the lower-income housing issue.¹²²

A. Strong Municipal Plan: California

California's housing laws follow the typical pattern in that they require municipalities to include a housing element, one that addresses the current and future needs for affordable housing, as a part of their

118. *See infra* Part V(A).

119. *See infra* Part V(B).

120. *See infra* Part V(C).

121. *Id.*

122. Though Massachusetts laws do not require developers to raise a strong hand in developing lower-income housing by threat of force, they go beyond the housing laws of the remaining states. As most states' housing laws encourage developers to build lower-income housing and allow them an avenue to challenge a denial of a permit to build such housing through the court system, Massachusetts laws allow developers to avoid such costly challenges, which can generally be expected to deter a developer from his efforts, and go straight to a state sponsored housing committee that can override a municipality's decision and grant the developer an instant right to develop lower-income housing. *See infra* Part V(B).

comprehensive zoning plans.¹²³ In addition to the typical requirements, the state housing laws also encourage municipalities to be active and work aggressively with state and other local governments to accomplish affordable housing goals by requiring municipalities to follow numerous specific provisions designed to “facilitate and expedite the construction of affordable housing.”¹²⁴ Heeding the state laws’ requirement to be active and work aggressively to accomplish affordable housing goals, the city of Napa has enacted one of the strongest municipal plans in the United States with regard to accomplishing those housing goals.¹²⁵

The City of Napa with its immense wine industry—an industry that relies on cheap labor—has no shortage of manual laborers. The city does, however, have a shortage of affordable housing for these manual laborers.¹²⁶ Many laborers, as well as other lower-income individuals and families, are forced to either sacrifice other necessities of life such as food, clothing, and insurance, or move their families outside of the

123. See CAL. GOV’T. CODE § 65,583 (1997); see also Lerman, *supra* note 101, at 405-406.

124. See CAL. GOV’T. CODE § 65,582.1 (1997) (“The Legislature finds and declares that it has provided reforms and incentives to facilitate and expedite the construction of affordable housing. Those reforms and incentives can be found in the following provisions:

- (a) Housing element law (Article 10.6 (commencing with Section 65580) of Chapter 3).
- (b) Extension of statute of limitations in actions challenging the housing element and brought in support of affordable housing (subdivision (d) of Section 65009).
- (c) Restrictions on disapproval of housing developments (Section 65589.5).
- (d) Priority for affordable housing in the allocation of water and sewer hookups (Section 65589.7).
- (e) Least cost zoning law (Section 65913.1).
- (f) Density bonus law (Section 65915).
- (g) Second dwelling units (Sections 65852.150 and 65852.2).
- (h) By-right housing, in which certain multifamily housing are designated a permitted use (Section 65589.4).
- (i) No-net-loss-in zoning density law limiting downzonings and density reductions (Section 65863).
- (j) Requiring persons who sue to halt affordable housing to pay attorney fees (Section 65914) or post a bond (Section 529.2 of the Code of Civil Procedure).
- (k) Reduced time for action on affordable housing applications under the approval of development permits process (Article 5 (commencing with Section 65950) of Chapter 4.5).
- (l) Limiting moratoriums on multifamily housing (Section 65858).
- (m) Prohibiting discrimination against affordable housing (Section 65008).
- (n) California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3).
- (o) Community redevelopment law (Part 1 (commencing with Section 33000) of Division 24 of the Health and Safety Code, and in particular Sections 33334.2 and 33413).”).

125. See Lerman, *supra* note 101, at 399 (“Western states . . . have had more success in implementing inclusionary programs. The western states’ approaches, especially that of the City of Napa, illustrate the potential for inclusionary programs.” .”).

126. See *Home Builders Ass’n of N. Cal. v. City of Napa*, 108 Cal. Rptr. 2d 60, 62 (Cal. App. 1st Dist. 2001).

city towards more affordable housing. As these lower-income individuals and families move away from their jobs, they are forced to commute back into the city, contributing to other rapid-development related problems—traffic and pollution.¹²⁷ In an effort to address these problems, the city formed a housing task force comprised of representatives from non-profit agencies, environmental groups, religious institutions, local industries, for-profit developers, and the local chamber of commerce.¹²⁸ This task force studied the local housing element, as required by state housing laws,¹²⁹ and recommended that the City of Napa enact an inclusionary housing ordinance modeled after the inclusionary ordinance already enacted by Napa County.¹³⁰

The City of Napa enacted two inclusionary housing ordinances requiring all developers to dedicate ten percent of all new development, residential and commercial, for use as lower-income housing. An inclusionary zoning plan of this nature immediately raised obvious takings and due process issues.¹³¹ The Home Builders Association of Northern California filed a complaint against the City of Napa seeking to have the housing ordinances invalidated as a violation of takings and due process laws.¹³² The Home Builders Association appealed the district court's demurrer of its complaint and again raised takings and due process arguments.¹³³ In response to these arguments, the court held that although the ordinances imposed significant burdens on developers, they also provided significant benefits, including "eligib[ility] for expedited processing, fee deferrals, loans or grants, and density bonuses."¹³⁴ The challenges on takings and due process grounds were invalidated because Napa's ordinance allowed developers to apply for and the city to grant waivers to the set-aside requirements.¹³⁵ Because the City of Napa could waive the ten percent requirement upon the developer's showing that such requirement is not justified, the housing ordinances were deemed valid.¹³⁶

Thus, California's housing laws allow municipalities to enact housing ordinances that require all developers to set aside a percentage of development or pay an in lieu fee for the development of lower-

127. *See id.*

128. *See id.*

129. *See* CAL. GOV'T. CODE § 65,583 (1997).

130. *See Home Builders Ass'n*, 90 Cal. Rptr. 2d at 62.

131. *See id.*

132. *See id.*

133. *See id.*

134. *Id.* at 62-63.

135. *See id.* at 64.

136. *See id.*

income housing.¹³⁷ These inclusionary zoning laws are not unlawful under the takings clause as long as the ordinance allows for the municipality to waive them when circumstances make them unnecessary.¹³⁸ On paper, this appears to be the most effective state law for ensuring that lower-income housing is developed. As developers must develop to stay in business, and as those who develop within certain municipalities must erect lower-income housing, California's housing laws do the most to ensure that lower-income housing is actually erected.¹³⁹

B. Weak Municipal Plan (Strong Developer Plan): Massachusetts

Massachusetts housing laws follow a different philosophy than California's; they encourage developers to take the lead in creating public housing.¹⁴⁰ Massachusetts encourages developers by providing an expedited application and development process for erecting lower-income housing that allows developers to avoid lengthy and costly delays that typically accompany such processes.¹⁴¹ Massachusetts' main housing law, the Comprehensive Permit and Zoning Appeals Act ("Chapter 40B") was initially referred to as the Anti-Snob Zoning Act because of the Massachusetts Legislature's original intent to combat the urban crisis and racial segregation (accompanied by a shortage of affordable housing for minorities in the inner city) that was exacerbated by the 1965 passage of the "Racial Imbalance Act"¹⁴² and other

137. *Id.*

138. *Id.*

139. Though critics of inclusionary zoning techniques argue that developers do not necessarily have to develop within the municipalities that have inclusionary housing laws, see Benjamin Powell, *supra* note 107, if states enact more specific laws that require all of their municipalities to adopt inclusionary zoning provisions, developers will be forced to either develop under the rubric of inclusionary zoning or else relocate their operations in a way that would drastically affect business. Hence, though technically, developers do not have to develop within a particular municipality to stay in business, specific state laws can eliminate or lessen the likelihood that developers will simply alter their operations to avoid a municipality's inclusionary techniques.

140. See MASS. GEN. LAWS ch. 40B, §§ 20-23 (1998) (Under §21 a developer can avoid lengthy and costly delays and offset the lower profit margin traditionally associated with developing lower-income housing with the benefits accompanying minimal administrative requirements required under expedited permit processing and the lessened possibility for permit denial or revocation).

141. *Id.*

142. See Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381, 385 (2001) ("The push for chapter 40B began in 1967 when a group of young, liberal legislators and housing activists skillfully seized upon the national 'Do Something' climate of opinion (regarding the urban crisis, racial segregation, shortage of decent housing, inner city decline and unrest) and capitalized on the political context in the Massachusetts legislature. The latter included overwhelmingly Democratic

historical housing procedures tending to make lower-income housing development a difficult task.¹⁴³ Under Chapter 40B, a developer desiring to construct lower-income housing need apply only to one local agency for the appropriate permit, which must either be granted or rejected within seventy days of the initial application.¹⁴⁴ Permit applications that are not approved or that are conditionally approved can be immediately appealed to the Housing Appeals Committee, which has the authority to override any local agency decision that is not reasonable or "consistent with the needs of the community."¹⁴⁵ Out of 112 local agency decisions to deny or conditionally deny lower-income housing permit applications, 94 were overturned for not being consistent with the needs of the community while only 18 were upheld.¹⁴⁶

In the late 1960s, the towns of Hanover and Concord, Massachusetts, were in need of lower-income housing for the elderly and for persons and families with lower incomes.¹⁴⁷ When two developers submitted comprehensive permit applications to the Hanover and Concord Boards of Appeals, each developer's application was

control, powerful House and Senate leadership positions held by urban-based politicians, and considerable 'political baggage' left over from the passage of the 'Racial Imbalance Act' in 1965. That controversial Act, which mandated the correction of racial imbalance in public schools, defined an 'imbalanced' school as one with more than 50% non-white enrollment; therefore, given racial residential patterns in metropolitan areas, it effectively applied only to urban school districts." (internal citations omitted).

143. Bd. of App. v. Hous. App. Comm. in Dep't. of Cmty. Affairs, 294 N.E.2d 393, 402-04(Mass. 1973) (instead of requiring developers to apply for permits or variances through numerous departments or agencies who often stand as a barrier to development of lower-income housing, such as those governing "minimum lot size requirements, green space zoning, minimum frontage and setback requirements, minimum floor area requirements, maximum building areas of lots, building height limitations, inspection and permit fees", the Act allows developers to apply to a single agency and avoid the time, monetary, and prejudicial drawbacks that accompany the traditional development process).

144. *See id.* at 386.

145. *Id.* at 386-87 ("The law also established standards for determining whether a ZBA denial is 'consistent with local needs,' and by so doing effectively set an affordable housing goal, or fair share quota or threshold, for all communities. Specifically, chapter 40B provides that developers are not entitled to a HAC appeal, and thus a ZBA decision will stand, if any one of the following conditions which define what "consistent with local needs" means, has been met by a community: (1) at least 10% of its total housing stock consists of subsidized housing for low- and moderate-income households; (2) at least 1.5% of its land zoned for residential, commercial, or industrial use is used for such housing; or (3) a proposed development would result within one calendar year in the start of construction of low- and moderate-income housing on more than 0.3% of the town's land zoned for residential, commercial, or industrial use, or ten acres, whichever is larger. This provision was intended to give an incentive to communities to take the initiative to develop a 'reasonable' amount of subsidized housing, i.e., at least 10% of their total housing, in order to become immune to the appeal process.").

146. *See id.* at 397-98. Five of the eighteen were upheld on technical grounds. *Id.*

147. Bd. of App. v. Hous. App. Comm. in Dep't. of Cmty. Affairs, 294 N.E.2d 393, 419-23 (Mass. 1973).

rejected.¹⁴⁸ Both developers immediately filed an appeal with the state Housing Appeals Committee.¹⁴⁹ Both rejections were overturned and a comprehensive permit was granted in one instance and the Board of Appeals was ordered to grant a permit in the other without any further hearing.¹⁵⁰ In both instances, the Housing Appeals Committee decided that the Boards of Appeals' decisions were not consistent with the housing needs of the communities.¹⁵¹ When the Boards of Appeals sought review in the Massachusetts Supreme Court, the court found that:

the Legislature's adoption of an administrative mechanism designed to supersede, when necessary, local restrictive requirements and regulations, including zoning by-laws and ordinances, in order to promote the construction of low and moderate income housing in cities and towns *is a constitutionally valid exercise of the Legislature's zoning power* which was properly implemented in the proceedings before us.¹⁵²

Thus, Massachusetts law allows for the State Housing Committee to override any local agency's decision if it is not in accord with what the state has envisioned for the housing needs of its residents.¹⁵³

In contrast with California's laws that invite municipalities to take the leading role in developing lower-income housing, Massachusetts' laws can eliminate the municipalities' role completely if their decisions are not consistent with the lower-income housing needs of the community. Thus, Massachusetts developers are encouraged to and supported in taking the lead in the development of lower-income housing, while Massachusetts' municipalities can be overruled if they do not share the state Housing Appeals Committee's view of local community needs.

148. *See id.* at 400.

149. *See id.*

150. *See id.* at 419-23.

151. *Id.*

152. *Id.* at 424 (emphasis added).

153. *See id.*

C. Typical Municipal Plan: Illinois

Illinois' Affordable Housing Planning and Appeal Act is representative of many other state housing laws¹⁵⁴ in that it requires municipalities to address the housing element, including an assessment of the current and future needs for lower-income housing.¹⁵⁵ Municipalities may satisfy this requirement by enacting a housing plan that consists of the following provisions: municipalities must set a goal of having at least fifteen percent of all new developments or redevelopments qualify as affordable housing, an overall three percent increase in affordable housing in the jurisdiction, or a minimum total of ten percent of all housing in the municipality qualified as affordable housing.¹⁵⁶ The Act defines affordable housing as

housing that has a sales price or rental amount that is within the means of a household that may occupy moderate-income or low-income housing. In the case of dwelling units for sale, housing that is affordable means housing in which mortgage, amortization, taxes, insurance, and condominium or association fees, if any, constitute no more than 30% of the gross annual household income for a household of the size that may occupy the unit. In the case of dwelling units for rent, housing that is affordable means housing for which the rent and utilities constitute no more than 30% of the gross annual household income for a household of the size that may occupy the unit.¹⁵⁷

The Act requires Illinois municipalities to create incentives for attracting the development of affordable housing in their jurisdiction in order to reach these affordable housing goals.¹⁵⁸

Illinois' law is typical in that it defines what a municipality must, may, or may not do,¹⁵⁹ but does not establish a system that adequately

154. See *supra* note 112 and accompanying text.

155. 310 ILL. COMP. STAT. ANN. 67/25 (2005) (Under Illinois' housing law, a state committee determines whether each municipality must conduct the assessment of public housing needs. Essentially, municipalities where less than ten percent of housing units are deemed "affordable" by the state agency must enact a housing plan.).

156. See *id.*

157. *Id.* § 67/15.

158. See *id.* § 67/25.

159. *Id.* (A municipality *must* enact a plan stating the current needs of affordable housing, identifying prospective sites. A municipality *may* adopt certain measures such as a housing trust fund to help finance affordable housing activities. A municipality *may not* enter into an intergovernmental agreement with another municipality that has more than twenty-five percent affordable housing in an attempt to avoid development requirements under the Act.) .).

encourages the development of lower-income housing.¹⁶⁰ The Illinois Act mandates that municipalities establish lower-income housing plans, but does not have in place the mechanisms that will result in the actual construction of lower-income housing. Developers can appeal a local agency's denial of a permit to develop lower-income housing to a state committee similar to the process in Massachusetts.¹⁶¹ Unlike Massachusetts, however, where the state committee can override a municipality's decision simply if the municipality has not adequately addressed its lower-income housing needs, the Illinois state committee cannot supersede a municipality's decision unless a developer can show that he or she was unfairly denied or that unreasonable conditions were placed upon the tentative approval of the development.¹⁶²

This leaves Illinois, and most other states that merely require their municipalities to address the housing issue in general, in the exact place where *Mt. Laurel I* left New Jersey, without the necessary construction of lower-income housing unless a developer or municipality voluntarily ensures such housing is developed.¹⁶³ Though a typical plan may be successful in that municipalities address the housing element in a way that allows developers to erect affordable housing, it does not create a specific framework expediting the process or otherwise providing sufficient incentives to ensure such development. In contrast to California's state laws that require municipalities to adopt inclusionary zoning ordinances that expedite the development of affordable housing, and Massachusetts' state laws that allow the state housing committee to supersede local municipalities if it decides that the municipality's decisions are not consistent with its lower-income housing needs, most states' laws that require municipalities to address the affordable housing issue do not establish the necessary framework to ensure that such housing is developed.¹⁶⁴

160. See Parts V (A) and (B), discussing California's and Massachusetts' housing laws, which adopt an expedited construction process for lower-income housing that goes beyond the discussion and calculation of the need for affordable housing and establishes an accelerated framework for the actual development of lower-income housing.

161. See *id.* § 67/30.

162. See *id.*

163. The first low-income housing actually developed under the *Mt. Laurel* doctrine was not approved until twenty-six years after the *Mt. Laurel* litigation began (1997), and the initial 140-unit townhouse development reached completion near the end of 2002, over thirty years after litigation began. See CALLIES ET AL., *supra* note 61, at 550.

164. See *supra* Part V.

VI. UTAH HOUSING LAWS ARE TYPICAL AND DO NOT REQUIRE AFFORDABLE HOUSING TO BE DEVELOPED

Though Utah appears, at first glance, to be an exception from most states in that some of its municipalities calculate a surplus in affordable housing, the state is not an exception from the rest of the United States when it comes to residents *actually living in public housing*; many residents qualify for lower-income housing that is not readily available.¹⁶⁵ Though incomes have increased by about five percent over the last three years, housing prices have increased twenty-five to thirty percent, leaving many residents unable to afford suitable housing.¹⁶⁶ To be able to afford the average two-bedroom apartment in Utah an individual would have to make \$12.98 per hour and work forty hours per week without any vacation.¹⁶⁷ A current minimum wage worker, someone who earns \$5.15 per hour,¹⁶⁸ would have to work 101 hours a week without vacation or else join 1.5 other people earning the same amount in order to afford the average two-bedroom apartment.¹⁶⁹ The State of Utah calculates that 4,342 new affordable housing units have been needed each year for the last eight years, while only 2,621 units were actually developed per year.¹⁷⁰ Of those 4,342 new affordable housing units needed each year, 625 are needed just for those families

165. See NATIONAL LOW-INCOME HOUSING COALITION, *OUT OF REACH 2005 1* (2005), <http://www.nlihc.org/oor2005/pdf/UT.pdf> (last visited Nov. 13, 2006); GEOFF BUTLER, *NEIGHBORHOOD LIFE CYCLE CASE STUDIES: IMPLICATIONS FOR AFFORDABLE HOUSING 39* (2006), http://www.utahhousing.org/documents/NeighborhoodLifeCycle9-06_GeoffButler.pdf (last visited Feb. 7, 2006) (The necessity of lower-income housing in Utah is understated by local governments because new construction is out of the price range of lower-income persons and families. As existing affordable houses have a slow turnover rate, lower-income persons and families are prevented from occupying such affordable housing. "While many communities meet affordable housing targets through existing housing stock, this often is not affordability that can be easily tapped. Most HB295 studies . . . tie most affordability to existing housing stock."); see also, 310 ILL. COMP. STAT. ANN. 67/20 (the state committee must take into account the total "number of *for-sale housing units* in each local government that are affordable to" lower-income households, not just the amount of existing units affordable to such households.").

166. See UTAH DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT ET AL., *STATE OF UTAH CONSOLIDATED PLAN 2006-2010 19*, http://community.utah.gov/housing_and_community_development/OWHLF/documents/ConsolidatedPlan2006-2010.doc (last visited Feb. 7, 2006).

167. See NATIONAL LOW-INCOME HOUSING COALITION, *supra* note 165, at 1 ("In Utah, the Fair Market Rent (FMR) for a two-bedroom apartment is \$675. In order to afford this level of rent and utilities, without paying more than 30% of income on housing, a household must earn \$2,249 monthly or \$26,989 annually.").

168. Pending legislation contemplates an increase of minimum wage in the near future. As of March 26, 2007, however, Federal minimum wage is \$5.15.

169. See *id.*

170. See UTAH DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT ET AL., *supra* note 166, at 8.

that earn less than thirty percent of the annual median income.¹⁷¹ Thus, many individuals and families in Utah must look to public housing to be able to afford rent without sacrificing other basic needs.

A. *Utah State Housing Laws*

As is the case with many of the state laws already discussed, Utah law requires each municipality to have a comprehensive plan in place that addresses its present and future needs.¹⁷² In 1996, the Utah Legislature passed House Bill 295, which requires municipalities to address the housing element in their general plan.¹⁷³ Municipalities adopt comprehensive plans upon recommendations made by their planning commissions.¹⁷⁴ Under Utah law, it is the planning commission which must address the housing element in its recommendation to the municipality.¹⁷⁵ The relevant portion of the Utah Code states the following:

(2)(a) At a minimum, the proposed general plan, with the accompanying maps, charts, and descriptive and explanatory matter, shall include the planning commission's recommendations for the following plan elements

(iii) for cities, an estimate of the need for the development of additional moderate income housing within the city, and a plan to provide a realistic opportunity to meet estimated needs for additional moderate income housing if long-term projections for land use and development occur.

(b) In drafting the moderate income housing element, the planning commission:

(i) shall consider the Legislature's determination that cities should facilitate a reasonable opportunity for a variety of housing, including moderate income housing:

(A) to meet the needs of people desiring to live there; and

(B) to allow persons with moderate incomes to benefit from and fully participate in all aspects of neighborhood and community life; and

(ii) may include an analysis of why the recommended means, techniques, or combination of means and techniques provide a

171. *See id.*

172. *See* UTAH CODE ANN. § 10-9a-401 (2005).

173. *See* BENJAMIN A. THOMSON, OREM DEPARTMENT OF DEVELOPMENT SERVICES, SUMMARY REPORT & PRELIMINARY PLAN OF ACTION, AFFORDABLE HOUSING (1998).

174. *See* UTAH CODE ANN. § 10-9a-403 (2005).

175. *See id.*

realistic opportunity for the development of moderate income housing within the planning horizon, which means or techniques may include a recommendation to:

- (A) rezone for densities necessary to assure the production of moderate income housing;
- (B) facilitate the rehabilitation or expansion of infrastructure that will encourage the construction of moderate income housing;
- (C) encourage the rehabilitation of existing uninhabitable housing stock into moderate income housing;
- (D) consider general fund subsidies to waive construction related fees that are otherwise generally imposed by the city;
- (E) consider utilization of state or federal funds or tax incentives to promote the construction of moderate income housing;
- (F) consider utilization of programs offered by the Utah Housing Corporation within that agency's funding capacity; and
- (G) consider utilization of affordable housing programs administered by the Department of Community and Culture.¹⁷⁶

While the Utah Code describes its affordable housing stock as moderate-income housing and not low-income housing, municipality moderate-income housing standards are identical to HUD's lower-income housing standard, fifty to eighty percent of the median income in the area.¹⁷⁷ Further, the Utah Division of Housing and Community Development estimates that only seventy-five percent of Utah municipalities have thus complied with state requirements to develop an affordable housing plan.¹⁷⁸ Thus, Utah, like Illinois and most other states, is not likely to have an increase in the amount of public housing unless developers are insistent upon erecting such housing to the point that they are willing to challenge municipal laws in court, and able to gain a victory, a feat not easily accomplished in most states.¹⁷⁹ Additionally, though the majority of Utah's municipalities have enacted ordinances that conform with state housing laws, a violation of such ordinances and or laws is not easily remedied by an expedited process but must be attacked through costly administrative and judicial proceedings, a fact that can discourage developers from leaving the comfort zone of traditional developing and branching out into the area

176. UTAH CODE ANN. §10-9a-403 (2005).

177. See PROVO, UT., GEN. PLAN CH. 4 1 (2003).

178. See UTAH DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT ET AL., *supra* note 166, at 19.

179. See *supra* Part IV(B)(1).

of affordable housing.¹⁸⁰

Compared with California's laws giving municipalities the authority to require lower-income housing development, Massachusetts' laws giving such power to developers, and Illinois' laws and most other state laws somewhere in the middle, Utah shares most similarities with those states in the middle. Such state laws require their municipalities to address the housing element, but do not have in place aggressive laws to ensure that such housing will actually be developed.¹⁸¹ Utah also participates in the federal financing plans previously discussed, such as the HOPE and the Tax Credit Program, which, though successful, do not provide the necessary funds to house all of Utah's lower-income population.¹⁸² Thus, it is left to municipalities and developers to work together if sufficient public or lower-income housing is to be constructed.

B. Utah Municipality Laws: Provo

The city of Provo's general plan complies with the state law requirement to provide a moderate income housing plan and it contains an in-depth analysis of Provo's current and future housing needs.¹⁸³ Provo's plan defines moderate income housing as "housing occupied or reserved for occupancy by households with a gross household income equal to or less than 80% of the median gross income of [the county]."¹⁸⁴ Based on the 2000 census, the average household size in the applicable area¹⁸⁵ was rounded up to four persons, making the median household income \$50,400, and 80% of that median income \$40,300.¹⁸⁶ Thus, households of four who earned less than \$40,300 per year qualified for moderate income housing, which meant they could afford to purchase a house for \$130,900 or less or to pay rent of \$940 per month or less without going over the national recommended spending limit of thirty percent of household income for housing.¹⁸⁷ With specific reference to the Utah Code, Provo's plan contains an

180. See PROVO, UT., GEN. PLAN CH. 4 3 (2003).

181. See *supra* Part V.

182. See UTAH DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT ET AL., *supra* note 166, at 22.

183. See PROVO, UT., GEN. PLAN CH. 4 (2003).

184. *Id.* at 1. Although Provo's plan describes moderate-income as fifty to eighty percent of the area's median income, HUD defines this same income class as low-income.

185. See *id.* at 2. (This statistical data was based on the previous definition of moderate income housing, which included a comparison to other individuals and families living in the metropolitan statistical area rather than the county).

186. See *id.* at 1 (including numbers based on statistics from 2002).

187. See *id.* at 2.

estimate of the existing supply of moderate-income housing, an estimate of the need for moderate-income housing for the next five years, a survey of total residential zoning, an evaluation of how existing zoning densities affect opportunities for moderate-income housing, and a description of Provo's program to encourage an adequate supply of moderate-income housing.¹⁸⁸

Provo's plan is quite different from those of other municipalities around the nation in that it is one of the few plans that actually calculates an overall surplus of lower-income housing.¹⁸⁹

[D]ata shows that there are more housing units than households in the 80% to 51% and the 50% to 31% income groups. There is a shortage of moderate-income housing in the 30% to 0% income group, but this is to be expected. It would be difficult to find a significant amount of housing for purchase lower than \$42,700 or for rent at less than \$280 a month.¹⁹⁰

Percentage of median income, actual income, and maximum rent affordable per month	80 to 51 Percent Income of \$37,200 and max rent of \$860	50 to 31 Percent Income of \$23,250 and max rent of \$510	30 to 0 Percent Income of \$13,950 and max rent of \$280
Households	6,060	4,386	4,269
Housing Units	8,215	6,463	2,243
Deficiency	0 (0%)	0 (0%)	2,026 (52.5%)

Although Provo's plan is unique in that it does not calculate an overall need for more lower-income housing, it is similar to plans of other municipalities in that it does calculate a need for more lower-income housing for households in the lowest income bracket.¹⁹¹ Provo's plan for addressing its lower-income housing needs is also unique in that its remedy for fulfilling the housing needs of its lower-income residents is

188. *See id.*

189. *See* PROVO, UT., GEN. PLAN CH. 4 3 (2003). *But see* GEOFF BUTLER, *supra* note 165, at 39 (The necessity of lower-income housing in Utah is understated by local governments).

190. *Id.*

191. *See id.*

not primarily focused on the construction of major developments but instead focuses on limited relaxations of zoning standards.¹⁹²

Provo's plan mainly advocates the relaxation of a limited number of zoning standards, and secondarily promotes various housing programs and incentives that are typical of municipalities around the nation.¹⁹³ Provo encourages usage of the Project Redevelopment Option, which allows new, one-family and multi-family lower-income housing to be built in residential and mixed-use settings. The plan also encourages accessory apartments, manufactured homes, and cluster development patterns, which patterns consist of efficiently clustering homes on smaller lots with smaller driveways so as to maximize land usage in an economy where land prices have jumped.¹⁹⁴ The plan also calls for incentives and tax breaks for developers of lower-income elderly and special-needs housing.¹⁹⁵ Finally, the plan encourages lower-income households to use various government programs that provide subsidies to assist those households in affording housing that is likely already on the market.¹⁹⁶

Thus, although Provo's general plan is unique in at least one aspect—the city does not calculate a pressing need for the development of lower-income housing—its operation under the umbrella of Utah state housing laws demonstrates that Utah's state laws are typical of most other states in the union; they require their municipalities to address the housing element but do not have laws to ensure that such housing will actually be developed.¹⁹⁷

VII. CONCLUSION

There is a wide-spread need for additional public housing throughout the United States. Federal and state governments have introduced and implemented numerous plans to aid in developing public or lower-income housing. Though public housing issues are being widely addressed, few state laws or municipal plans put in the "steel" that the New Jersey's Supreme Court envisioned in the *Mt. Laurel II* decision.¹⁹⁸ Most states and municipalities discuss the need for lower-income housing and encourage the use of incentives and programs, but

192. *See id.* at 8–11.

193. *See id.*

194. *See id.*

195. *See* PROVO, UT., GEN. PLAN CH. 4 9–11 (2003).

196. *See id.* at 11.

197. *See id.*; *supra* Part VI.

198. *Id.*

do nothing in the way of actually requiring the development of lower-income housing. A growing number of states require their municipalities to adopt incentive or inclusionary zoning techniques or plans, and two states in particular, Massachusetts and California, have aggressive plans in place to ensure that lower-income housing is erected by allowing developers an expedited process under which erecting affordable housing becomes or remains a viable option. Most other states, including Illinois and Utah, follow a pattern of requiring their municipalities to address the housing element. However, instead of establishing a framework under which municipalities or developers can ensure that development within a municipality will contain affordable housing, they sit back and wait for municipalities and developers to work together towards the actual development of lower-income housing. Thus, although there are numerous programs aimed at increasing the amount of public housing, and although states have the ability to establish laws requiring the development of lower-income housing, aside from two exceptions, California and Massachusetts, state and municipal laws do not have a major effect on the development of lower-income housing.

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