

ARTICLES

SOLUTIONS TO THE AFFORDABLE HOUSING CRISIS: PERSPECTIVES ON PRIVATIZATION

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INTRODUCTION

The Republican landslide in the 1994 elections has reinvigorated efforts to cut back on Federal spending for a wide range of social welfare programs, including housing.¹ President Clinton added his voice to the call for less government with a proposal for financing a middle class tax cut by trimming twenty-four billion dollars in federal domestic spending over five years.² While the President resisted recommendations to eliminate major agencies such as the Department of Housing and Urban Development (HUD), he did propose to change drastically the Federal housing programs by consolidating sixty programs, including public housing, into three new housing block grants that would be distributed to state and local governments.³ The President did not match

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1. For example, the Personal Responsibility Act, an integral part of the *Contract With America* promulgated by Republican members of the House of Representatives on September 27, 1994, proposes a cap on annual funds for a wide range of social welfare programs, including 15 major federal housing programs, that is estimated to require a \$26 billion reduction in spending over 4 years. NATIONAL HOUSING LAW PROJECT, THE TIME OF RECKONING FOR NATIONAL HOUSING POLICY: TO BE OR NOT TO BE 3; CENTER ON BUDGET AND POLICY PRIORITIES, THE NEW FISCAL AGENDA: WHAT WILL IT MEAN AND HOW WILL IT BE ACCOMPLISHED? 3 (revised Dec. 14, 1994). Additional proposals to require a balanced budget by 2002 without raising taxes or cutting defense and Social Security outlays are estimated to require more than a 25% reduction in all other federal expenditures. *Id.* at 1.

2. Todd S. Purdum, *President Outlines His Plans To Shrink U.S. Government*, N.Y. TIMES, Dec. 20, 1994, at A1.

3. John H. Cushman, Jr., *President's Suggested Reductions Face Many Obstacles*, N.Y. TIMES, Dec. 20, 1994, at B1. The Administration proposes to create a consolidated individual assistance block grant to replace the Section 8 certificate

Republican proposals to cut deeper into the Federal housing budget, but he did accept aspects of the privatization movement⁴ with his call to substitute housing vouchers⁵ to low-income persons for direct subsidies to local public housing authorities.⁶ He also attempted to respond to charges that existing Federal housing programs were overly expensive, insensitive to local conditions, and ineffective.⁷

Recent articles in the Chicago newspapers offer a perspective on current affordable housing issues. During the summer and fall of 1994, articles describing housing finance initiatives by private financial institutions,⁸ celebrities,⁹ and local social agencies¹⁰ were juxtaposed with stories reporting lawsuits against suburban housing developments,¹¹ allegations of irregularities in local pub-

and voucher program, and the consolidation of 60 HUD programs into two block grants, one for affordable housing and the other for community development. NATIONAL HOUSING LAW PROJECT, *supra* note 1, at 10 (citing HUD, *Reinvention Blueprint* (Dec. 19, 1994)).

4. See *infra* notes 51-57 and accompanying text.

5. See *infra* notes 57-97 and accompanying text.

6. *Id.* Public housing essentially would be privatized after a three year transition period. Approved public housing authorities would be deregulated and become free to operate as private landlords under state landlord tenant law; including competing for tenants receiving voucher assistance as well as those not receiving such assistance. NATIONAL HOUSING LAW PROJECT, *supra* note 1, at 11.

7. See *infra* notes 31, 43, 46 and accompanying text.

8. Hi-Hopes stands for Housing Initiative-Home Ownership Program and Equity Strategies. Jim DeBoth, *Getting Hopes Up: Program Being Tried in Chicago Opens Ownership Doors to Less-Affluent*, CHI. TRIB., Aug. 14, 1994, § C, at 9. Eligible participants can purchase homes with 3% downpayments rather than normal downpayments of 5-10%. *Id.* The program was described as being a "laboratory test case for private sector financing of affordable housing," and as unique because of its reliance on local churches to publicize the program and direct potential homeowners among their congregations to Hi-Hopes. *Id.* Homeownership counseling is a major component of the program. *Id.* Homebuyers go through an evaluation process and then participate in either a homebuyer education program or debt/credit counseling, referred to as "homeownership boot camp." *Id.*

9. Flynn McRoberts, *Oprah Winfrey Commits \$6 Million for CHA Families*, CHI. TRIB., Sept. 14, 1994, § C, at 3. Ms. Winfrey pledged the money to the Families for a Better Life program, to be run by Jane Addams Hull House Association. *Id.* Under the program, up to 100 families in public housing will receive as much as \$30,000 per year for two years to enable them to receive job training, health care, family and financial counseling and educational opportunities along with expanded choices for apartments or homes outside public housing projects. *Id.* Eligible families must complete an eight-week training program, agree to undergo extensive background checks, allow home visits and be drug free. *Id.*

10. Flynn McRoberts & Patrick T. Reardon, *CHA Gets Thumbs Up From HUD*, CHI. TRIB., June 25, 1994, § 1, at 5.

11. Art Barnum, *Naperville Residents Sue to Block Low-Income Site*, CHI. TRIB., Aug. 13, 1994, at D5. The project is being financed by the Illinois Housing Development Authority on a ten acre site. *Id.* Thirty-three story buildings with six units each are to be constructed. *Id.* Of the units, 90% are for "low-income" residents" and 10% for "very low-income" residents. The site is wedged between two apart-

lic housing administration,¹² meetings to calm fears about proposals to relocate public housing tenants in suburban areas.¹³ Further, there were articles about meetings to discuss proposals to replace public housing with mixed-income communities co-sponsored by non-profit and for-profit developers,¹⁴ and allegations that redevelopment strategies such as tax increment financing (TIF) were being used to force low- and moderate-income ethnic groups out of inner ring suburbs.¹⁵ These articles illustrate the

ment buildings and townhomes. Several hundred other IHDA financed multi-family units are nearby according to the story. *Id.*

12. Hal Dardick, *Hesed House Homeless Shelter Gets Endowment*, CHI. TRIB., Dec. 2, 1994, at D3. Hesed House, an umbrella organization for social welfare agencies, operates a transitional housing program that reported a \$150,000 deficit in a \$270,000 budget in 1993. *Id.* Unstable federal and state financing along with fluctuating private donations led the agency to establish an endowment fund with a \$20,000 seed money grant. *Id.*

13. Patrick T. Reardon, *Lane Tries to Calm Suburbanites Fears Over CHA Moves*, CHI. TRIB., July 1, 1994, § 2, at 3. The purpose of the meeting was to allay suburban residents' fears that proposals to transform public housing from high-rise ghettos into a region-wide system in which public housing tenants would have choices where they could live, and would not result in recreating low income ghettos in quiet, suburban neighborhoods. *Id.* One of the points that Vincent Lane, the director of the Chicago Housing Authority reportedly made at the meeting was that at most, two thousand CHA families or five thousand public housing tenants would choose to take advantage of opportunities to relocate in the suburbs. *Id.* In view of the fact that there are approximately 4.5 million people in the Chicago suburbs, the impact of 5,000 new residents would be negligible, particularly since the thrust of the proposal is to emphasize scattered site housing through the use of demand side subsidies such as housing vouchers, rather than construction for low income housing developments. *Id.*

14. Maudlyne Ihejirika, *Lane Renews Proposal to Rebuild CHA*, CHI. SUN-TIMES, Oct. 5, 1994, at 27. Vincent Lane, Chair of the Chicago Housing Authority, has proposed several ambitious plans to demolish existing high-rise public housing units and replace them with mixed-income communities designed to help revitalize their neighborhoods over a 10 year period. Legislation to authorize federal assistance for his proposals died in the last days of the 103d Congress.

15. Jan Ferris, *TIF Foes See Racial Angle In Housing Plan*, CHI. TRIB., Sept. 12, 1994, at D1. TIF is a redevelopment strategy that has become increasingly popular with local government officials. Tax increment financing permits municipalities to issue bonds for public improvements in targeted blighted or redevelopment areas by pledging all tax revenues attributable to increases in property values resulting from privately-owned improvements in the targeted area to repayment of the bonds, rather than distributing these additional tax revenues to local public entities such as school districts and city and county general revenue funds. The majority of courts have upheld TIF enabling legislation against a variety of constitutional challenges. *See, e.g., Denver Urban Renewal Auth. v. Byrne*, 618 P.2d 1374 (Colo. 1980); *State v. Miami Beach Redev. Agency*, 392 S.2d 875 (Fla. 1980); *City of Canton v. Crouch*, 403 N.E.2d 242 (Ill. 1980); *South Bend Pub. Transp. Corp. v. City of South Bend*, 428 N.E. 2d 217 (Ind. 1981); *Short v. City of Minneapolis*, 269 N.W.2d 339 (Minn. 1978); *Tax Increment Fin. Comm'n of Kansas City v. Dunn Constr. Co.*, 781 S.W. 2d 70 (Mo. banc 1989); *Meierhenry v. City of Huron*, 354 N.W. 2d 171 (S.D. 1984); *Tribe v. Salt Lake City Corp.*, 540 P.2d 499 (Utah 1975).

A few courts have invalidated TIF statutes for a variety of reasons. *See, e.g.,*

complexities of proposed solutions to the affordable housing crisis that have plagued our cities for the last several decades.

In recent years, critics have argued that public solutions to affordable housing problems have failed and that the country would be better off if current public housing and other government supported housing were "privatized" through a variety of mechanisms to transfer control and responsibility for housing activities to the private sector.¹⁶ Debate over the application of privatization principles to housing policy reflects a broader question: what is the appropriate role of government in securing affordable, decent housing for its citizens? This question has been posed at least since the enactment of the Housing Act of 1949 when Congress espoused the goal of providing "a decent home and a suitable living environment for every American family."¹⁷

Affordable housing policy suffers from recurring collisions among several conflicting forces. The "power to exclude" aspect of property ownership, when used to protect individual privacy,¹⁸ may clash with liberty interests of equality of opportunity and individual freedom of association.¹⁹ The enormous costs of housing development, particularly when implemented on a large scale, put severe strain on public and private budgets.²⁰ These costs can overwhelm a housing policy, particularly one which attempts to make a dent in the large number of persons who are homeless or who are living in substandard housing.²¹ Use of economies of

City of Tucson v. Corbin, 623 P.2d 1239 (Ariz. Ct. App. 1980) (failure to provide for voter approval of TIF bonds); Card v. Community Dev. Agency, 131 Cal. Rptr. 153 (1976) (failure to include a relocation plan for persons who would be displaced); Miller v. Covington Dev. Auth., 539 S.W.2d 1 (Ken. 1976) (inadequate legislative standards to guide agency discretion).

The Iowa Supreme Court has held that TIF bonds were within the overall borrowing limits for local government. Richards v. City of Muscatine, 237 N.W.2d 48, 56-57 (Iowa 1975).

16. See, e.g., PRESIDENT'S COMMISSION ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT 113 (1988).

17. Housing Act of 1949, ch. 338, § 2, 63 Stat. 413 (1949) 1227, (codified as amended at 42 U.S.C. § 1441) (1988).

18. Reflected in the traditional "Every man's home is his castle" idea. HERBERT BROOM, A SELECTION OF LEGAL MAXIMS, 281 (10th ed. 1989).

19. The "Not in My Backyard" (NIMBY) debate exemplifies this clash. The literature on the NIMBY syndrome is vast. See, e.g., Peter Margulies, *Building Communities of Virtue: Political Theory, Land Use Policy and the "Not In My Backyard" Syndrome*, 43 SYRACUSE L. REV. 945 (1992); Serena M. Williams, *The Need for Affordable Housing: The Constitutional Validity of Inclusionary Zoning*, 26 J. MARSHALL L. REV. 75 (1992).

20. See *infra* part I.A.

21. While "tremendous progress" has been made toward the national housing goal, "decent housing at an affordable price is still not a reality for many households with low or very low incomes." AMY BOGDON ET AL., NATIONAL ANALYSIS OF HOUSING AFFORDABILITY, ADEQUACY, AND AVAILABILITY: A FRAMEWORK FOR LOCAL

scale to achieve the laudable goals of cost control and maximum impact often results in large concentrations of housing. But large concentrations of housing have created even greater isolation of low- and moderate-income families and greater ghettoization of cities along racial and class lines.²² A countervailing force, "small is beautiful,"²³ offers greater potential for success in individual cases, but requires a much longer period of time and much greater patience on the part of people who are not so fortunate to participate in the "small projects" undertaken.²⁴

This Article examines current efforts to respond to the affordable housing issues of the cities, particularly through the lens of the "privatization" movement. This Article argues that privatization by itself will not address the core problems of housing for low-income persons, but that privatization has potential for improving the effectiveness of housing programs when careful attention is paid to the privatization mechanisms selected.

Part I summarizes current criticisms of affordable housing policies and programs. These criticisms generally identify three major problems: (1) costs to the public treasury for subsidizing housing in a variety of forms are too high; (2) poor and incompetent management, both of public housing units and of privately-owned units made available to tenants in the Section 8 program; and (3) standards of housing construction that are too high, thereby producing excessive costs and also engendering class conflict.

HOUSING STRATEGIES 11 (1993) (prepared for the Department of Housing and Urban Development by the Urban Institute). Data from the 1989 American Housing Survey (AHS) indicates that nearly 75% of very low-income renters paid over 30% of their income for housing, and that about 8% of households (7,317,951 containing approximately 19,250,000 persons) occupied "moderately or severely inadequate" units. *Id.* at 11, 16.

22. For accounts of the Federal government's role in this process, see DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); Alexander Polikoff, *Gautreaux and Institutional Litigation*, 64 CHI.-KENT L. REV. 451, 451-76 (1988); Leonard S. Rubinowitz, *Metropolitan Public Housing Desegregation Remedies: Chicago's Privatization Program*, 12 N. ILL. U. L. REV. 589, 593-611 (1992). For a collection of essays reviewing the state of America's cities in the 25 years after the Kerner Commission report in 1968, see Symposium, *The Urban Crisis: The Kerner Commission Report Revisited*, 71 N.C. L. REV. 1283, 1283-1785 (1993).

23. The point is made forcefully in E.F. SCHUMACHER, *SMALL IS BEAUTIFUL* (1973).

24. For example, the Ecumenical Housing Production Corporation of St. Louis, discussed *infra* part III.B, has acquired and rehabilitated 157 single family homes over a 14 year period in St. Louis County, a jurisdiction with a public housing/Section 8 waiting list of approximately 1,100 applicants. Interview with the County of St. Louis Public Housing Authority, Jan. 25, 1994. The County of St. Louis Public Housing Authority has not been accepting new applications for the last six months; their acceptance of new applications has been suspended indefinitely. *Id.*

Part II summarizes and discusses the privatization movement as it developed in the United States and other parts of the world with particular attention paid to recommendations for privatizing housing programs. Part III describes some current models of affordable housing, both urban and suburban, that exhibit the necessary elements for a successful program of empowerment, coordination, partnership and sensitivity to external impact.

Part IV describes elements of a privatization-based affordable housing strategy. These elements include: (1) comprehensive, business-like planning that combines top-down with bottom-up planning techniques; (2) deregulation at the federal, state and local levels to make federal programs more effective and to deal with the "Not In My Backyard" syndrome that emphasizes exclusion rather than inclusion of a variety of affordable housing strategies; (3) tax reform to cap the mortgage interest tax deduction and use the funds released by the cap to establish a federal housing trust fund; and (4) empowerment through (a) leadership that is inclusive rather than exclusive, regional in scope rather than parochial, and reflects listening rather than imposing; (b) ownership that emphasizes joint ventures between non-profits and for-profits, cooperative forms of ownership, and lease-purchase techniques to permit low-income persons to step up to home ownership in a phased process; and (c) management that emphasizes social services, a continuum of care process leading to ultimate self-sufficiency.

I. CURRENT CRITICISMS OF AFFORDABLE HOUSING PROGRAMS

Current criticisms of government assisted housing programs center on the cost of such programs, lack of attention to management responsibilities, and excessive quality standards imposed on assisted housing.

A. Costs

Critics have leveled charges of excessive costs against public housing,²⁵ privatized housing production programs such as the old section 236²⁶ and Section 8 new construction²⁷ programs,

25. Codified at 42 U.S.C. §§ 1437-1437w (1988 & Supp. V 1993). See, e.g., PRESIDENT'S COMMISSION ON PRIVATIZATION, *supra* note 16.

26. Codified at 12 U.S.C. § 1715z-1 (1988 & Supp. V 1993).

27. Codified at 42 U.S.C. §§ 1437a, 1437c, 1437f, 3535(d), 13611-13619 (1988 & Supp. V 1993); 24 C.F.R. § 880 (1994). The New Construction program regulations were published on October 15, 1979. 44 Fed. Reg. 59410 (codified at 24 C.F.R. § 880) (1994). A recent clarification of the applicability provisions for Section 8 new construction and substantial rehabilitation programs appears in the Friday, November 18, 1994 Federal Register, setting forth the final rule regarding 24 C.F.R. §§ 880-881, 883. 59 Fed. Reg. 59,648 (codified at 24 C.F.R. §§ 880-881, 883) (1994).

and privatized housing demand programs such as Section 8 vouchers.²⁸ The Section 8 new construction program, the flagship of the first wave of privatization efforts in the 1970s, committed the government to long-term subsidies of new or substantially rehabilitated units.²⁹ Fair market rental rates, which were based on the analysis of local market costs for similar units, soared to \$800-1200 per month in high cost urban areas.³⁰

The Section 8 new construction and substantial rehabilitation programs were extraordinarily popular with low-income housing developers, but were criticized by some low-income housing advocates for alleged failure to reach the lowest income households who were most in need.³¹ The Federal government paid the difference between a HUD-established area fair market rental rate

The final rule establishes that the Federal Preference requirements set forth in a provision of a 1990 statute (§ 545(c) of the Cranston-Gonzalez National Affordable Housing Act, 104 Stat. 4220 (1990), 42 U.S.C. § 1437f (1988 & Supp. V 1993)) "apply to all Section 8 new construction and substantial rehabilitation projects," including State Housing Agency administered projects. *Id.* at 59649. The date on which the Department and the project owner executed the agreement has no effect on the applicability of the 1990 preference regulations (§§ 880.613-.617, 883.714-.718); thus, the requirements apply to all Section 8 new construction and substantial rehabilitation projects. *Id.*

28. Codified at 42 U.S.C. § 1437f(o)(5) (1988 & Supp. V 1993).

29. Housing and Community Development Act of 1974, Pub. L. No. 93-383, sec. 201, §8, 88 Stat 663, 662 (1974) (codified at 42 U.S.C. § 1437f(a), (e) (1970 & Supp. IV 1974).

30. In Los Angeles, during the 1980s, the Section 8 Fair Market Rents (FMRs) applicable to New Construction and Substantial Rehabilitation for a detached structure were: \$724, 2 bedroom; \$791, 3 bedroom unit and \$870 for a four or more bedroom. 45 Fed. Reg. 58081 (1980) (codified at 24 C.F.R. § 888 (1993)). The FMRs for semi-detached 2, 3 and 4 bedroom units were \$623, \$753 and \$819, respectively. *Id.* In Trenton, New Jersey, during 1980, the fair market rents for detached units were: \$904, 2 bedroom; \$1009, 3 bedroom; and \$1073 for a four or more bedroom unit. 45 Fed. Reg. 58044 (1980) (codified at 24 C.F.R. § 888 (1993)). In New York City, the 1980 FMRs for units in a 2-4 story structure with an elevator were: \$716, 2 bedroom; \$901, 3 bedroom; and \$1069 for a four or more bedroom unit. 45 Fed. Reg. 58045 (1980) (codified at 24 C.F.R. § 888 (1993)). New York City 1980 FMRs for 5 story structures, with an elevator were: \$918, 2 bedroom; \$1164, 3 bedroom; and \$1331 for four or more bedroom units. *Id.* Section 8 Housing Assistance Payments Program, Fair Market Rents and Contract Rent Annual Adjustment Factors are codified at 24 C.F.R. § 888 (1993).

31. In a 1980 General Accounting Office Report, the Section 8 program was criticized for being costly to administer and serving "too few of the households eligible for assistance." *GAO Report Criticizes Cost of Section 8 Program*, [Current Developments] 8 Hous. & Dev. Rep. (BNA) 63 (June 23, 1980).

In a 1980 Report of the General Accounting Office, the GAO concluded that as revealed by a survey of 17 cities, the Section 8 program costs were higher than necessary because project rents were permitted to increase "at rates faster and to levels higher than can be justified." *Id.* Though vested with the authority to allow gross rents 20% in excess of FMRs, HUD permitted gross rents to exceed FMR limits not as exception, but often. *Id.* In fact, 68% of the projects surveyed allowed gross rents in excess of FMRs. *Id.*

(FMR) and a statutorily-established percentage of eligible tenant income.³² Utility costs were included in the calculation of the tenants' share.³³ The government would pay the balance of the fair market rent. As a result, a family of four receiving Section 8 assistance with a head of household working full-time for minimum wage (\$4.25 x 2000 hours = \$8500) might pay only \$50-100 per month in rent. Annual contribution contracts obligated the Federal government to pay the fair market rental balance after tenant contributions for as long as twenty to forty years.³⁴ The budgetary impact became enormous³⁵ and fueled the argument that a more effective approach would be to further privatize the process by shifting from support for new construction to support for owners of existing units.³⁶

The shift from production support to demand support was accomplished during the Reagan Administration.³⁷ However, the

32. 42 U.S.C. § 1437a(a)(1) (1988).

33. 42 U.S.C. § 1437f(c) (1988).

34. 42 U.S.C. § 1437c(a) (1988 & Supp. IV 1992).

35. The 1980 Budget of the United States authorized approximately \$20 billion in assistance contracts for Section 8 lower income housing. OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1980 tbl. 86-0139-0-1-604 at 499 (1979). When public housing, Rental Supplements and Homeownership and rental housing (sec. 235, 236) programs were factored in, the total housing assistance commitment of the 1980 budget amounted to \$27.6 billion. *Id.* at 500.

According to final HUD statistics for 1980, substantial rehabilitation was the most expensive Section 8 program having an average per-unit subsidy cost of \$5,842. New construction units in 1980 had an average per-unit subsidy cost of \$5,400, while existing housing remained the least expensive with an average subsidy of \$3,448. *Expensive Financing Drove Section 8 Costs Above Estimates For Fiscal 1980*, [Current Developments] 8 Hous. & Dev. Rep. (BNA) 538 (Nov. 24, 1980).

36. The Reagan Administration's housing policy severely constricted new housing appropriations; appropriations declined from \$32.1 billion in 1978 to \$9.8 billion in 1988, an 80% decrease once adjusted for inflation. JOEL BLAU, *THE VISIBLE POOR: HOMELESSNESS IN THE UNITED STATES* 71 (1992). The greatest decline was experienced between the years 1982-1983, "[W]hen subsidized housing absorbed 50% of all domestic cutbacks in the administration's first two budgets." *Id.* (citing Paul Leonard, et al., *A Place to Call Home: The Crisis in Housing for the Poor* 28 (Washington, D.C.: Center on Budget and Policy Priorities, 1989)). The number of new households assisted each year plummeted from an average of 316,000 new households in fiscal years 1977-1980, to 82,000 new households in fiscal years 1981-1988; almost a 75% decrease. *Id.* While in excess of 1 million new housing units were created by the federal government between 1976 and 1982, only 25,000 units were being produced annually by the end of the Reagan Administration. *Id.*

37. Following the 1983 repeal of the Section 8 New Construction and Substantial rehabilitation programs, the emphasis of the U.S. federal housing policy has focused on the utilization of existing housing stock. (1983 Repeal of 42 U.S.C. § 1437f, Pub. L. No. 98-181, § 214(b) Nov. 30, 1983, 97 Stat. 1185 (1978). See 42 U.S.C. §§ 1437f(b) & 1437f(o) (amended in 1983 to curtail new construction and rehabilitation), 42 U.S.C. § 12742(a)(2) (1988 & Supp. V 1993) (preference for rehabilitation of existing housing stock). Following repeal of the Section 8 New Con-

cost factor is still in dispute because fair market rental rates under the Section 8 existing housing program tend to be above the actual market rates that owners of existing units who do not participate in Section 8 can command.³⁸ In addition, per-unit subsidies for new construction under the Low Income Housing Tax Credit (LIHTC)³⁹ program and the HOME⁴⁰ housing block grant program can range as high as \$30,000-\$40,000.⁴¹

B. Management

Closely related to the problems of costs under the Section 8 existing program are problems related to the management of

struction program, 42 U.S.C. § 1437(h) stipulated that "[o]n or after October 1, 1983, the Secretary may enter into a contract involving new construction only if the public housing agency demonstrates to the satisfaction of the secretary that the cost of new construction is less than the cost of acquisition or acquisition and rehabilitation . . . would be." 42 U.S.C. § 1437(h) (1988 & Supp. III 1985).

38. The New Fair Market Rental rates for existing housing were published on Wednesday, September 28, 1994 in the Federal Register. 59 Fed. Reg. 49,194 (Sept. 28, 1994). For Chicago, IL, the FMRs are slated as follows: \$602, 1 bedroom; \$716, 2-bedroom; and \$895 for a 3-bedroom unit. *Id.* at 49,508. St. Louis FMRs are \$367, 1-bedroom; \$476, 2-bedroom and \$619 for a 3-bedroom unit. *Id.* at 49,524. New York City's FMRs are: \$740 for a one-bedroom; \$840 for a 2-bedroom; and \$1052 for a 3-bedroom unit. *Id.* at 49,530. On the West Coast in California, San Francisco's FMRs are: \$808, 1-bedroom; \$1022, 2-bedroom; and \$1401 for a 3-bedroom unit. *Id.* at 49,500.

Controversies over Fair Market Rent rates persist largely due to the inconsistencies of various housing submarkets which exist within large metropolitan areas. *Good PHA Data Key to Correcting FMRs, HUD Says*, [Current Developments] 22 Hous. & Dev. Rep. (BNA) 403, 404 (Nov. 7, 1994). HUD has explained that shortages of units at the 45th percentile rent level are not necessarily attributable to miscalculated FMRs, for in tight housing markets of metropolitan areas affordable units may be re-rented through word of mouth, well before certificate bearers have a chance to learn of the available units. *Id.*

A U.S. General Accounting Office (GAO) report attributed problems with the current FMR system to the significant variation in rent levels within designated market areas. *Costs of Reducing FMR Areas Might Outweigh Benefits, GAO Says*, [Current Developments] 22 Hous. & Dev. Rep. (BNA) 132 (July 18, 1994). However, using smaller market areas to establish FMRs and more accurately correlate FMRs with local rents would be costly because of the data collection expenses attendant administration of such a comprehensive system. *Id.*

39. I.R.C. § 42 (1994).

40. HOME Investment Partnerships Act, Pub. L. No. 101-625, §§ 201-289, 104 Stat. 4079, 4095-128 (1990) (codified as amended at 42 U.S.C. §§ 12722-12839) (1988 & Supp. V 1993).

41. The high per-unit subsidy is a result of substantial gaps between costs of construction and rents that low income persons can afford to pay. For example, a \$60,000 unit project charging \$500 per month in rent can borrow about 52% of the estimated development costs (\$31,000) and repay that loan from expected rental income, leaving a gap of \$29,000 to be raised by the developer. If the project is designed to serve low- and moderate-income people, the rent will have to be reduced, expanding the gap still more. LIHTC and HOME can help reduce that gap.

those units. The existing Section 8 housing program was originally sold as a better alternative to the ghettoization occurring in traditional public housing and other assisted housing production programs.⁴² The argument was that private sector owners would be more efficient and more effective in improving the housing conditions for low-income persons. However, little or no public discussion ensued concerning the management implications of shifting housing for very low-income people from the public to the private sector.

In recent years, serious conflicts have erupted in communities in which significant numbers of Section 8 units are located. The common theme of those controversies is that the introduction of Section 8 units to a neighborhood results in a reduction in property values and a greater feeling of instability and insecurity.⁴³ Critics charge that landlords have little or no incentive to screen tenants because Section 8 guarantees them a profitable income stream. Tenants are believed to have little or no incentive to care for their units because they are paying virtually nothing in rent, and the "good cause" requirement for termination of a Section 8 tenancy⁴⁴ makes it very difficult to be evicted. HUD, its delegate agencies, and local public housing authorities are charged with failure to properly supervise landlords and tenants.⁴⁵ Local public housing authorities often respond by assert-

42. See, e.g., PRESIDENT'S COMMISSION ON PRIVATIZATION, *supra* note 16, at 11-15. For a contrary view arguing for a return to housing production subsidies, see NATIONAL TASK FORCE, A DECENT PLACE TO LIVE 33-34 (1988). See generally A. SOLOMON, HOUSING THE URBAN POOR (1994).

43. See Cynthia Todd, *Housing Subsidies Set Off Exodus: City Homeowners Want Changes In U.S. Program*, ST. LOUIS POST-DISPATCH, Mar. 18, 1994, at 1, (reporting on a simmering controversy in South St. Louis where area residents claim the community's social problems are directly attributable to the increased concentration of Section 8 tenancies in the area). Area Aldermen Paul M. Beckerle, D-25th Ward, even proposed a plan which would restrict the number of subsidies in use per city block. *Id.* at 20. The concern is focused on the fact the 25th Ward of St. Louis has 105 of the 156 Section 8 certificates in its ward concentrated in one apartment complex. Mike DeFilippo, *Section 8 Bawl: South Side Aldermen Cry Foul Over Low-Income Housing Clusters*, RIVERFRONT TIMES, Jan. 26-Feb. 1, 1994, at 16.

44. 24 C.F.R. § 880.607 (1994). In order to terminate a Section 8 tenancy or modify the leases, the owner of the Section 8 unit must have good cause as defined under 24 C.F.R. § 880.607, and must directly comply with the notification procedure set forth by the regulation. A tenant's material non-compliance with the terms of the lease constitute good cause if it amounted to a substantial violation of the lease, consisted of repeated minor violations which disrupted the liveability of the building, affected the health or safety of residents, interfered with the management of the building or had an adverse financial effect on the building. 24 C.F.R. § 880.607(b) (1994).

45. *Hard Housing Lessons From the Deep South*, WASH. POST, Apr. 17, 1994, at B1 (describing New Orleans public housing development encircled by "moats of raw sewage" that seep from fractured underground pipes; recent appointment of private

ing that the Section 8 statute and regulations restrict their ability to intervene.⁴⁶

C. Housing Quality Standards

A third major criticism of government housing policy, which is related to both the cost and management issues, concerns housing quality standards. During the 20th Century, the United States has been enormously successful in raising the housing quality standards of the great majority of American families.⁴⁷ However, when housing quality standards are examined from the perspective of their impact on residents of a given neighborhood, two types of problems may occur. Low-income people may be forced to leave the neighborhood because the introduction of new housing

management has yet to rectify the project's deplorable conditions); *How Boston Improved Public Housing*, ST. LOUIS POST-DISPATCH, Sept. 10, 1994, at 14B. Boston's public housing authority was criticized as "incompetent" during the 1980s, for contributing to the situation in which only about 25% of the occupied units met health and safety standards. *Id.* However, since court placement of the public housing authority into receivership, substantial improvement has been realized by Boston's public housing projects. *Id.*; see also Serge F. Kovaleski, *D.C. May Write Off More Rents — Housing Agency's Losses Would Grow By \$5.8 Million*, WASH. POST, May 15, 1994, at A1. According to a draft for D.C. Public Housing improvement, almost half of the uncollected \$11 million of delinquent rents would be written off. *Id.* The "woeful state" of D.C.'s public housing was attributed to mismanagement, incompetence and corruption. *Id.*

46. A recent study of public housing in St. Louis, noted that the Housing Authority is required to maintain a "waiting list" which currently bears the names of approximately 14,000 applicants. MAYOR'S ST. LOUIS HOUSING AUTHORITY TASK FORCE, TASK FORCE REPORT (1994) [hereinafter TASK FORCE REPORT]. The Task Force suggested that minimal effort should be directed towards maintenance of the list, and that instead, efforts should be focused on the uniform screening of applicants at the top of the list to ensure that those who fall under "federal preference" requirements also have the requisite income and are "suitable candidates for assisted housing." *Id.*

The Committee concurred on the issue of impaction, agreeing that some standard to limit impaction is necessary; however, committee members did not reach a consensus on the type of standards to be implemented. See *supra* note 43 for one alderman's proposal of limiting subsidies used per block.

The problem with implementing another level of restraints with respect to impaction of subsidies is that it will tend to undermine the whole integration principle of the voucher system. Emphasis should instead be placed broadening the market areas available to voucher holders. The Task Force recommended the establishment of a regional administrative authority, which would focus on broadening the accessible market area through improved tenant landlord and tenant selection and education addressing their "mutual responsibilities." TASK FORCE REPORT, *supra*.

47. The 1989 AHS reported that less than 10% of housing units were severely or moderately inadequate in most areas of the country. BOGDON ET AL., *supra* note 21, at 40; see also JAMES W. ROUSE & DAVID O. MAXWELL, *Foreword* to BUILDING FOUNDATIONS, HOUSING AND FEDERAL POLICY vii (Denise D. Pasquale & Langles C. Keyes eds., 1990).

supported by government actions raises the effective cost of housing within that neighborhood to the point where it becomes out of reach for the current low-income residents.⁴⁸

A related criticism is that when Section 8 housing quality standards are based on a "middle class value" level, rental property owners who do not participate in the Section 8 program cannot afford to compete for low-income tenants because the Section 8 fair market rental rates are significantly higher than actual rates of existing low-income rental units, thus skewing the market.⁴⁹ The dilemma is exacerbated by the fact that under current housing policies, extremely small numbers of Section 8 vouchers are available. If those vouchers become concentrated in a particular area, controversies can erupt because of the resulting disruption in market forces which may occur.⁵⁰

48. For a discussion of the gentrification question, see Chester Hartman, *An Urban Planner's Perspective on Displacement Urban Revitalization*, 5 PUB. L.F. 85 (1986); Peter W. Salsich, Jr. *Displacement and Urban Reinvestment: A Mount Laurel Perspective*, 53 U. CIN. L. REV. 333, 335-43 (1984); Williams, *supra* note 19, at 75. Serena Williams observes that in its 1991 report, the President's Advisory Commission on Regulatory Barriers to Affordable Housing "concluded that exclusionary, discriminatory, and unnecessary regulations constitute formidable barriers to affordable housing by raising costs twenty to 35% in some communities." *Id.* (citing ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, "NOT IN MY BACKYARD": REMOVING BARRIERS TO AFFORDABLE HOUSING 4 (Washington, D.C., United States Department of Housing and Urban Development, July 1991)).

Rental units priced within the means of low-income families are in short supply throughout the United States, particularly in urban communities. BOGDON ET AL., *supra* note 21, at 51. In 1990, the affordable housing stock "fell short of [low-income] households by 20% nationwide." *Id.* at 52. However, this shortfall estimate assumes that households are matched to units which fall within their affordability means, when often higher-income households occupy units affordable to the lowest income households. *Id.* at 53. Thus, the shortfall figure is greatly underestimated. *Id.*

49. Proponents of affordable housing have also criticized Section 8 market rate subsidies for contributing to inflated rent levels and causing a market shift detrimental to scores of low-income families. BLAU, *supra* note 36, at 66.

In St. Louis, for example, an audit of the St. Louis Section 8 rental-assistance program revealed that rents of subsidized units are significantly higher than rents received in similar market-rate units. Mike DeFilippo, *Section 8 Discharge: HUD Release a Report on the Housing Authority's Unbalanced Spending Practice*, RIVERFRONT TIMES, May 4-10, 1994, at 24. Inattentive administration of the Section 8 program was highlighted by repeated failures to assure that "request for lease approval" applications were completely and accurately filled out. *Id.* It was discovered that often the Housing Authority never even obtained information requested on the application, particularly the figures for rent previously charged for the unit. *Id.* Additionally, zip code listing for various units were inaccurate.

The overall significance of Section 8 rents being artificially inflated is the fact that scarce funding is able to aid fewer needy families, while the housing needs of other impoverished families are not met. For further discussion of the fair market rent controversy, see *supra* note 31.

50. In Pittsburgh, both the city and tenants of a project authorized for preserva-

The reoccurring criticisms of government housing programs as resulting in housing that is excessively costly, poorly managed, and disruptive of neighborhoods have fueled demands that housing policies "go private."

II. THE PRIVATIZATION CONCEPT

A. Privatization Defined

The term, privatization, has several meanings. Webster's Dictionary defines the word "privatization" as "[t]he tendency for an individual to withdraw from participation in social and especially political life into a world of personal concerns usually as a result of a feeling of insignificance and lack of understanding of complex social processes."⁵¹

In the past twenty-five years, a second meaning has become commonplace, that of a paring down of government participation in a given market sector in order to promote efficiency.⁵² The benefits commonly sought by government privatization initiatives include, "enhanced efficiency and expertise, cost savings through competition among contractors, and avoidance of burdensome regulations that govern the operations of public agencies and the

tion incentives, have challenged HUD action, contending that application of Section 8 funds to the project contravenes statutory civil rights protections against further and unnecessary impaction of low-income residents. *Tenants, Citing Impaction, Seek to Block LIPRHA Plan*, 22 Hous. & Dev. Rep. (BNA) No. 24, at 359 (Oct. 24, 1994); 24 C.F.R. § 881.206(b)-(c) (1994). The Allegheny Commons project is situated in a census tract which is occupied by 61.8% low- and moderate-income residents; according to HUD rules this constitutes an area of low-income concentration because it exceeds Allegheny County's 20% low- and moderate-income residency percentage. *Tenants, Citing Impaction, Seek to Block LIPRHA Plan, supra* at 359. The complaint states that "[t]he conversion of a significant percent of the units in Allegheny Commons to Section 8 units . . . will, in effect, destabilize a successful community and result in further segregation of residents of low and moderate income levels." *Id.* HUD Section 8 site standards require neighborhoods to be suitable to full compliance with civil rights laws, provide a greater choice of housing alternatives and avoid undue concentration of assisted persons in already impacted areas. *Id.*

51. WEBSTER'S 3D NEW INTERNATIONAL DICTIONARY 1805 (1993).

52. Peter D. Linneman and Isaac F. Megbolugbe, in their article, *Privatization and Housing Policy*, observe that "[p]rivatization is guided by three commonly cited broad objectives: to increase economic efficiency at the level of individual firms and markets; to raise revenue for government activities and to promote distributional and political ends." Peter D. Linneman & Isaac F. Megbolugbe, *Privatization and Housing Policy*, 31 URB. STUD. Nos. 4/5, at 639 (1994); see also Alexander E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1252 (1992), where Rogers observes that the benefits sought in implementing privatization include "enhanced efficiency and expertise, cost savings through competition among contractors, and avoidance of burdensome regulations that govern the operations of public agencies and the bureaucracy of state governments."

bureaucracy of state governments.⁵³

The President's Commission on Privatization⁵⁴ identified three standard techniques for privatizing the delivery of public services: (1) sale of government assets;⁵⁵ (2) contracting with private firms to provide goods and services for the public;⁵⁶ and (3) distributing to eligible persons, vouchers that can be redeemed for goods and services such as food and housing.⁵⁷

By the year 2000, privatization is anticipated to raise \$800 billion dollars for governments worldwide.⁵⁸ A review of the methods of privatization and the role privatization is playing in the world economy is helpful in understanding the application of

53. Rogers, *supra* note 52, at 1252.

54. PRESIDENT'S COMMISSION ON PRIVATIZATION, *supra* note 16, at 1-2.

55. The Privatization Commission noted that government assets can be sold in a variety of ways, such as the public stock offering that transferred ownership of Conrail in 1987, the sale of obsolete military bases, loan portfolios, surplus equipment, and other individual assets, and relinquishment of the asset value of government-owned stock, thereby separating an entity from the government, as was done with the National Consumer Cooperative Bank in 1982. *Id.*

56. Under the administration of Mayor Rudolph W. Guiliani, assorted New York City services have been contracted out to private firms. Steven Lee Myers, *More New York City Services Are Going to Private Hands*, N.Y. TIMES, Dec. 5, 1994, at 1. The New York City Department of Transportation, the Department of Homeless Services and the Department of Parks and Recreation were among the City's first privatization efforts aimed at cutting government spending while preserving necessary services. *Id.* Similarly, in Baltimore, Maryland, the management of the city's public schools has been contracted out to Educational Alternatives, Inc., a for-profit company that has revitalized the Baltimore public school system by cleaning it up and bringing in high-tech equipment for computer-aided educational programs. Charles Mahtesian, *The Precarious Politics of Privatizing Schools*, GOVERNING, June 1994, at 46-51.

57. The federal food stamp program, codified by the Food Stamp Act of 1977 at 7 U.S.C. § 2011 (1988 & Supp. V 1993) and the Section 8 housing voucher program, 42 U.S.C. § 1437(f)(o) (1988 & Supp. V 1993), are examples of privatization through the use of vouchers.

58. *Privatization: A World Privatization Guide*, INT'L FIN. L. REV., at 2. Approximately \$328 billion has been raised by privatization since 1985, and Salomon Brothers estimates that an additional \$120 billion will have been raised in equity between 1993 and 1995. *Id.* at 3. Of the \$120 billion estimated to be raised between 1993 and 1995 the regions anticipated to raise and enjoy such capital are Europe (anticipated to realize \$55 billion), Latin America (anticipated to realize \$30 billion), Asia and the Pacific rim (anticipated to realize \$20 billion), the United States (anticipated to realize \$5 billion) and the rest of the world which is expected to raise \$10 billion. *Id.* at 3.

It is estimated that at least \$15 billion is currently needed to shore up the Central Cities of the United States, and such capital is expected to be raised by the private sector. *\$15 Billion Need Estimated For Revitalization of Cities*, 22 Hous. & Dev. Rep. (BNA) No. 26, at 394 (Nov. 7, 1994). John Taylor, the President of the National Community Reinvestment Coalition (NCRC), has asserted that institutions need to be informed of the fact that inner-city investments are actually less risky than those made elsewhere. *Id.* Taylor claims, "[t]he higher the income (of the borrower), the higher the default rate." *Id.*

privatization to United States housing policy. Former British Prime Minister Margaret Thatcher embarked on an ambitious, privatization program which attracted the attention of President Reagan, ultimately leading to the appointment of the President's Commission on Privatization in 1987.⁵⁹

In raising some sixty billion since 1980, the United Kingdom was viewed as a trailblazer by proponents of privatization of state-owned assets. The sale of governmentally owned commercial entities was viewed as a central accomplishment of the Thatcher administration.⁶⁰ At the time of Prime Minister Margaret Thatcher's election in 1979, "11.5% of the UK's GDP accounted for state-owned enterprise;"⁶¹ yet, by her third election victory in 1987, "that figure was down to only 7.5%."⁶² In excess of half a million workers were shifted into the private sector by this decrease in state-owned enterprise.⁶³

Additionally, during the Thatcher administration, the "sale of more than one million government owned housing units to residents affected the approximately 40 percent who lived in . . . council housing."⁶⁴ The sale of the government housing stock to its residents made independent property owners of formerly government-dependent citizens and further benefitted British government by dispensing with the draining operating expenses of maintaining such facilities.⁶⁵

59. Exec. Order No. 12,607, 3 C.F.R. 243 (1987).

60. PRESIDENT'S COMMISSION ON PRIVATIZATION, *supra* note 16, at 1-3. "Among the entities sold to workers, consumers, and the general public are British Rail Hotels, English channel Ferry Service, Jaguar (automobiles), British Petroleum, British Aerospace, Britoil, National Freight Corporation, Gibraltar Dock Yard, the British Telecom System, British Gas, British Airways, British Airports Authority, and Rolls Royce." *Id.* at 4.

France has since set the pace with the largest privatization scheme in place. Linneman & Megbolugbe, *supra* note 52, at 635; *Privatization: A World Privatization Guide*, *supra* note 58, at 4. Even the position of French primary economic minister has been retitled as the Minister of the State in Charge of Finance, the Economy, and Privatization. PRESIDENT'S COMMISSION ON PRIVATIZATION, *supra* note 16, at 4. France's strong commitment to fortifying the french stock market by dispersing corporate share ownership among its citizens is apparent in the fact that during the first year of its program, the number of French owning corporate shares climbed from two million to more than five million. *Id.* at 4.

61. Linneman & Megbolugbe, *supra* note 52, at 635.

62. *Id.* at 635. To date, five of the world's ten largest initial public offerings have been in the UK. ("BP, worth \$9.4 billion, British Gas (\$7.8 billion), British Telecom (\$4.9 billion), British Steel (\$4.5 billion), and Scottish Power (\$3.7 billion"). *Privatization: A World Privatization Guide*, *supra* note 58, at 4.

63. Linneman & Megbolugbe, *supra* note 52, at 635.

64. PRESIDENT'S COMMISSION ON PRIVATIZATION, *supra* note 16, at 4.

65. *Id.* In 1980, tenants of British Council Housing were given a statutory right to purchase the units they occupied. MICHAEL A. STEGMAN, MORE HOUSING, MORE FAIRLY, REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON AFFORDABLE HOUSING 35 (1991).

Though Britain's successful sale of public housing is largely attributable to public housing comprising a greater share of the national housing stock in Britain and its public housing occupants being largely middle-class, the President's Commission on Privatization noted that, "[n]evertheless, the gains achieved suggest that similar results might also be achievable in the United States in appropriate circumstances."⁶⁶

The President's Commission on Privatization proceeded to recommend that the U.S. broaden the use of vouchers and enact legislation authorizing and directing HUD to sell public housing units consisting of detached single-family houses, duplexes and rowhouses, which are in good condition, to occupants at discounted prices.⁶⁷ Public housing tenants who elect to vacate, or lack the means to purchase the units, would be provided vouchers.⁶⁸ For the larger public housing complexes private management and tenant management alternatives were recommended by the commission.⁶⁹ This "supply out-contracting to private vendors"⁷⁰ is a common form of privatization in the United States, as are various hybrids of public-private partnerships.⁷¹

66. PRESIDENT'S COMMISSION ON PRIVATIZATION, *supra* note 16, at 16.

67. *Id.* at 15, 17.

68. *Id.*

69. *Id.* at 21.

70. Linneman & Megbolugbe, *supra* note 52, at 635.

71. Recent proposals in Fairfax, VA and St. Louis, MO aim to use low income housing tax credits in conjunction with public housing development funds. See *HUD Considers Proposals to Syndicate Public Housing*, [Current Developments] 22 Hous. & Dev. Rep. (BNA) No. 2, at 6 (May 23, 1994), where the Fairfax County, VA, Department of Housing and Community Development (DHCD) received positive feedback from HUD regarding a proposal to conjunctively apply low income housing tax credits and public housing development funds. To bridge a gap in public housing funds, DHCD requested HUD approval to syndicate the construction of 12 new units at Tavenner Lane. *Id.* at 6. In requesting a tax credit allocation from the state, Webdale commented, that "[t]he proposed use of tax credits for Tavenner Lane puts forth a bold initiative for the best use of public and private funding sources for the development of affordable housing currently available." *Id.* at 6. Under the proposal DHCD would form a partnership to develop Tavenner, with DHCD as the singular 1% general partner, and limited partnership interests would be purchased by investors interested in the tax credits. *Id.* at 7. DHCD would retain the option to purchase back the limited partnership interests after a minimum 15-year compliance term and a segment of the funds raised by syndication would be placed in escrow and invested to fund the eventual buy-back. *Id.* at 7. Robin Saloman, a consultant to DHCD, asserted that if HUD approves the proposal, such tax credits could serve as a "potent weapon" for PHA's looking to bridge financing gaps during the development of affordable housing. *Id.* at 7.

A similar proposal has been submitted by the St. Louis Housing Authority regarding demolition of the Vaughn public housing project. *Id.* at 7. The St. Louis proposal provides for application of \$35 million in public housing development funds to the replacement and additional development of units. *Id.* at 7.

In a preliminary investigation of the Fairfax and St. Louis proposals HUD

Privatization activities have been characterized as "load shedding" or "empowerment."⁷² Load shedding techniques, such as sales of assets, budget reductions and user fees, allow the government to disassociate itself from both the funding and the provision of goods and services.⁷³ Empowerment techniques, such as vouchers, subsidies and contracting-out, allow the government to relegate the production and delivery of goods and services to the private sector while continuing to fund them.⁷⁴

B. Privatization Applied to Affordable Housing

1. Affordable Housing Defined — the Concept of Shelter Poverty

Affordable housing has a basic problem of definition. We all seek affordable housing, and tend to equate it with housing that fits our budget. To focus the discussion, this Article will use a definition keyed to family income and family size based on the concept of shelter poverty developed by Michael Stone, Professor of Community Planning at the University of Massachusetts at Boston.⁷⁵ Affordable housing is decent housing that is within the normal economic reach of families when the "cost of a minimum standard for non-shelter necessities" is taken into account, "with income and household size as the principal parameters."⁷⁶ The

detected no statutory bars to the plans. *Id.* at 7. HUD General Counsel Nelson A. Diaz indicated that the projects must conform with terms of the annual contributions contract with HUD for a minimum 40 year term, and that transaction documents would have to be drafted to assure that a foreclosure would not detrimentally impact the functioning of the public housing units. *Id.* at 7.

72. Linneman & Megbolugbe, *supra* note 52, at 636.

73. *Id.*

74. *Id.*

75. MICHAEL E. STONE, SHELTER POVERTY (1993). In an earlier article, I used the national median income for renters (\$20,696 in 1991) as the benchmark for examining housing affordability. Peter W. Salsich, Jr., *Urban Housing: A Strategic Role for the States*, 12 YALE L. & POL'Y REV. 93, 96, n. 18 (1994).

76. "Households paying more than they can afford on this standard are *shelter-poor*." STONE, *supra* note 75, at 34. Stone calculates a shelter poverty scale by adding estimates of tax costs to the BLS non-shelter cost estimates. *Id.* at 36. Stone is particularly critical of fixed ratios or percentage of income rules-of-thumb, such as 25% or 30% of income, as a basis for determining housing affordability.

What most households actually pay is not what they realistically can afford: many pay more, while some pay less, whether measured in dollars or as a percentage of income. In doing so, though, they are not simply choosing freely among limitless opportunities, but instead making difficult choices among limited and often unsatisfactory alternatives. Since a housing affordability standard is intended to measure whether a household has sufficient resources left to meet its non-shelter needs after paying for housing, basing such a standard on what people actually pay provides no way of assessing whether they are in fact able to achieve some minimum standard for non-shelter necessities.

Id. at 35.

United States Bureau of Labor Statistics has developed a "market-basket" definition⁷⁷ of a minimum adequate standard of living in its Lower Budget Estimates which are drawn from the major expenditure categories such as food, household furnishings, transportation, medical, personal care, entertainment, as well as shelter.⁷⁸ Under the BLS Lower Budgets, a family of four needed an income in excess of \$15,813 in 1990 in order to be able to afford any housing, and an income of \$19,083 to afford housing costing no more than \$275 per month.⁷⁹ Thus, families of four in

77. STONE, *supra* note 75, at 324. Stone argues that the market-basket approach is superior to the official federal Poverty Level because the Poverty Level is "based directly on food costs alone." *Id.*

78. *Id.* at 327. Under the Bureau of Labor Statistics' January 1995 Consumer Price Index, the following weights were assigned to various spending categories: Housing accounted for 41% of the typical household budget; food and beverages, 17%; medical care, 7%; apparel, 6%; entertainment, 5% and other, 7% (the figures do not total to 100% due to rounding of the numbers.) William Gies, *Getting Personal; Find Out Where You Stand in the Inflation Picture*, CHI. TRIB., Jan. 5, 1995, at 1. The BLS measurement of housing costs takes into account housing payments, lawn care, and long distance telephone bills. *Id.* Though it records in excess of 90,000 prices of 70,000 products and services obtained from 85 U.S. cities, the CPI which was created in 1913 does not take into account the types of goods and services purchased by consumers today. Ronald E. Yates, *The New Way to Gauge Economy, Professor Says Customer Satisfaction Level Tells More*, CHI. TRIB., Sept. 18, 1994, at B1. For example, home computers and on-line services were not used as extensively in 1984 as they are today, so personal computers are not included in the CPI. Jim Gallagher, *U.S. Seeking Companies to Help Track Inflation*, ST. LOUIS POST-DISPATCH, Aug. 22, 1994, at B7. Critics of the CPI fixed market basket of purchases assert that it overstates inflation by neglecting to factor in the fact that a family residing in the same house for 15 years might have a static mortgage payment, allowing them to allocate only 20% of their spending for housing. *Id.* In his article, Giese points out that if, however, 20% of a family's spending is allocated solely to its mortgage payment and the family's ARM rate jumps up a couple points their inflation rate has soared. *Id.*

Another critic of the CPI, Claes Fornell, of the University of Michigan's School of Business Administration, has created a new index, the American Customer Satisfaction Index (ACSI) which he says will provide a more accurate measurement of economic output, corporate performance and consumer behavior, than the consumer price index. Yates, *supra* at 1.

Instead of measuring the average price change in a fixed market basket of goods and services which Americans purchased between 1982 and 1984, like the CPI, Fornell's index calibrates customer satisfaction with goods and services provided today by 7 economy sectors, 40 industries, principal government agencies and 203 U.S. and foreign companies totalling \$2.8 trillion in yearly sales. *Id.*

79. STONE, *supra* note 75, at 327. Stone's analysis of shelter poverty leads him to six conclusions.

- 1) Funds available for housing increase steeply as income increases.
- 2) Family size has a direct bearing on the amount of funds available for housing.
- 3) Each household size has an income level below which members cannot afford to pay anything for housing if they are going to maintain the BLS Lower Budget standard and pay taxes. In 1990, the "zero point of

the lowest economic quartile, with an average family income in 1992 of \$11,550, clearly are shelter poor.⁸⁰ For such households, housing would have to cost far less than \$35,000 to buy⁸¹ or \$250 per month to rent in order to be affordable.⁸² Unfortunately, the private sector has shown little or no recent ability to provide housing meeting current community standards at these affordable prices.⁸³

2. Implications of Shelter Poverty

If advocates of the shelter poverty concept are correct that at least thirty percent of the population in the United States was shelter poor in 1991, affordable housing is a problem of scandalous proportions for a country as wealthy as the United States.⁸⁴

affordability" for a family of four was \$15,813, but only \$4,500 for a single, non-elderly adult.

4) Likewise, each household size has an income level above which members can afford to pay more than the conventional 25 or 30% of income for housing. In 1990, that level was \$27,500 for a married couple with two children.

5) The maximum amount of affordable housing dollars increases "almost linearly" as income increase because of the fact that personal taxes (federal and state income taxes and social security) are "virtually a flat percentage of income."

6) Inflation and tax increases have reduced the amount of income that households on fixed incomes can afford to allocate to housing.

Id. at 37-44, 327.

80. See, e.g., Aaron Bernstein, *Inequality: How the Gap Between Rich and Poor Hurts the Economy*, BUS. WK., Aug. 15, 1994, at 78.

81. The \$35,000 figure is slightly more than three times the annual income of families which fall into the lowest economic quartile. To purchase a home with an FHA loan, the real estate industry requires that a family's mortgage payments consume no more than 29% of the household's gross monthly income. Interview with Velma Fowlkes, Sales Manager, Malone Mortgage Company (Jan. 25, 1995). In order to qualify for an FHA loan, households in the lowest income quartile, earning \$11,500 a year, would have to have essentially no debt and find a home under \$25,000. Burdened by no other debt, the maximum mortgage payment that a family in the lowest income quartile could afford is \$269.50 per month in principal and interest; however, about \$75.00 of that sum must be allocated to taxes and insurance, leaving the family with an effective maximum principal and interest payment of just under \$200 per month. The mortgage payment calculations are based on the \$11,500 median annual income of families in the lowest earning quartile for 1992 and are based on a 9% interest rate. Interview with Kristin Conwell, Financial Services Representative for Commerce Mortgage Corp. (Feb. 6, 1995). These figures are quite discouraging when considered in light of the fact that in the United States the median purchase price of a home in 1992 was \$141,000. STATISTICAL ABSTRACT OF THE UNITED STATES Tbl. 1226 at 744 (1994).

82. The \$250 per month rental figure is approximately 25% of the average monthly income of \$960.

83. National median monthly housing costs for owners and renters in 1989 were \$364 and \$411. BOGDON ET AL., *supra* note 12, at 44.

84. STONE, *supra* note 75, at 44. In 1991, according to Stone's analysis, of the 96

Michael Stone's calculations of affordability and shelter poverty reveal a \$1.5 billion gap in 1991, which is 3 times the high point of federal budget authorization for low-income housing of \$33 billion in fiscal year 1981.⁸⁵ While this is a staggering figure, Stone notes that it represents only two percent of the Gross Domestic Product of the United States and that it is not that much larger than the estimated \$60-80 billion of tax revenues foregone through tax benefits to homeowners.⁸⁶

While the shelter poverty analysis highlights the aforementioned affordable housing crisis, it also provides a basis for a more effective response because it emphasizes the fact that affordable housing problems are concentrated more specifically in lower-

million households in the United States, nearly 29 million were shelter poor. The key difference between a shelter poverty analysis and conventional poverty analyses is that shelter poverty brings to light the concentration of the problem among lower income and large households. Stone concluded that 15 million more people were shelter poor in 1991 than would be so classified under the 30% of income ratio, even though approximately the same number of households fell into each category. Stone found that renter households were nearly twice as likely to be shelter poor as owner households, primarily because the 1991 median income for homeowners was \$35,000, but for renter households only about \$19,000. *Id.* at 45. Shelter poverty was much higher among African-American households (49%) and Latino households (50%) in 1991. *Id.* at 50. While Stone found "no statistical confirmation of direct housing price discrimination against blacks and Latinos," he found that "race is a highly significant factor in determining the quality of housing occupied by a household with a given income or paying a given amount. *Id.* at 53. Stone concluded that elimination of racial discrimination while it would have little impact on shelter poverty, would "at least increase their chance of obtaining decent housing." *Id.* at 54.

85. *Id.* at 57.

86. *Id.* Critics of existing federal housing and tax policies argue that the free enterprise process has impeded the progress of economically disadvantaged persons, and that the government's liberal use of the mortgage interest tax deduction and allocation of subsidies to developer-landlords has failed, proving both costly and inefficient. STELLA M. CAPEK & JOHN GILDERBLOOM, COMMUNITY VERSUS COMMODITY: TENANTS AND THE AMERICAN CITY 263 (1992). Critics further claim that federal expenditures such as the mortgage interest tax deduction, capital gains exclusion, and numerous other federal credits consistently benefit middle and upper income households to the detriment of those in critical need of housing assistance. STEGMAN, *supra* note 65, at 5. The tax break extended to homeowners through the federal government's provision of the mortgage interest tax deduction is rarely referred to as a subsidy and likewise does not carry with it the same stigma as that tied to public housing assistance. *Id.* at 10. A study of 1988 tax expenditures found that over half of the tax savings provided by the mortgage interest deduction was realized by people whose incomes were in the ninety-second percentile or higher. James M. Poterba, *Taxation and Housing: Old Questions, New Answers*, 82 EMPIRICAL PUB. FIN. 237, 239 (1992); see also BLAU, *supra* note 36, at 63. The Budget of the United States for Fiscal Year 1995 projects that deductibility of mortgage interest on owner-occupied homes will amount to approximately \$55 billion of revenue loss this year. OFFICE OF MANAGEMENT AND BUDGET, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1995, 77 (U.S. GOVERNMENT PRINTING OFFICE 1994).

income, large families rather than across some standardized spectrum of income ratios. The shelter poverty analysis can help explain why housing programs that require beneficiaries to pay fixed percentages of their income for housing⁸⁷ do not succeed in reaching the lowest income households. If a household's non-housing expenses consume all of its disposable income, requiring that household to pay twenty-five or thirty percent of its income on housing in order to qualify for a housing subsidy may be an exercise in futility. Policy analysts contemplating the fact that some people may be unable to afford any cost for housing because of their extreme poverty, should be less likely to advocate a program that requires such individuals to make choices between shelter and non-shelter expenditures because of unrealistically high shelter payment requirements.⁸⁸

3. Privatization Initiatives

The chronic imbalance between the cost of housing meeting American standards of quality,⁸⁹ and the amount that low-income families can afford to pay for housing,⁹⁰ has led to an effort spanning my lifetime — I was born the year the Federal public housing program was created⁹¹ — to provide decent housing at affordable prices through a variety of federal and state subsidy programs.⁹² As noted earlier, public housing and private housing subsidy programs have come under intense criticism for alleged failures in tenant selection, housing maintenance and management, as well as high costs of production, allegations of graft and corruption, and the isolation of residents from their surroundings.⁹³ These criticisms, coupled with the enormous growth in

87. See *supra* notes 32-57 and accompanying text.

88. Of course, some payment for shelter should be required to avoid "free rider" morale problems for both recipients and taxpayers.

89. See *supra* notes 75-86 and accompanying text.

90. *Id.*

91. That year was 1937. United States Housing Act of 1937, Pub. L. No. 93-383, 88 Stat. 653 (1937), 42 U.S.C. § 1437 (1988 & Supp. V 1993). See LAWRENCE M. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING* 94-113 (1968) (tracing the history of the establishment of the public housing program).

92. For a review of the Nation's experience in housing, see generally Symposium, *The Urban Crisis: The Kerner Commission Report Revisited*, 71 N.C. L. REV. 1283-1838 (1993).

93. According to a study of 368 PHAs conducted by Abt Associates, Inc., between 1969 and 1978, the income generated by PHAs increased at a much slower rate than operating expenditures during the period between 1969 and 1978. *Large PHAs In Worse Financial Shape, Most In Need of Subsidies, Study Says*, 8 Hous. & Dev. Rep. (BNA) No. 16, at 310 (Sept. 15, 1980). Large PHAs fared the worst, having the highest operating deficits, lowest project reserves, and were the most reliant on federal subsidies. *Id.* In 1978, small PHAs, with between 100 to 499 units, were able to offset 74% of their operating expenses with rental income. *Id.* While

the federal deficit,⁹⁴ have fueled increasing calls for a *load shedding* privatization of troubled public housing units and of the growing federal inventory of failed assisted housing developments,⁹⁵ as well as greater use of *empowerment* forms of privatization such as housing vouchers.⁹⁶

Load shedding implies dumping. While the result may be a reduction in financial pressures for the "load shedder," the identity of the recipient of the "load" and the impact of the "shedding" on the recipient and other affected persons must be considered in evaluating a decision to privatize in this manner. Load shedding of housing units to speculators and slumlords may simply exacerbate the conditions that caused the conditions in the first place. Load shedding of those same units to partnerships of experienced for-profit organizations and non-profit, community-based corporations that are capitalized sufficiently with funds and expertise has great potential for ameliorating the plight of residents trapped in squalid ghettos.

C. A Privatization Alternative: Social Housing

A European strategy that is attracting increasing attention in

extra-large PHAs were only capable of offsetting 44% of their expenditures with rental income. *Id.*

By 1978, subsidies accounted for 28% of total operating expenditures for PHAs; for extra-large PHAs, subsidies amounted to 57% and for small PHAs, subsidies amounted to approximately 24%. *Id.* Overall, total operating expenditures climbed 131% during the period between 1969 and 1978. *Id.*

In conceding the failure of large high-rise housing projects, Housing Secretary Henry G. Cisneros has referred to such projects as "warehouses of violence" incapable of being secured. *Big High-Rise Housing Projects Aren't Worth Saving; HUD Says*, ST. LOUIS POST-DISPATCH, May 3, 1994, at 4C. Cisneros has indicated that future hopes of success must be founded on a "model of integration by income and race across a metropolitan areas." *Id.*; see *supra* note 50 and accompanying text.

94. The \$152.5 billion deficit projected for 1994 is a starkly different back-drop for housing policy deliberations than what confronted the nation in 1968, when major federal housing production programs were enacted in response to pent up demands for better housing, employment and educational opportunities that flared into urban riots. In calling for a massive federal response to the plight of the cities, the National Advisory Commission on Civil Disorders (Kerner Commission) observed that:

[t]he key factors having a bearing on our ability to pay for the cost are the great productivity of the American economy, and a Federal revenue system which is highly responsive to economic growth. In combination, these produce truly astounding automatic increases in Federal budget receipts, provided only that the national economy is kept functioning at capacity, so that actual national income expands in line with potential.

REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 411 (1968) [hereinafter KERNER COMM'N REPORT].

95. See *supra* note 45 and accompanying text.

96. 42 U.S.C. § 1437f(o) (1988 & Supp. V 1993).

the United States is the concept of social housing.⁹⁷ Social housing takes many forms, including ownership of housing by public or non-profit entities,⁹⁸ of land underlying housing by community land trusts,⁹⁹ communal ownership through mutual housing associations¹⁰⁰ and limited equity housing cooperatives,¹⁰¹ and

97. For an informative analysis of the advantages of social housing as well as a comprehensive overview of numerous variations of collective housing, see generally, *NEW HOUSEHOLDS, NEW HOUSING* (Karen A. Franck & Sherry Ahrentzen eds., 1991). Among the many social housing models explored are Communal Housing in Sweden, Co-housing in Denmark, mingle units, goals, Gottornes and Single Room Occupancy (SRO) Hotels. *Id.*

98. See generally CAPEK & GILDERBLOOM, *supra* note 86.

99. Community land trusts (CLTs) are organizations that function on a not-for-profit basis, acquiring land and holding it in perpetuity, with residents on such land holding lifetime, or long-term, inheritable leases. Arlene Zarembka, *The Urban Housing Crisis: Social, Economic, and Legal Issues and Proposals* 47 (1990). Commonly, the CLT is governed by a board comprised of members elected from the local Community and the land trust residents. *Id.* In exchange for the use of the land, land trust residents pay a lease fee, which apportions the cost of real estate taxes, assessments, insurance and debt service among CLT households. *Id.* Generally a CLT ground lease will run for a ninety-nine year period, and frequently it contains a renewal option. See generally David M. Abromowitz, *Community Land Trusts and Ground Leases*, A.B.A. J. OF AFFORDABLE HOUSING & COMMUNITY DEV. L., Spring 1992 at 5. Though they may not own the land, CLT residents may own the improvements they construct on the land; however, resident's ownership is subject to the land trust's first right to purchase the improvements. *Id.* Alternatively, the land trust has the right to approve a sale of the improvements to a low or moderate income household. *Id.* When either alternative is exercised, the price is "based on the amount that the seller paid down on the property, with adjustments made for inflation, improvements, depreciation, and damage." *Id.* at 48 (citing INSTITUTE FOR COMMUNITY ECONOMICS, *COMMUNITY LAND TRUST HANDBOOK*, Ch. 2 (1992)). Arlene Zarembka, a proponent of Social Housing, asserts that since CLTs may at some point dissolve, in order to be treated as permanent components of the Social Housing Sector, the land trust or cooperative should, upon dissolution, be subject to transfer to another segment of the Social Housing Sector which would ensure that the property does not revert back to the private, for-profit sector. Zarembka, *supra*, at 47. See generally Abromowitz, *supra* at 5 for an in-depth analysis of the CLT ground lease model.

100. The DeSales Mutual Housing Association in St. Louis is an example. See *supra* notes 122-30 and accompanying text.

101. A limited equity cooperative (LEC) is comprised of members who each own a share of the cooperative property's total value. Zarembka, *supra* note 100, at 47. The resale value of a share is determined according to a formula designed to arrest inflation in the value of shares in order that low- and moderate-income households are not priced out of an opportunity to by a share in the cooperative. *Id.* at 48. The resale value of a share is limited to the member's cash investment in the cooperative and small return on the initial outlay. *Id.* at 48. Most often, members of LECs are entitled to reside in their housing unit in perpetuity and may pass their unit onto their heirs. *Id.* at 48. If a member opts to sell his or her unit, the LEC maintains the first option to purchase the property at a sale price arrived at under the formula. *Id.* at 48. The LEC may then resell the share, admitting a new member to the cooperative. *Id.* at 48. See generally, David H. Kirkpatrick, *Cooperatives and Mutual Housing Associations*, A.B.A. J. OF AFFORDABLE HOUSING & COMMUNITY

ownership by individuals with limited economic means.¹⁰² The "unifying concept" is the existence of "enforceable provisions preventing the housing from being sold in the private, speculative market."¹⁰³ Social housing is being advocated in this country as a means of preventing gentrification, regulating the speculative aspects of housing ownership, and providing a realistic opportunity for low-income households to experience the benefits of ownership.¹⁰⁴

Under a social housing regime, owners agree that housing will remain affordable, based on agreed upon definitions of affordability, for a particular period of time, up to and including "permanently," "forever" or "in perpetuity."¹⁰⁵ The theory behind the social housing movement is that a certain percentage of the housing stock within the community should be dedicated to persons in the lower income levels. This dedication offers, in the minds of the supporters of social housing, the opportunity for low-income persons to move through a continuum of growth to eventual homeownership.

The security of tenure accorded low- and moderate-income persons by social housing models is not without its share of legal hurdles. Commentators have identified several legal issues that need to be addressed before social housing programs may be successfully implemented.¹⁰⁶ Mechanisms which assure the availability of affordable housing to economically disadvantaged persons "in perpetuity" may be challenged as: (1) unreasonable restraints on alienation; (2) violations of the rule against perpetuities; or (3) illegal price fixing.¹⁰⁷

The right of first refusal, through which a social housing regime can prevent conversion of affordable housing to market-rate housing by purchasing the unit on previously-agreed terms,¹⁰⁸ may be challenged as an unconstitutional restriction

DEV. L., Spring 1992 at 7 (presenting an in-depth analysis of limited equity cooperatives).

102. See generally Abromowitz, *supra* note 100, at 5. Michael F. Keeley & Peter B. Manzo, *Resale Restrictions and Leverage Controls*, A.B.A. J. OF AFFORDABLE HOUSING & COMMUNITY DEV. L., Spring 1992 at 10.

103. STONE, *supra* note 75, at 193; Zarembka, *supra* note 99, at 47.

104. Zarembka, *supra* note 99, at 45-53.

105. STONE, *supra* note 75, at 193.

106. Zarembka, *supra* note 99, at 145-58; Abromowitz, *supra* note 99, at 5-6; Kirkpatrick, *supra* note 101, at 7-8; Keeley & Manzo, *supra* note 102, at 9-11.

107. Zarembka, *supra* note 99, at 145-48; Abromowitz, *supra* note 99, at 5-6; Kirkpatrick, *supra* note 101, at 7-8; Keeley & Manzo, *supra* note 102, at 9-11.

108. The right of first refusal, unlike an option, allows the holder of the right to purchase the property on specified terms only when and if the seller decides to sell. J.A. Bryant, Jr., Annotation, *Pre-emptive Rights to Realty As Violation Of Rule Against Perpetuities Or Rule Concerning Restraints On Alienation*, 40 A.L.R. 3d 920, 924, 925 (1971 & Supp. 1994). Unlike the right of first refusal, which is con-

on the use and disposition of property. Any restriction on use attributed to the right of first refusal is not severe enough to amount to a *per se* taking, because it does not destroy all economically viable use of such property,¹⁰⁹ nor amount to a permanent physical occupation of the property.¹¹⁰ Uncompensated economic regulation accomplished through zoning and land use regulation has generally been upheld as a valid application of the state police power, when exercised for the preservation of the general health, safety, morals, or welfare of the population.¹¹¹

When reviewing resale control mechanisms, most courts employ a reasonableness test as a means of review, balancing the purpose of the restriction, the party's interest in imposing it, and the restrictions effect on the transferability of the owner's property.¹¹² Below-market purchase rights have generally been upheld

tingent upon the seller's willingness to sell, an option allows its holder to compel a sale of the property. *Id.*

109. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

110. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Restrictions on demolition and condominium conversion should also be upheld as constitutional in many states but still could be subject to attack under the Fifth amendment by owners who claim that the restrictions on disposition of the property amounts to a taking without just compensation. *Zarembka*, *supra* note 99, at 149. Despite challenge, restrictions on condominium conversions and demolitions have been upheld on various combinations of the following grounds: (1) they do not amount to a taking by denying owners all beneficial use of the property, and thus permit a return on the owner's investment; (2) notice of the restrictions was available, and purchasing subject to such restrictions, owners may not claim that the restrictions interfere with investment-backed expectations; (3) the burden imposed on owner's liberty interests are minimal; and (4) deference is accorded the legislature's balancing of interests. *Id.* at 149. In states where restrictions on condominium conversion and demolition would be held unconstitutional, in order to implement social housing programs, state legislatures may need to enact laws authorizing municipalities to employ the power of eminent domain for the acquisition of property that landowners plan to demolish or convert. *Id.* at 150-51.

111. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 121 (1978); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Zarembka*, *supra* note 99, at 147.

112. *Keeley & Manzo*, *supra* note 102, at 10; see also RESTATEMENT (FIRST) OF PROPERTY § 406 (discussing the factors establishing the reasonableness of restraint). "[J]udges and commentators have long argued that government should be allowed to exercise more control over landlords than over other property owners." Note, *Constitutionality of Rent Control Restrictions on Property Owners' Dominion Interests*, 100 HARV. L. REV. 1078 (1987) (citing *Block v. Hirsh*, 256 U.S. 135, 157-58 (1921) (noting preference accorded tenants under English Law)). However, some state courts have struck down first right of refusals to purchase landlord property, holding that such restrictions appropriate a fundamental right of ownership by frustrating the owners' right to sell the property to persons of his choice. *Hall v. City of Santa Barbara*, 797 F.2d 1493 (9th Cir. 1986); *Gregory v. City of San Juan Capistrano*, 191 Cal. Rptr. 47 (Cal. Ct. App. 1983).

in cases involving cooperative arrangements, while little precedential law exists regarding such restrictions when the cooperative model is absent and the grantor owns the property in fee simple.¹¹³

In certain states, resale restrictions may violate the rule against perpetuities, because such restrictions may encumber the land for more than twenty-one years beyond a life in being.¹¹⁴ If state statutes and case law do not modify the common law application of the rule against perpetuities, in order to avoid the restrictions of the rule, the term of the right to purchase may need to be limited to the duration of the buyer's life, plus exactly twenty-one years.¹¹⁵

Lastly, price-fixing agreements are generally prohibited by antitrust laws.¹¹⁶ As a result, public agency efforts to preserve affordable housing availability through the use of resale price agreements, resale controls and antispeculation mechanisms may raise antitrust objections.¹¹⁷ However, the Supreme Court has laid to rest most antitrust objections so long as delegated statutory authority includes "suppression of competition [as] the 'foreseeable result' of what the statute authorizes."¹¹⁸

III. SOME PRIVATIZATION MODELS

Privatization strategies relying solely on a private market economy offer little hope for long-term success in alleviating shelter poverty. The competitive nature of the private market in today's climate of wrenching technological change offers little solace to the millions of households trapped in minimum-wage jobs, mental and physical disabilities, or broken social relationships. They are unable to compete in the private market for decent housing. Current patterns of federal tax¹¹⁹ and local land

113. Keeley & Manzo, *supra* note 102, at 10.

114. *Id.* at 9, 10. Keeley and Manzo observe, however, that modern courts are reluctant to void "a preemptive right such as a right of first refusal under [the common law rule against perpetuities]," and California law has even altered the RAP to allow for a ninety year 'wait and see' period. *Id.* at 10.

115. *Id.* at 10.

116. ALAN MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES 143 (1984) (citing Sherman Act, 15 U.S.C. §§ 1-18 (1890)).

117. *Id.*

118. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991) (upholding billboard regulations authorized by state zoning enabling act); see also MALLACH, *supra* note 116, at 143.

119. As affordable housing advocates have noted, taxpayers pay considerably less than they would otherwise be responsible for if current mortgage interest and real estate tax deductions were not permitted. Zarembka, *supra* note 99, at 155. For example, the Office of Management and Budget anticipates that in 1995, alone, the deductibility of mortgage interest on owner-occupied homes will amount to approximately \$55 billion of foregone federal revenue. OFFICE OF MANAGEMENT AND BUD-

use¹²⁰ policies, along with the economics of land development and housing construction¹²¹ drive the private housing market away from provision of low-cost housing. Load shedding privatization solely to the private market may make politicians and taxpayers feel better, but it will do little for shelter poverty.

However, empowerment-based privatization, in conjunction with the social housing movement, offers potential for both short-term and long-term benefits. A variety of models for successful privatization strategies of this type are in place in a number of communities. Several examples from the St. Louis area can be used to identify the necessary elements of a successful strategy.

A. Urban Models

1. The DeSales Mutual Housing Association: Housing Cooperative

The DeSales Mutual Housing Association is a cooperative organized by the DeSales Housing Corporation, a non-profit neighborhood-based housing corporation operating in the Fox Park neighborhood of south St. Louis. The DeSales project, patterned after projects in Madison, Wisconsin and several other cities in the United States and Europe,¹²² combines the concept of coop-

GET, *supra* note 86.

120. Under traditional zoning, segregation of uses is the primary objective. Though locating like uses together was intended to preserve the general welfare and the health and safety of a community's residents, it has effectively operated to exclude low- and moderate-income residents from many communities. In the case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court upheld an exclusionary zoning provision in the interest of protecting a single family residential neighborhood's quality and character. The *Euclid* case is often regarded as the pivotal case which engendered the hierarchy of uses which posits single-family residential neighborhoods as preferable to multi-family housing. See Williams, *supra* note 19, at 77-78.

After years of upholding zoning provisions which effectuated economic segregation, the New Jersey Supreme Court, in its *Mount Laurel* cases, held that a municipality must employ its land use regulations in a manner which will enable it to supply its fair share of the region's affordable housing. *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975); *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983). Similarly, in a unanimous decision of the New Hampshire Supreme Court, the Town of Chester was required to redraft its residential zoning ordinance to take into account the region's housing needs and to permit the development of additional apartment complexes. *Britton v. Town of Chester*, 595 A.2d 492 (N.H. 1991). For a thorough exploration of state courts' imposition of inclusionary zoning methods such as a fair-share requirement, see generally Williams, *supra* note 19, at 79-83. In her article, Williams also analyses the takings challenges to inclusionary zoning methods. *Id.* at 88.

121. See *Hoffman v. City of Town and Country*, 831 S.W.2d, 223, 231 (Mo. Ct. App. 1992), where it was noted that in order for development of a parcel to be economically feasible, homes must sell for 4 to 5 times of the total price of the undeveloped parcel plus the cost of the developed lot.

122. Boston, New York, San Francisco, Los Angeles, Berkeley, Canada, Sweden,

eratives and condominiums with rental housing, yielding affordable housing which stabilizes neighborhoods and encourages further private investment in the community.¹²³ Residents of a Mutual Housing Corporation do not own their units; however, due to their extensive management, voting and continued occupancy rights, Mutual Housing Association (MHA) residents possess a stake in their neighborhood's success and enjoy a sense of ownership.¹²⁴ As long as MHA residents comply with their occupancy agreements, they enjoy the right to lifetime residency, receive protection from arbitrary rent increases, as well as the right to participate in the supervision of property management and selection of new residents.¹²⁵ If an MHA resident should voluntarily elect to move, prior to vacating the unit, the resident can nominate a member of his or her immediate family who will then receive priority consideration for placement in the unit.

Public and private sources provided financing for the DeSales project, and the resulting development of twenty-two units of affordable housing for low- and moderate-income residents was completed in 1994.¹²⁶ The residents are members of the association that actually owns the property.¹²⁷ Leases that allow MHA residents to stay as long as they participate in the association activities and abide by the rules of the association provide residents with a security of tenure rarely provided by rental hous-

Finland, France, Italy. CAPEK & GILDERBLOOM, *supra* note 86, at 260. Sweden's results with cooperative programs have been particularly encouraging. *Id.* Supporters of the cooperative movement argue that in Sweden, slums have vanished, there is no homeless problem, and the average household pays half of what a comparable American household would pay in rent. The Swedish call cooperatives and public housing Kollektivhus, for the collective and communal character of the dwelling arrangement. ALISON WOODWARD, COMMUNAL HOUSING IN SWEDEN: A REMEDY FOR THE STRESS OF EVERYDAY LIFE?, NEW HOUSEHOLDS: NEW HOUSING, 71 (Karen A. Franch & Sherry Ahrentzen eds., 1991).

123. Interview with Maida J. Coleman, Mutual Housing Coordinator, DeSales Community Housing Corporation, in St. Louis, Mo. (Jan. 23, 1995).

124. Marcia L. Koenig, *Mutual Housing's a Cozy Option: Sense of Ownership Helps Tenants Help Each Other*, ST. LOUIS POST-DISPATCH, May 19, 1994, at Metro 1.

125. 1994 DESALES MUTUAL HOUSING ASSOCIATION FACT SHEET [hereinafter DESALES FACT SHEET].

126. Interview with Maida J. Coleman, *supra* note 123. DeSales Community Housing Corporation works with existing structures and properties; rehabilitation of the completed 22 units includes 10 townhomes and 12 garden apartments. *Id.* The completed 22 units include 1, 2, 3 and 4-bedroom floorplans and rents range from \$290 to \$495 a month. *Id.* Due to the partial federal funding of the DeSales project, a family of four cannot have an income in excess of \$26,400 and reside in the DeSales MHA units. *Id.* DeSales is currently planning the development of 12 additional units. *Id.*

127. *Id.*

ing.¹²⁸

The housing cooperative principle is expanded in the MHA through the addition of representatives of business, community groups and government to the governing board, although a majority of the board is made up of residents.¹²⁹ MHAs emphasize long-term affordability by offering a lifetime right to occupy, along with a right to pass on the unit to a family or household member.

A related but different model is the co-housing model. Co-housing employs the same essential features of the cooperative but also requires people to live in a more communal environment. Co-housing provides congregate living facilities for meals, recreation, etc. Cooperatives do not provide congregate facilities but do involve the tenants in many of the management activities.¹³⁰

2. Joint Ventures between Non-Profits and For-Profits: The St. Louis Association of Community Organizations

The St. Louis Association of Community Organizations (SLACO) is a consortium of twelve neighborhood corporations that have worked together for approximately fifteen years to improve community living in the inner-city areas of St. Louis.¹³¹ They have engaged in a variety of activities focusing on job development, crime control, neighborhood clean-up, and housing. A major success of SLACO has been its ability to negotiate and participate in joint ventures with for-profit developers to produce rental and for-sale housing on scattered sites throughout the St. Louis area. In 1993, SLACO broke ground for the next phase of twenty-one homes in its Buder Place Development, a major initiative to provide single family homes in an area of the near southside that has been characterized by demolition and derelict buildings for years.¹³² Once the next phases of the Buder Place Development are completed, there will be a total of seventy-three Buder Place Homes.¹³³

SLACO began a new lease-purchase program with the Regional Housing Alliance in which low-income families who have good prospects for homeownership enter into long-term leases

128. Koenig, *supra* note 124, at 1.

129. For example, the DeSales Mutual Housing Association board includes community, government and business leaders, as well as MHA residents who have been elected by their peers. Interview with Maida J. Coleman, *supra* note 123. Management of DeSales' MHA is coordinated and directed by the MHA Resident Council, comprised strictly of MHA residents and in which all residents possess voting rights. DESALES FACT SHEET, *supra* note 125.

130. See generally CAPEK & GILDERBLOOM, *supra* note 86.

131. Interview with Gina Ryan, Executive Director of St. Louis Association of Community Organizations (SLACO), in St. Louis, Mo. (Jan. 17, 1995).

132. *Id.*

133. *Id.*

with a portion of their rental payments being dedicated to a downpayment fund. Forty homes, twenty in the city of St. Louis and twenty in a low-income area of St. Louis County, will be purchased and renovated during the first year of Affordable City Homes, a partnership between SLACO and C.F. Vatterott Co., a private developer that has worked with SLACO on a number of successful housing projects since 1984.¹³⁴ SLACO also broke ground in 1994 for the first of a number of single family homes to be built by the Ranken Development Corporation, a partnership between SLACO and Ranken Technical College. This joint venture agreement provides that students at Ranken Technical College, as a part of their studies, will do the carpentry work on the houses.¹³⁵ Prospective homeowners will be screened and selected by SLACO.

B. A Suburban Model: Single Family Rental Property With Housing Services, (Ecumenical Housing Production Corporation)

The Ecumenical Housing Production Corporation (EHPC) is a non-profit corporation that was established in 1980 by a group of residents of St. Louis County who met regularly over breakfast at a time when St. Louis County and HUD were engaged in a bitter public squabble over the placement of Section 8 housing developments in suburban areas.¹³⁶

Over the past 15 years, EHPC has acquired 157 single family homes within incorporated municipalities of suburban St. Louis County. These houses for the most part are three bedroom homes. Many were constructed in the 1940s and 1950s in response to the housing demand after the Second World War. EHPC acquires the houses, makes necessary repairs, and rents the houses to families who qualify for Section 8 certificates and vouchers.

EHPC provides a variety of social service programs including housekeeping and budget counseling, parenting skills, day care,

134. *The Mustard Seed*, ST. LOUIS ASS'N FOR COMMUNITY ORGANIZATIONS (SLACO) NEWSL., Summer 1994.

135. *Id.*

136. The author was a founding member of EHPC and was president of the board in 1987 and 1988. Based on the author's experiences with EHPC an earlier article argued for the following approach to housing by not-for-profit organizations:

- (a) "small is more humane",
- (b) define the housing mission clearly,
- (c) long-term commitment,
- (d) develop a housing focus,
- (e) provide housing services beyond a shelter,
- (f) cooperation with private developers,
- (g) involvement in the community.

Peter W. Salsich, Jr., *Non Profit Housing Organizations*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y, 227, 260-67 (1989).

educational referral services, family enrichment programs, job training, and job internships at EHPC to help them develop skills and build résumés so that they will be able to acquire jobs on their own.¹³⁷

EHPC places great emphasis on careful selection of tenant families and active encouragement of families once they become tenants. For example, a two year old program, Partners in Self-Sufficiency (PSS), jointly funded by EHPC and the St. Louis County Housing Resource Commission, offers twenty-five families "an interlocking set of employment, education, and intensive family preservation services" to help them move toward economic self-sufficiency. Individual Action Plans (IAPs) are jointly arrived at by EHPC management, staff and participating families. PSS is structured as "an agreement in which program resources are given in return for [household] participation and an obligation to do their best" in fulfilling the IAPs.¹³⁸ Other EHPC programs include a Mothers Support Group to provide parenting information and parent-child interaction expenses and a Staff Internship Program providing fifteen families with a five-step internship program offering "progressive levels of training from basic office procedures, through advanced procedures and finally into a specialized area of EHPC operations."¹³⁹ EHPC has concluded that in order to succeed with the kind of families it serves, it must allocate approximately \$150-200 per month per-unit for management costs that are traditionally referred to as "soft costs." These are expenses for social services, counseling, etc., that are normally not part of the responsibilities of landlords.

C. Public Housing

The beginning of the end of the federal policy that concentrated low-income families in high-rise, urban, public housing ghettos can be traced to three highly-publicized events; one in Chicago and two in St. Louis. The Chicago *Gautreaux* case,¹⁴⁰ which began in 1966, resulted in a Supreme Court ruling that the

137. Letter from Christopher Krehmeyer, Executive Directory, EHPC, to Michael A. Stegman, Assistant Secretary for Policy Development and Research, HUD (Nov. 4, 1994) (on file with *The John Marshall Law Review*). The average EHPC family is a single female head of household with slightly over four members of the family, having an average annual income of \$5,500. *Id.* Full time employment rate for residents is twice that of comparable national figures for female-headed households occupying assisted housing units. 97% of the 500 resident children under 19 are permanently enrolled in school. One-third of EHPC families have become financially self-sufficient.

138. Michael J. Kelly, *Final Evaluation Report*, ECUMENICAL HOUSING PRODUCTION CORP.'S PARTNERS IN SELF-SUFFICIENCY 1, 9 Oct. 1994.

139. *Id.* at 11-12.

140. *Hills v. Gautreaux*, 425 U.S. 284 (1976).

practice of separating public housing residents by race was unconstitutional. The decision triggered a closely-observed, two-decade remedial experiment to offer a variety of housing choices, including suburban locations, to low-income families.¹⁴¹

In St. Louis, a year-long rent strike in 1968-1969 led to statutory limits on rents that public housing authorities can charge, authorization of new subsidies to cover public housing operating deficits,¹⁴² as well as the explosive demolition, five years later, of high-rise buildings in the Pruitt-Igoe project in St. Louis.

141. A report prepared for the Department of Housing and Urban Development in 1979 described the "Gautreaux demonstration" as a program "to assist members of the plaintiff class in obtaining housing in non-racially impacted areas throughout the Chicago SMSA and to develop, test, evaluate, and report, on procedures to accomplish that goal. The initial goal was to house 400 families in the first year of the demonstration. At the time of the renewal of the contract for a second year, the goal of placing an additional 470 families was established. The vehicle used to carry out the demonstration was a modified version of the Section 8 Existing Housing Assistance Payments Program." KATHLEEN A. PEROFF ET AL., GAUTREAUX HOUSING DEMONSTRATION: AN EVALUATION OF ITS IMPACT ON PARTICIPATING HOUSEHOLDS, 30 HUD (1979). The Leadership Council for Metropolitan Open Communities, a private non-profit organization, was retained by HUD to administer the program, recruiting families and providing assistance to those families. JAMES E. ROSENBAUM ET AL., LOW-INCOME BLACK CHILDREN IN WHITE SUBURBAN SCHOOLS 1 (1986). By 1992, approximately 4500 low income families had been placed in privately owned apartments with over half of these being in the suburbs of Chicago. Rubinowitz, *supra* note 22, at 592. Researchers have found that participants were almost universally more satisfied with their housing following their move and that most of the people who moved to the suburbs were successful in achieving social integration and employment, as well as better education for their children.

"These findings indicate that low income blacks get along quite well in white, middle-class suburbs. They benefit from suburban schools, make friends, and are accepted by most of their suburban neighbors. The results indicate that neighborhoods make a great difference in their quality of life." JAMES E. ROSENBAUM & SUSAN J. POPKIN, ECONOMIC AND SOCIAL IMPACTS OF HOUSING INTEGRATION v (1990).

The Gautreaux Program's successful promotion of the economic independence of low income individuals gave rise to a 1991 amendment to the 1990 National Affordable Housing Act which provides for replication of Gautreaux as a demonstration program in five other cities. SANDRA J. NEWMAN & ANN B. SCHNARE, URB. INST. REP. BEYOND BRICKS AND MORTAR: REEXAMINING THE PURPOSE AND EFFECTS OF HOUSING ASSISTANCE, at 31 (1992). While the majority of people who participated in the program improved their lives through the experience, one limiting factor in the possible replicability of the Gautreaux demonstration was the general reluctance of private landlords to participate. Rubinowitz, *supra* note 22, at 655-68.

142. 42 U.S.C. § 1437a(a)(1) (originally 25% of tenant income, now 30%) & § 1437g (operating subsidy) (1988 & Supp. V 1993). For discussions of the Brooke Amendment and its relationship to the St. Louis public housing rent strike, see DANIEL MANDELKER, HOUSING SUBSIDIES IN THE UNITED STATES AND ENGLAND, 84-85, 88-91 (1973); Richard D. Baron, *Community Organizations: Antidote for Neighborhood Succession and Focus for Neighborhood Improvement*, 21 ST. LOUIS U. L.J. 634, 643-54 (1978).

Pruitt-Igoe went from an architectural pride and joy, to a worldwide symbol of the failure of conventional public housing policies, and triggered demands for less concentrated and more neighborhood-friendly low-income housing developments.¹⁴³

A generation after these events took place, a national consensus is slowly taking shape about how to reshape public housing policies to serve more effectively their intended beneficiaries and affected communities. Some examples, again from St. Louis, can trace the outlines of an emerging strategy.

1. Transforming Public Housing

Plans are on the drawing boards in St. Louis that would transform public housing in a variety of ways. Taking a cue from the strengths of the tenant-management movement (TMC),¹⁴⁴

143. Pruitt-Igoe was a massive public housing complex of 33 high-rise buildings that was opened in the mid-1950s. When it was opened, an architectural magazine complimented the project for "innovative cost-saving and community-building design features." In its heyday, it housed about 26,000 people. Within ten years of its opening, serious problems developed. In the 1960s, it declined dramatically as the composition of tenants changed and the extreme density became intolerable for families with children. By the time of the St. Louis rent strike in 1968-1969, Pruitt-Igoe was in such bad shape that its residents did not participate effectively in the rent strike. In the early 70s, it closed and then was demolished as a national symbol of failure. Salsich, *supra* note 75, at 136 n.229.

144. The rent strikes of the 1960s were the birthplace of the public housing resident management program. The 1969 settlement agreement in St. Louis included a provision for establishment of a city-wide public housing tenant affairs board (TAB) drawn from project-based tenant management corporations (TMCs) (ADD specifics from *Baron* article.) The TMCs were organized as non-profit I.R.C. § 501(c)(3) corporations, and entered into contracts with local public housing authorities to perform certain management functions such as tenant selection, routine building maintenance and rent collection. 42 U.S.C. § 1437r(b)(4) (1988 & Supp. V 1993). An amendment to the National Housing Act in 1990 formally recognized the TMC movement and authorized HUD to provide financial and technical assistance to local public housing authorities desiring to establish TMCs. The resident management provision empowers public housing residents to improve the conditions of the housing projects in which they reside by permitting resident management entities to retain, and use for specific purposes, any revenues above and beyond the project's operating expenses. *Id.* § 1437r(a)(1). To encourage implementation of resident management groups, technical assistance funding is provided "to promote formation and development of resident management entities." *Id.* § 1437r(a)(2).

Prior to implementation of a resident management program, the public housing project's elected resident council must approve the establishment of a resident management corporation. *Id.* § 1437r(b)(1). Once approval is granted, the corporation is structured as a non-profit corporation established under the laws of the state in which the project is located and the tenants become the corporation's sole voting members. *Id.* Before the corporation may assume management responsibility it must obtain fidelity bonding and insurance or provide equivalent protection in compliance with the requirements set forth by the Secretary and the public housing agency. *Id.* § 1437r(b)(3). Once the resident management corporation has qualified under the provision, and procured the necessary bonding and insurance,

public housing residents, community leaders and public officials are reviewing proposals for a limited-equity resident cooperative,¹⁴⁵ a collaboration between a public housing project and its surrounding neighborhood,¹⁴⁶ and the replacement of a largely vacant high-rise project with a lower-density, mixed income development featuring townhouses and some for-sale units.¹⁴⁷

2. *Up From the Ashes (Pruitt-Igoe Development Corporation)*

The Pruitt-Igoe Development Corporation (PIDC) is a non-profit, community-based housing organization operating in an

the corporation enters into a contract with the public housing agency which establishes the respective responsibilities of the resident corporation and the agency. *Id.* § 1437r(b)(4). This contract is regarded as a contracting-out of services by the agency. *Id.*

Under a flexible waiver of Federal requirements provision, in some instances the Secretary may waive requirements which unnecessarily increase the costs of running the public housing project or limit the project's income. *Id.* § 1437r(d)(1). Furthermore, in some instance the Secretary may permit residents to volunteer labor to the housing project. *Id.* § 1437r(d)(2).

Under § 1437r(e), a contract entered into by the resident management corporation must also provide an explicit analysis of the housing projects projected income and operating subsidy. *Id.* § 1437r(e).

Over the past 25 years, the movement has had its ups and downs. Individual TMCs have flourished or floundered, often depending on whether a charismatic leader was able to elicit support from public and private sources. The TMC movement received strong support from the Bush Administration, when former HUD Secretary Jack Kemp made it the centerpiece of his privatization strategy.

Recently, much of the success in turning around Boston's public housing conditions has been attributed to the emphasis on tenant involvement in planning, redevelopment, and public safety, while the public housing authority was under day-to-day supervision of an appointed receiver. *How Boston Improved Public Housing*, ST. LOUIS POST-DISPATCH, Sept. 10, 1994, at 14; see *supra* note 45.

145. Thom Gross, *Carr Square Kicks Off Renovation*, ST. LOUIS POST-DISPATCH, Nov. 25, 1993, at 1C (reporting announcement of a \$20 million tenant-sponsored plan to convert a 50 year old low-rise public housing project into a resident cooperative).

146. Cynthia Todd, *Safe At Home*, ST. LOUIS POST-DISPATCH, Mar. 5, 1992, at 1 (describing the activities of the Covenant Blu-Grand Center neighborhood, "a unique coalition of rich and poor, black and white, urbanites and suburbanites, Catholics, Baptists and methodists who decided two years ago to take on the areas toughs").

147. Thom Gross, *\$46 Million to Rejuvenate Darst-Webbe*, ST. LOUIS POST-DISPATCH, Jan. 20, 1995, at 1A (reporting a federal grant to enable the City of St. Louis to replace 758 high-rise public housing units on the near south side with more than 1000 low-rise units scattered over a larger area through "a new approach to public housing"); Cynthia Todd, *Housing Plan: Scatter Poor In City, County*, ST. LOUIS POST-DISPATCH, Nov. 27, 1994, at 1D (describing a proposed settlement to a class-action lawsuit that has delayed implementation of a HUD-approved plan to demolish the 460 unit Vaughn public housing complex on the near northside and replace it with 220 townhouses and 440 Section 8 existing housing certificates and vouchers).

area of north St. Louis, most famous for the demolition of a failed high-rise public housing project by the same name in the 1970s. PIDC was formed in 1991 and is an incorporated, section 501(c)(3), Community Housing Development Organization (CHDO) created to improve the quality of housing in the community and assist the community in its efforts to revitalize the area. Community residents and members of local businesses make up the majority of its board of directors and staff.

PIDC was established by an umbrella organization called The Greater Pruitt-Igoe Two Community Organization which serves a very depressed community of approximately 2,300 people, over 95% of whom are African-American. The large majority of the community residents fall in the very-low to low-income as defined by HUD, with a small portion falling into the moderate and above levels. A neighborhood development plan was prepared by the Greater Pruitt-Igoe Two Organization. The plan calls for a variety of projects to revitalize the area, including a step by step process to rehabilitate existing housing units and through that effort, provide affordable housing for the very low-income residents. PIDC also works closely with the St. Louis Association of Community Organizations (SLACO) an umbrella non-profit that provides professional staff for ten low-income community organizations for the city of St. Louis, one of which is The Greater Pruitt-Igoe Two.¹⁴⁸

148. PIDC is involved in a multi-phased housing program. During the first phase, PIDC acquired 11 buildings with a total of 13 units from a local community land trust organization that had originally acquired the properties in the 1980s with the assistance of loans from the Institute of Community Economics (ICE) and the McAuley Institute, national non-profits that provide short-term financing and assistance to non-profits across the country. Three of the buildings containing five units were completely rehabilitated at the time and several other buildings were upgraded. Rental rehabilitation loans were placed on two of the buildings which include three of the rehabilitated units.

The Community Land Trust was unable to complete its planned rehabilitation on the remainder of the acquired units and PIDC obtained a short-term three year loan of \$144,000 from ICE to take over ownership of those units and to complete that particular project. At the present time, 11 units have been finished and are being rented to very low income families. One unit is being rehabilitated and one unit has been converted into an office for PIDC. In one case a four-family unit was converted into two three-bedroom units to accommodate larger families.

A Section 8 moderate rehab application is pending to enable four of the originally acquired two and three-bedroom units to be upgraded and to add four additional units in two vacant buildings that will be gut rehabilitated.

PIDC has also received a certificate of eligibility to participate in the Missouri Neighborhood Assistance Program (NAP). NAP is a state-authorized program that enables businesses to receive tax credits when they help finance local projects. Tax credits may equal up to 50% of the value of a contribution that a business firm makes to an eligible non-profit organization. These tax credits may be claimed against state income, corporate franchise, and financial institution taxes. On the strength of the NAP certification, PIDC has received a commitment from a local bank to provide long-term loan funds. PIDC is planning to rehabilitate four of the

IV. A PRIVATIZATION-BASED HOUSING STRATEGY

An affordable housing strategy that is based on privatization concepts would contain at least four elements: (1) a collaborative, inclusive planning process that draws the private sector into a three-way partnership with the public sector and affected residents (both intended beneficiaries and their neighbors) and that effectively links housing with related strategies to improve schools, jobs, public safety and social services; (2) deregulation, particularly of state and local land use laws that impair efforts to maximize affordable housing location choices; (3) tax reform through greater use of the Earned Income Tax Credit¹⁴⁹ and by capping the mortgage interest tax deduction to free up additional funds for affordable housing initiatives and reduce incentives for overconsumption of housing; and (4) empowerment through leadership, ownership opportunities and resident-sensitive management. Elements of the strategy may vary depending on whether the targeted areas are urban ghettos, viable urban neighborhoods, or suburban localities.

A. *The Appropriate Role of Government*

A privatization-based affordable housing strategy is not an invitation for the government to withdraw to the sidelines and lick its wounds.¹⁵⁰ Nor is it a call solely for government load shedding to promote efficiency and to reduce government deficits.¹⁵¹ Rather, it is a call for the government to increase the

existing units into "for sale" units and to acquire two additional units and make them available as three-bedroom townhomes. Anticipated sale prices are in the \$45,000-55,000 range. The NAP program is authorized by MO. REV. STAT. §§ 32.100-32.125 (1988) and regulations of the Department of Economic Development found in MO. CODE REGS. tit. 4, § 85-2.010.

Tax abatement of local property taxes is also being sought under authorization of Missouri revised statutes chapters 99 and 353.

The second major phase of the housing development program is a combined application for HOME/CDBG/LIHTC Tax Credit investment totalling \$1.5 million dollars. PIDC plans to buy out the short-term loan on the existing units and add ten additional units to its inventory. HOME and Block Grant Funds are anticipated to total between \$400,000-500,000. Funds derived through use of the low income housing tax credit are anticipated to be in the \$700,000-800,000 range and the balance will be made up with a small conventional loan. The Enterprise Foundation is working with PIDC on this project and has given them a pass-through grant for staff costs. PRUITT-IGOE DEVELOPMENT CORP., DESCRIPTION OF CURRENT STRATEGIES, PROGRAMS AND PROJECTS, Mar. 1, 1994 (unpublished document on file with *The John Marshall Law Review*).

149. I.R.C. §32 (1994); Pub. L. No. 103-66, §13142, 107 Stat. 312, 437-39 (1993).

150. This is suggested by the original definition of personal privatization. See *supra* note 51 and accompanying text.

151. See *supra* note 52 and accompanying text.

allocation of funds for affordable housing,¹⁵² but to redirect the housing dollars to programs designed to respond more effectively to shelter poverty, community concerns, and changing family living arrangements.¹⁵³ It is a call for a privatization program based on the empowerment model with a social housing twist.

B. Planning

A major requirement of a successful privatization-based affordable housing strategy is planning. Planning that is "business-like, very strategic planning,"¹⁵⁴ that involves all segments of the community, and that coordinates housing investment with investment for education, economic development, public safety.¹⁵⁵ Current discussion of housing planning tends to focus on two planning alternatives. The first is labeled "top down" planning in which government officials get together with professional planners, develop a plan and then attempt to impose it on a community.¹⁵⁶ The counterweight to this approach is so-called "bot-

152. Michael Stone has estimated that an effective attack on shelter poverty could be mounted with a 10 year commitment of capital grants for new construction and substantial rehabilitation of social housing, conversion of shelter-poor homeowners to social housing by purchasing mortgages and homeowner equity, buying out absentee landlords on a "limited equity" basis through issuance of 40 year government bonds, and providing operating subsidies for necessary social services, either directly to the social service providers or by distribution of vouchers to be redeemed in a "social market" in which housing choices are available but speculative profit is not part of the market price, for a total cost of approximately \$100 billion per year or about 2% of the Gross Domestic Product and about one third more than tax revenue foregone from homeowner tax deductions. STONE, *supra* note 75, at 224-34.

153. The average American household size has declined over the last two decades, as has the incidence of two-parent families. AMY BOGDON ET AL., *supra* note 21, at 15. In 1970, the average U.S. household was comprised of 3.14 persons, while in 1990 it contained 2.63 persons. *Id.*

In 1993, 30% of all American families and 63% of America's black families were headed by single parents. *30% of Families Have One Parent*, ST. LOUIS POST-DISPATCH, Jan. 10, 1995, News, at 1. These statistics include single-parent families where the head of the household was divorced, widowed or never married. *Id.* For a comprehensive analysis of the changing composition of American families, see generally, Edward H. Ziegler, *The Twilight of Single Family Zoning*, 3 UCLA J. ENVTL. L. & POLY 161 (1983).

154. Interview with Patricia Pepper, Executive Director, Miami-Dade County Community Partnership for Homeless, Inc., in Miami, Fla. (Sept. 15, 1994).

155. See, e.g., FINAL REPORT OF THE NEIGHBORHOOD DEVELOPMENT STRATEGIC PLANNING TASK FORCE TO THE MAYOR OF ST. LOUIS 4 (1994). "Strategies for investment in education, economic development, social services and security must be developed in a coordinated manner so that clear linkages are established to maximize the impact of public investments made to revitalize or rebuild city neighborhoods." *Id.*

156. Robert Mier stresses the importance of communication and community involvement in local economic development, aptly asserting that development deci-

tom up" planning in which community organizers help residents articulate a plan for the community and present it to government officials.

Both approaches have their strengths and weaknesses. The value of top down planning is the professional input. The value of bottom up planning is the input from people who are most likely to be affected by the plans. Neither type of planning can succeed fully without the other. Experiences with the Empowerment Zone planning process in St. Louis, the Miami-Dade County, Florida Community Partnership for Homeless, Inc., and the Chicago Affordable Housing and Community Jobs Campaign suggest that the planning that is needed is a combination of top down and bottom up activities, planning that is collaborative and inclusive.¹⁵⁷ Planning must reconcile the principle of subsidiarity¹⁵⁸ with the need to establish a critical mass capable of transforming an environment.¹⁵⁹ Planning must reconcile the goal of inclusion with the forces that emphasize exclusion.¹⁶⁰ Planning must take

sion making is:

an act of social construction concerned with attention shaping and persuasion, coalition building, and resource mobilizing behavior. These are communicative activities. The act of social visioning is replete with contradiction and paradox. Too often in local economic development, power is employed to resolve differences, and analysis is employed to justify the exercise of power.

ROBERT MIER, *Foreword to SOCIAL JUSTICE AND LOCAL DEVELOPMENT POLICY*, xi-xii (1993).

157. For a thorough historical analysis of successful Chicago development strategies, engendered by Major Harold Washington's neighborhood-based agenda in the mid-80s, see generally ROBERT MIER, *supra* note 156.

158. Decisions are most effective if made by persons closest to the problem. Pope John XXIII, *MATER ET MAGISTRA*, in *REVIEWING THE EARTH* 62 (David J. O'Brien & Thomas A. Shannon eds., 1966).

159. Richard D. Baron, President of McCormack, Baron & Associates, Inc., St. Louis, Mo, has proposed replacing large public housing projects with smaller, community-based, family housing clusters that would integrate well-designed and managed affordable housing into surrounding neighborhoods. These new mixed income developments could be funded through reallocation of current federal expenditures for operating subsidies and direct public housing support. MCCORMACK BARON & ASSOC., *URBAN REVITALIZATION DEMONSTRATION (MIXED-INCOME HOUSING INITIATIVE)*, Jan. 10, 1994 (unpublished report on file with *The John Marshall Law Review*). For a thoughtful analysis of large and small redevelopments in New Haven, comparing "coarse-grained" (large scale, neighborhood redevelopment) projects with "fine-grained" (small-scale, single building redevelopment) projects and concluding that an urban strategy that encourages a multitude of fine-grained redevelopment projects has a better chance of success than a strategy that heavily subsidizes a few coarse-grained redevelopments, see generally John P. Elwood, *Rethinking Government Participation in Urban Renewal: Neighborhood Revitalization in New Haven*, 12 YALE L. & POLY REV. 138 (1994).

160. Zoning is by nature exclusionary but must be done "in accordance with a comprehensive plan." See Charles M. Haar, *In Accordance With A Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955); Daniel R. Mandelker, *The Role of the Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976).

a long-term view, and must be linked to financial feasibility.¹⁶¹

In Miami, in order to gain approval of a homeless transitional housing initiative, fifty neighborhood meetings were held within a two month period of time.¹⁶² The Chicago affordable housing campaign was a two year effort of neighborhood organization, classical grass roots participation and extensive negotiation with public officials.¹⁶³ A new St. Louis housing plan, and the St. Louis Empowerment Zone Application,¹⁶⁴ established priorities

Collaborative and inclusive leadership efforts are referred to as "Cooperative Leadership" by Robert P. Giloth, who cites "task forces, ad hoc networks, innovative organizations, and partnerships born of struggle" as examples of desirable inclusionary planning entities. Robert P. Giloth, *Cooperative Leadership for Community Problem Solving*, foreword to SOCIAL JUSTICE AND LOCAL DEVELOPMENT POLICY xii (1993).

161. Richard D. Baron, president of a nationally-recognized housing development company, has criticized affordable housing plans that are not grounded in feasibility analysis as "fields of dreams" proposals. Richard D. Baron, address to a class at Washington University School of Architecture (Sept. 23, 1994).

162. Interview with Patricia Pepper, *supra* note 154. In Brooklyn, Pastoral & Educational Services, Inc. (PAES) purchased a vacant building from the city for a dollar and developed it into a multipurpose housing project, which now provides shelter to three discrete homeless populations. *Three Groups of Homeless Create Community Through Brooklyn Gardens Project*, 22 Hous. & Dev. Rep. (BNA) No. 28, at 440 (Nov. 21, 1994). The project, Brooklyn Gardens, won a Fannie Mae Foundation Maxwell Award of excellence in its provision of housing to three unique homeless populations. *Id.* Brooklyn Gardens offers: to single mothers and their children, under six years of age, 44 units of short-term transitional shelter; to single adults of both sexes, 74 units of permanent single room occupancy; and for psychiatrically disabled adults there are 18 units of long-term transitional housing. *Id.* PAES asserts that involvement of the surrounding community in the decision to develop the project was critical to the Brooklyn Gardens' success. *Id.* Residents from the surrounding community now hold Alcoholics & Narcotics Anonymous meetings at the project site. *Id.* PAES cites this kind of community involvement as indispensable to a project of this nature. *Id.* at 441.

163. In Chicago, over 260 organizations endorsed the Affordable Housing and Community Jobs Campaign in an effort to double the resources the City allocates to affordable housing. CHICAGO AFFORDABLE HOUSING AND COMMUNITY JOBS CAMPAIGN '93 1 (newsletter on file with *The John Marshall Law Review*). The community's collaborative effort was rewarded when in October 1993 Mayor Richard M. Daley announced that Chicago's funding of affordable housing would be increased by 50% over the next five years. *Id.*

164. *Visions of Hope: Rediscovering the Spring of St. Louis*, St. Louis, Missouri Empowerment Zone Proposal, June 1994, at 13-14.

Community out-reach efforts included more than 100 meetings with neighborhood residents, business people, service providers, social service agencies, police, potential funders, and many more. More than 3,000 people were involved in some way in the development of this plan The final decisions on the plan were made by a Planning Committee made up of representatives of neighborhoods, government, business, nonprofits, and other organizations One committee member remarked that it was the first time in his more than 40 years in St. Louis when he saw so many civic and business leaders putting aside their personal agendas to work together for the good of the community.

based on one year's discussion among professionals, neighborhood leaders, politicians, and developers.¹⁶⁵

C. Deregulation

As noted earlier,¹⁶⁶ one of the essential ingredients of privatization strategies implemented in this country and abroad is deregulation. With respect to housing, deregulation can take many forms. It needs to operate at all three levels of government in order for a privatization-based strategy to be effective.

1. Federal Regulations

At the federal level, most of the regulatory burden that causes affordable housing advocates to cringe involves standards for qualifying to receive federal subsidies. While the actual amount of new federal support for housing has diminished in the last ten to fifteen years, the dollar amounts available remain quite significant.¹⁶⁷ HUD and Congress over the last few years have moved away from categorical grant support for specific housing developments to the housing block grant concept. However, even within the housing block grant concept, many detailed regulations tend to complicate life for recipients of the block grants as well as potential beneficiaries of the programs. One concrete example worth noting because of its relationship to an empowerment based strategy is the eligibility standard for the new comprehensive CHDO that was authorized as a part of the 1990 Housing Act.¹⁶⁸ The requirements to qualify for a CHDO include a specific requirement that a percentage of the members of the board must be

Id.

165. The St. Louis priorities focus on the areas that need the most help, focus on the people who are current residents rather than attempting to attract new residents, and relate affordable housing to efforts to upgrade neighborhoods through education, economic development, crime control, and social services. Two examples of this attempt at coordinated approach include a series of homeownership based programs in which unions are underwriting development of modest cost new homes in low income minority concentrated areas of the northside of the city. The second program supported by the Missouri Housing Development Commission in which police officers are offered special rates and low downpayment loans if they agree to purchase a house in a 6 neighborhood area designated as areas of high crime is the Cops on the Block program. *Cops on the Block*, ST. LOUIS POST-DISPATCH, Feb. 24, 1994, at B14. The federal version of this program is Cops on the Beat and is codified at 42 U.S.C. § 3796 (1988).

166. See *supra* part I.

167. According to the 1995 Budget, approximately \$22 billion for housing assistance will be utilized this year. OFFICE OF MANAGEMENT AND BUDGET, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES, FISCAL YEAR 1995 102 (1994).

168. 42 U.S.C. § 12704(6) (1988 & Supp. V 1993); Cranston-Gonzalez Housing Act of 1990, Pub. L. No. 101-625, 104 Stat. 4079 (1990) (codified at 42 U.S.C. §§ 12701-12898 (1988 & Supp. V 1993)).

residents or eligible beneficiaries of the federal support that is allocated to non-profit organizations.¹⁶⁹ While this requirement certainly may serve a useful purpose of guaranteeing that intended beneficiaries have a voice in how the funds are used, it causes problems of its own because many of the existing organizations that grew out of the efforts in the 1980s to deal with a reduced federal support for housing do not qualify for CHDO status. They either have to reorganize or pass on the opportunity to receive housing block grant funds. A case in point is the Ecumenical Housing Production Corporation, discussed earlier as a model of non-profit scattered site suburban housing. EHPC would not qualify because it does not have the requisite percentage of resident participation on its board.¹⁷⁰ Additional examples of regulatory burdens at the federal level that could and should be relaxed include the regulations for implementation of the HOME program¹⁷¹ and the new Shelter Plus Care program¹⁷² designed to offer support services as well as housing to homeless people and people who are in danger of becoming homeless.

A central theme of the 1994 HUD Reinvention Blueprint¹⁷³ is deregulation. The proposed phase-out of public housing operating subsidies in exchange for Section 8 tenant-based vouchers includes elimination of federal regulations of public housing man-

169. 42 U.S.C. § 12704(6)(B) (1988 & Supp. V 1993). The Cranston-Gonzalez Housing Act of 1990 also provides that once federal housing block grant funds are made available to a jurisdiction, for a period of 24 months, not less than 15% of such funds are to be reserved strictly for investment in "housing to be developed, sponsored, or owned by community housing development organizations [CHDOs]." 42 U.S.C. § 12771(a) (1988 & Supp. V 1993).

170. See *supra* part II.B.

171. HOME Investment Partnership, 42 U.S.C. § 12741 (1988 & Supp. V 1993). The HOME program was created by the National Affordable Housing Act (NAHA) of 1990, which reasserts in Title I of the Act the "[n]ational goal that every American family be able to afford a decent home in a suitable environment." Pub. L. No. 101-625, §§ 101, 103 (1990). Under the NAHA such participating jurisdiction is required to establish a Comprehensive Housing Affordability Strategy (CHAS) for its community. 42 U.S.C. §§ 12705, 12746(5) (Supp. V 1993).

Once HUD has approved the jurisdiction's CHAS, the jurisdiction may participate in NAHA programs it specified in its CHAS strategy, and under certain programs may not be required to obtain project-by-project approvals. 42 U.S.C. §§ 12705(c), 12747(7) (Supp. V 1993).

172. Shelter Plus Care program, 42 U.S.C. §§ 11403-11407 (1988 & Supp. V 1993). The Shelter Plus Care Program codified at 42 USC §§ 11403-11407, was established to provide rental housing assistance in tandem with supportive services provided through other sources to homeless persons with disabilities and their families. 42 U.S.C. § 11403 (1988 and Supp. V 1993). Recipients of assistance obtain 5 year contracts and the aggregate amounts received are not to exceed the fair market rent limitation under section 8(c) of the U.S. Housing Act of 1937 (42 USC § 1437f(c)) that is in effect at the time of the application's approval. 42 U.S.C. § 11404(b) (1988 & Supp. V 1993).

173. See *supra* note 3 and accompanying text.

agement, with local public housing authorities being treated like private landlords under state landlord-tenant laws. While this proposal offers an excellent starting point for discussion, care must be taken to ensure that important tenant protections such as grievance procedure and "good cause" eviction requirements are not jettisoned indiscriminately, particularly for frail elderly, persons with disabilities and others who may not be able to compete effectively in a "self-sufficiency" driven, private market environment.¹⁷⁴

2. State and Local Regulations

At the state and local level, deregulation is required to respond to the "Not In My Back Yard" (NIMBY) movement. NIMBYism is all around us and is particularly prevalent in situations where new forms of housing are being advocated to respond to the changing nature of the American family and specific types of housing problems. Examples include: group homes for the developmentally disabled, scattered site housing for Section 8 families, residential treatment centers for substance abusers, and a variety of other programs.

The Federal Fair Housing Amendments Act of 1988 added prohibitions against discrimination on the basis of disabilities and families with children to the civil rights laws.¹⁷⁵ These changes, along with the new methods of enforcing all of the provisions of the civil rights statute,¹⁷⁶ establish a basic legal framework for

174. Concern about the impact of the proposed deregulation of public housing has been expressed by low income housing advocacy groups. See, e.g., *Tenants Would Fare Poorly Under Block Grants, NHLP Says*, 22 [Current Developments] Hous. & Dev. Rep. (BNA) 552 (Jan. 16, 1995). For a review of current legal protections afforded public housing tenants, see Shelby D. Green, *The Public Housing Tenancy: Variations of the Common Law That Give Security of Tenure and Control*, 43 CATH. U. L. REV. 681 (1994).

175. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 42 U.S.C. §§ 3601-3622 (1988)).

176. Civil Rights Act of 1968 (Fair Housing Act), Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (1988)). Under the FHAA, there are three courses of action to pursue in enforcing the Act's provisions. First, an administrative complaint may be filed with HUD by the "aggrieved" person, and if conciliatory effects are unsuccessful, the claim may be decided at an administrative hearing, unless one of the parties chooses to pursue review in federal court where the Justice Department would prosecute on complainant's behalf. 42 U.S.C. §§ 3612-3614 (1988 & Supp. V 1993). Second, the "aggrieved" party may initiate a private suit in federal or state court, where a jury trial is available. *Id.* § 3613. Third, a civil action may be taken by the Attorney General when a pattern or practice of illegal conduct is discerned and such behavior flags "an issue of general public importance." *Id.* § 3614. For a thorough analysis of the Fair Housing Amendments Act of 1988 and the Act's fortified enforcement methods, see Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. AM. U. 59 (1993).

responding legally against illegal efforts at excluding people with particular housing needs. However, the statute has an exception for "reasonable local . . . restriction[s] regarding the maximum number of occupants permitted to occupy a dwelling."¹⁷⁷ This ex-

A study conducted by the U.S. Commission on Civil Rights concluded that realizing the full potential of the 1988 amendment's enforcement provisions would require a greater allocation of resources and the establishment of an "independent [administrative] agency at the deputy secretarial level . . . within HUD, to contain the legal and fair housing staff required to enforce the law, including field office personnel whose responsibility is fair housing." *New HUD Fair Housing Agency, Increased Funding Recommended By Civil Rights Commission*, 22 Hous. & Dev. Rep. (BNA) No. 24, at 360 (Oct. 24, 1994).

The Commission's report concluded that, "[t]he division of responsibility for administering the 1988 amendments between HUD's general counsel and the assistant secretary for fair housing and equal opportunity (FHEO) has resulted in an anomaly whereby no one below the secretarial level has sole responsibility for the equitable and efficient implementation of the law." *Id.* The Commission criticized HUD's enforcement efforts as passive and devoid of a systematic approach to processing complaints. *Id.* Development of a fair housing complaint manual for staff procedure and the implementation of testing for disparate treatment were among recommended changes contained in the report. *Id.*

An August 29, 1994 memo issued by the Office of Fair Housing and Equal Opportunity set forth new procedures that went into immediate effect to ensure that individuals who have filed a fair housing complaint receive timely, adequate notification when resolution of the complaint has not occurred within 100 days of the filing. *Housing Briefs*, 22 Hous. & Dev. Rep. (BNA) No. 24, at 368 (Oct. 24, 1994).

177. 42 U.S.C. § 3607(b)(1) (1988). Housing discrimination under the FHAA includes the refusal of a landlord to make "reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [handicapped persons] equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B) (1988). The reasonable accommodation provision applies not only to landlords, but also to zoning ordinances and community efforts to enforce such measures. *Martin v. Constance*, 843 F. Supp. 1321, 1326 (E.D. Mo. Feb. 10, 1994); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993). In effect, the FHAA's "reasonable accommodation" provision has been interpreted to obligate communities to grant exceptions to ordinances when necessary in order to ensure that persons with disabilities are provided with equal housing opportunities. *Horizon House Developmental Servs., Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 699, 700 (E.D. Pa. 1992), *aff'd without op.*, 995 F.2d 217 (3rd Cir. 1993); *United States v. Village of Marshall*, 787 F. Supp. 872, 876-78 (W.D. Wis. 1992); *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1344-45 (D.N.J. 1991); *United States v. Commonwealth of P.R. and the Regulations and Permits Admin.*, 764 F. Supp. 220, 224 (D.P.R. 1991).

Though the House Report strongly indicates that Congress intended municipal zoning actions to be subject to the FHAA prohibition of discrimination on the basis of handicap, H.R. REP. NO. 711, 100th Cong., 2d Sess. 24 (1988), the FHAA fails to expressly delineate the amendment's application with regard to zoning. Therefore, the FHAA exemption of "reasonable local . . . restrictions regarding the maximum number of occupants permitted to occupy a dwelling" remains a much litigated provision. 42 U.S.C. § 3607(b)(1) (1988).

For the most part, courts have been inclined to enforce reasonable local restrictions regarding the maximum number of occupants per dwelling only when the ordinance applies equally to all potential occupants and when such ordinance is

emption throws greater light on the importance of sensitive state and local land use regulations. A number of cases have been litigated around the country,¹⁷⁸ generally concluding that communities need to pay more attention to the impact of their land use regulations on affordable housing efforts. HUD is now requiring recipients of housing block grants and other block grant monies to prepare analyses of regulatory barriers to affordable housing.¹⁷⁹

A broad based deregulatory process must be undertaken in order to separate those reasonable regulations which will continue to apply to all land use development affecting health, safety, and the environment from those unnecessary regulations that reflect lifestyle choices or preferences and that unnecessarily exclude affordable housing from potentially attractive locations. Ideally, affordable housing as a category would be a permitted use in all residential areas.¹⁸⁰ This deregulatory process must be sensitive not only to the needs of affordable housing advocates but also to neighbors affected by the housing and related efforts. NIMBYism is not just a problem in the affluent suburbs, it also affects the goals and aspirations of neighborhood-based redevelopment of low-income areas.¹⁸¹

D. Funding

A third key requirement is funding. Planning and deregulation will fall short if an adequate supply of funds to support affordable housing is not available. Housing is expensive. For most families, housing is their largest investment. Shelter poverty cannot be overcome without sufficient funds being allocated to affordable housing programs.

Capping the mortgage interest tax deduction is one possible solution to the funding problem. A cap that is designed to sepa-

reasonably crafted to limit overcrowding. *City of Edmonds v. Washington State Bldg. Co.*, 18 F.3d 802 (9th Cir.), cert. granted, 115 S. Ct. 417 (1994). The U.S. Supreme Court has granted certiorari over the *Edmonds* case and by this summer the Court's decision should help establish the fate of residential zoning ordinances limiting the maximum number of unrelated occupants permitted per dwelling. In February 1995, HUD expects to release a final rule which would clearly define the "significant facilities and services" provision of the 55-and-over exemption from the FHAA's prohibition of discrimination on the basis of familial status. *Fair Housing, Public Housing Rules High on Department Agenda*, 22 Hous. & Dev. Rep. (BNA) No. 28, at 423 (Nov. 21, 1994).

178. *City of Edmonds*, 18 F.2d 3d at 802.

179. *Consolidated Plan Final Issued by HUD 22* [Current Developments] Hous. & Dev. Rep. (BNA) 550 (Jan. 16, 1995).

180. For a review of efforts to reform local land use laws, see Salsich, *supra* note 75, at 107-13.

181. See, e.g., Vicki Been, *Local Undesirable Land Uses in Minority Neighborhoods: Disproportionate Sitting or Market Dynamics?*, 103 YALE L.J. 1383 (1994).

rate the control incentive from the speculation incentive of housing ownership could release ten to twenty million dollars for a national housing trust fund that could be allocated to state and localities based on their strategic plans.¹⁸²

Large pension funds could be a second source. There are billions of dollars reposed in these funds and a social investment policy to take some of that money could be linked again to the planning process so that these kinds of funds could be made available without undue risk to the investors.¹⁸³

E. Empowerment

Successful application of empowerment based privatization to

182. In the closing days of the 1994 Congressional session, Representative Major Owens (D, N.Y.) introduced the Federal Housing Trust Fund Act, H.R. 5275. *Introduction of the "Federal Housing Trust Fund Act of 1994,"* 140 CONG. REC. E2272 (daily ed. Oct. 8, 1994). Rep. Owens' proposal establishes a National Housing Trust Fund and seeds that fund by limiting deductions for mortgage interest and real property taxes by "3 percentage points for each \$1,000 by which the modified adjusted gross income of the taxpayer for the taxable year exceeds \$75,000" up to a maximum of 50% of allowable deductions. H.R. 5275, 103d Cong., 2d Sess., §§ 101, 103 (1994). Numerous proponents of affordable housing advocate capping the mortgage interest deduction. STEGMAN, *supra* note 65, at 18; Zarembka, *supra* note 99, at 155. A recent "Big Issues" memo, circulated by the Office of Management and Budget Director, Alice M. Rivlin, cited limiting the mortgage interest deduction as a promising deficit reduction measure. *Real Estate Groups Oppose Limit On Mortgage Interest Deduction*, 22 Hous. & Dev. Rep. (BNA) No. 21, at 437 (Nov. 21, 1994). Capping the mortgage interest deduction for an individual tax return at \$12,000, or for a joint return at \$20,000 could yield a five-year budget savings of approximately \$32 billion. *Id.* The mortgage interest deduction presently applies to interest on homeowners debt up to \$1 million, if such debt was used to obtain, build or substantially improve a primary residence, and a second residence. *Id.*; I.R.C. § 163(h)(3)(B) (1994). A supplemental deduction is allowed for \$100,000 of a home equity loan. I.R.C. § 163(h)(3)(C) (1994).

183. Interpretative Bulletin 94-1 of the U.S. Department of Labor, released on June 23, 1994, is designed to encourage investments in economically targeted investments (ETIs) under carefully controlled circumstances. Diane E. Burkley & Shari A. Wynne, *The Clinton Administration Is Attempting To Persuade Pension Funds to Invest Their Vast Resources In Projects That Offer Benefits To Low-Income Communities*, NAT'L. L.J., Sept. 5, 1994, at B5. For a strong argument against such investments, see Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795 (1993).

Under the authorization of the 1993 HUD Demonstration Act, HUD has chosen six pension funds to serve in the first level of the Section 8 pension fund demonstration. Housing Briefs, [Current Developments] Hous. & Dev. Rep. (BNA) No. 26, 401 (Nov. 7, 1994). Responsible for collaborating in the development of the program with HUD, the AFL-CIO Housing Investment Trust will receive \$50 million of Section 8 funding. *Id.* Each of the five other pension funds will receive \$10 million. *Id.*; see also Mary Anne Perez, *HUD Director Offers Plan to Finance Homes; Housing Loans Backed By Union and Pension Money Will Fund Affordable Housing In Lincoln Heights And Four Other Local Communities*, L.A. TIMES, Jan. 22, 1995, at City Times, p. 3.

affordable housing requires effective leadership, ownership and resident-sensitive management.

1. Leadership

Affordable housing cannot be imposed on communities. Leaders must be willing to "role up their sleeves and go into the communities and talk to people."¹⁸⁴ The history of the last twenty-five years proves conclusively that efforts by government to simply mandate housing in certain areas will not succeed.¹⁸⁵ Housing is uniquely location-sensitive. Houses are so visible and so much a part of the fabric of a neighborhood that success or failure of a housing policy depends in large measure on the ability of policymakers and implementors to devise programs in which the housing that is produced and the people who occupy that housing will be viewed as assets of a neighborhood, rather than causes of the decline of that neighborhood. Careful thought must go into the way a housing program is organized and presented to the community. Leaders must be willing to listen not only to the people they seek to serve, but also to the neighbors who will be affected by housing location choices.

That affordable housing triggers highly emotional responses has become almost self-evident.¹⁸⁶ Perhaps the emotional reac-

184. Interview with Patricia Pepper, *supra* note 154.

185. "Traditional Federal solutions have been top-down, bureaucratic, complex and overly prescriptive. HUD oversight of public housing, for example, has emphasized process over performance, weakened local responsibility, and stifled local creativity. The Federal government must become a true partner for change in communities — acting as a clearinghouse for innovative solutions, educating recipients about new models of housing finance, and providing technical support to government, community-based groups, and others." HUD Reinvention Bulletin, *supra* note 3 at 4.

186. Connecticut, Hartford and New Haven have the highest percentage of public housing. Robert A. Hamilton, *A Town's Outsized Housing Role*, N.Y. TIMES, Jan. 15, 1995, § 13CN, at 8. But Windham, a town of less than 22,000 persons has the third highest percentage of public housing and is ready for suburbs and other communities to admit their share of public housing. *Id.* Michael J. Westerfield, the Executive Director of the local housing authority claims, "[t]here is a pretty clear opinion in town that we have enough subsidized housing now, and it's time for the surrounding communities to take up some of the burden . . . But . . . there's a fairly strong resistance in suburban towns to any form of subsidized housing." *Id.* The citizens' concern with the concentration of public housing in Windham is directly attributable to the disproportionate taxes that they pay. *Id.* As required by the state, the town pays 20 cents of every dollar for General Assistance. *Id.* This mandatory allocation of funds, diminishes the amount left over which could be put towards recreational facilities and other optional services that make a community a desirable place to reside. *Id.* Joel T. Cogen, executive director of the Connecticut Conference of Municipalities explains that "[i]t's unfair to rely on a property tax for so many of the services that are located at the local level. Property taxes become prohibitive, and people who have a choice, the middle class, move out. That's

tion is best captured by Howard Husock's statement:

Scattering subsidized housing breaks the unspoken rules of housing, and thus inspires bitter opposition. Public housing built in affluent or blue-collar neighborhoods allow families who have not followed the same route of upward mobility to share the reward. What is undermined is a defining aspect of middle-class life: accepting the discipline of work and family as well as law and order to attain after a time, comfortable and secure surroundings. . . . New public housing and the opposition that it will appropriately inspire, is likely to stigmatize minority families generally — and make their gradual movement into the middle-class more difficult.¹⁸⁷

Anthony Downs, Senior Fellow at the Brookings Institute, responds to such reactions by arguing that it is "morally improper" for citizens to be compelled to live in concentrated poverty by local land use regulations, and that "relatively better off citizens" who insist on such segregation have a "moral obligation at least to contribute major financial support to improving the quality of life in areas of concentrated poverty."¹⁸⁸

That debate, the essence of the NIMBY problem,¹⁸⁹ will be resolved, not by laws alone but by effective leadership that listens,

what's happening in Connecticut, and that's why the system needs reform." *Id.* Mr. Pawelkewicz, who is on the State Property Tax Reform Commission agrees that the current system, where each town provides services like education and road maintenance from its property taxes is ineffective when such a large percentage of the town's residents live in tax-exempt housing. *Id.*; see also Michael Wheeler, *Negotiating NIMBYs: Learning from the Failure of the Massachusetts Siting Law*, 11 *YALE J. ON REG.* 241, 249 (1994) (arguing that the NIMBYism of suburban communities is often apparent in their zoning laws). Multi-family housing is perceived as an undesirable and burdensome use because of the attendant social service costs, such as schools, police and fire protection. *Id.*

187. Howard Husock, *The Folly of Public Housing*, *WALL ST. J.*, Sept. 28, 1993, at A18.

188. COMMISSION ON HUMAN RIGHTS, ARCHDIOCESE OF ST. LOUIS, *HOUSING IN ST. LOUIS: A CHALLENGE AND AN OPPORTUNITY*, at 8-9 (Nov. 1992) (quoting ANTHONY DOWNS ET. AL., *CITIES, SUBURBS AND "THE COMMON GOOD": BOUNDARIES OF MORAL RESPONSIBILITY*, WASHINGTON, D.C., THE WOODSTOCK THEOLOGICAL CENTER, 7 (1991)). Downs notes that residential neighborhoods are arranged in a "socio-economic hierarchy" in accordance with two "fundamental moral principles" accepted by most Americans:

1) all households have the right to live in neighborhoods approximately like themselves and all important characteristics except race;

2) residents of each neighborhood have the right to protect the quality of life and the environment of the neighborhood, including property values by excluding all elements, except race, they believe would impair their quality of life.

These principles are maintained, according to Downs, by local zoning laws permitting exclusion of groups with incomes lower than current residents. Downs believes that, while the result for most people is a "satisfying and effective" environment, application of these principles requires that the very poorest households live in neighborhoods where most of the other residents are also extremely poor.

189. See *supra* part IV.C.2.

that includes all affected segments, that searches for common ground and non-adversarial ways of discourse and problem solving. Poor communities, as well as wealthy ones, now are rebelling against overcrowding and overconcentration of subsidized housing and other group homes.¹⁹⁰ The Miami Community Partnership for Homeless found that people are very angry with local government officials for neglect of their infrastructure. They are taking their anger out on the closest available targets, who in many cases are people attempting to respond to affordable housing and homelessness problems.¹⁹¹

Two examples of community-based leadership resulting in exciting programs that bear study are the Chicago Network's successful Affordable Housing and Jobs Campaign and Florida's successful campaign, Community Partnership for Homeless, Inc. of Dade County, to achieve a dedicated funding source for a broad-based area-wide approach to homelessness.

a. Chicago Affordable Housing and Community Jobs Campaign

The Chicago Rehab Network, a coalition of thirty-five community development groups was successful in organizing a much larger coalition of organizations that pressed over a two year period of time for a change in city housing policy. Following an extremely sophisticated community-based organizational campaign, Chicago Housing Network reported an agreement with the city to allocate over a five year period of time, \$752 million for housing. This was an increase of fifty percent of the city's spending over five years. The plan contemplates creating over 17,000 units of affordable housing and generating 13,000 new jobs for Chicagoans. The Chicago Affordable Housing Community Jobs campaign succeeded in persuading the city to allocate a large portion of the new resources to benefit Chicagoans most in need. As a result, much of the additional funds were specifically committed to the city's low-income housing trust fund, which provides rental subsidy assistance to low-income households.¹⁹²

b. Community Partnership for Homeless, Inc., Dade County, Florida

In Miami a consortium of public and private entities came together to create a non-profit section 501c(3) corporation: Community Partnership for Homeless, Inc. The corporation's board of directors is composed of fifty-four individuals representing a cross-

190. See *supra* part I.

191. Interview with Patricia Pepper, *supra* note 154.

192. Report of Chicago Rehab Network and presentation in St. Louis, September 23, 1994.

section of the community's leadership. A dedicated funding source adopted by the Dade County Commission allocates one percent sales tax imposed upon certain businesses. This is expected to yield over twenty million over the next three years. The county commission also created and adopted a comprehensive plan to provide a continuum of care for homeless people. During its first year, the Community Partnership raised \$5.8 million and conducted 50 separate neighborhood meetings in a 90 day period leading to a county on July 5, 1994, to authorize construction of a full-service transitional housing campus in downtown Miami, including 350 beds and dining, job training, counseling, and medical services facilities. The ultimate goal of the Community Partnership for Homeless is to provide permanent housing and long-term services to those in need and to establish Homeless Assistance Centers in three areas of Dade County.¹⁹³

Participants in the Chicago and Miami campaigns report that essential ingredients to their success were extensive preparation and planning, including choosing sharp issues to focus the efforts, establishing a strategy for accomplishing the goals for raising funds and recruiting people who could effectively represent large numbers of the community. In addition, major outreach efforts were undertaken. In Chicago, organizers approximate a year with extensive meetings, educational programs, letter writing campaigns, etc. In Miami, fifty neighborhood meetings were held in a ninety day period of time. In both the cases, the key local government actual decisions were preceded by extremely well organized and effective negotiation and demonstrations of solidarity.

2. Ownership

Ownership aspects of the empowerment prong of a privatization-based strategy are three-fold: (1) ownership of development

193. Interview with Patricia Pepper, *supra* note 154. In another progressive move, the Dade County Housing Authority has contracted out to four private management firms the management responsibilities attendant several of its projects. *PHA Turns to Private Firms To Help In Project Management*, 22 Hous. & Dev. Rep. (BNA) No. 30, at 455 (Dec. 5, 1994). Gregory A. Byrne, Executive Director of the Metropolitan-Dade County Department of Housing and Urban Development (DCHUD) has pointed out that the distinctions between "this demonstration and others involving private managers are in the allocation of subsidies to the projects and in the injection of competition between the firms." *Id.* This is a departure from tradition for PHAs because PHAs receive their funds in a lump sum and tend not to look at the income each individual project should receive. *Id.*

Prior to its bid solicitation the PHA estimated the income that each project required to operate and then requested that bidding management firms work strictly within that project income limit. *Id.* According to Byrne, looking at the income standards for the individual projects is critical, as it places the projects on the same plane as private-market housing. *Id.*

projects by non-profits through joint ventures between non-profits and for-profits; (2) ownership by residents of housing development through cooperative and mutual housing associations; and (3) homeownership opportunities through lease-purchase techniques that enable shelter poor households to step up to traditional homeownership in a phased process.

It is not necessary and in many cases may be undesirable for the traditional single family free-standing fee-simple ownership model to be replicated in all cases. Much of the criticism of privatization of public housing is directed at the notion that the privatization movement contemplates transferring fee-simple ownership to individual public housing tenants. It is a truism that very low-income persons are simply not going to be able to afford the costs associated with fee simple ownership. That does not mean, however, that ownership attributes cannot be made available to low-income persons. Elements of ownership that offer security, a sense of roots, a sense of belonging, a sense of place and some notion of building equity can be made available to low-income persons.

They can be made available in several stages. The experience of SLACO¹⁹⁴ demonstrates the potential for non-profit/for-profit joint ventures with the non-profit organization controlling the location choice, the tenant selection mix, and the ownership vehicle for the housing, and the for-profit providing the expertise and helping to arrange the financing to accomplish the actual development. Cooperative housing has potential for a variety of situations including the conversion of traditional public housing, as illustrated by the Carr-Square program in St. Louis. The mutual housing association addition of members of the community who are not residents of the cooperative housing adds an element of strength and stability which can reduce the isolation of subsidized housing units.

Finally, the lease-purchase technique offers a way for low-income tenants who desire to purchase fee interests in housing to begin the process while they are at the same time moving toward self-sufficiency through education, job training, and related activities. A five year lease with a percentage of the rental payment credited as a downpayment toward the purchase offers a low-income tenant a five year period of time to accumulate necessary downpayment funds, while at the same time, adding the educational and job-based resources to enable that individual to qualify for a first mortgage loan and take the necessary steps to become a responsible homeowner.

194. See *supra* notes 126-28 and accompanying text for a discussion of the St. Louis Association of Community Organizations and its participation in joint ventures between non-profit and for-profit organizations.

3. Management

The experience of the Ecumenical Housing Production Corporation¹⁹⁵ demonstrates conclusively the essential requirement that housing managers seeking to serve people in the lowest economic quartile must have a management budget that includes a significant allocation of funds for housing-related services. EHPC spends between \$150-200 per-unit per month linking social services to housing management in a "holistic strategy for ensuring that the needs of tenants are met in an efficient and cost-effective manner."¹⁹⁶ The willingness to put in the time and energy to raise that money through private sources has enabled EHPC to successfully manage 160 single family houses scattered throughout St. Louis County, all of which are rented to families receiving Section 8 vouchers or certificates. EHPC's rent default and foreclosure rates are almost non-existent. EHPC has encountered virtually no public controversies involving its housing, as compared to the substantial public controversies associated with Section 8 in other parts of the St. Louis metropolitan areas.¹⁹⁷ This management style is being recognized in the recent HUD initiatives, Moving to Opportunity¹⁹⁸ and Choice in Residency.¹⁹⁹

195. See *supra* part II.B.

196. Visions of Hope: Rediscovering the Spirit of St. Louis, VII 33 (June 1994) (City of St. Louis' Empowerment Zone Application).

197. See *supra* part II.

198. Pub. L. No. 102-550, §152, 106 Stat. 3716 (1992) (effective and applicable upon enactment, under §2 of such Act, which appears as 42 U.S.C. § 5301 (1988)). Under the Section 8 Moving to Opportunity mobility demonstration, local non-profit organizations collaborate with PHAs in the provision of rental counseling and unit search assistance, for the purpose of helping recipients move from high poverty areas to low poverty areas. Moving to Opportunity Tenants Won't Count Against 10 Percent Cap. 22 [Current Developments] Hous. & Dev. Rep. (BNA) 145 (July 18, 1994). The \$164 million allocated by HUD for Section 8 housing is anticipated to aid 4,300 households. *Id.* The demonstration's comprehensive counseling, provided by the non-profit organizations, is made possible by the \$2.7 million which HUD has allocated as housing counseling grants to non-profit organizations. *Id.* For each unit to which they provide counseling, non-profits will receive \$1,000. *Id.*

The program randomly channels low-income families to either the demonstration project, with its comprehensive counseling, or a control group which receives the traditional PHA counseling. *Id.*

Under Phase II, an additional \$82 million is available, making eligible those PHAs which administer Section 8 programs in a central city with a population of over 350,000 persons, located within a metropolitan area populated by over 1.5 million persons. The HUD notice of funding availability specifies 29 locations which qualify under this population criteria. *Id.*

Under Phase I, households which received the comprehensive counseling were required to apply their funding assistance in a low poverty area; while Phase II recipients of the comprehensive counseling are free to apply their assistance any-

Holistic management that examines the entire spectrum of needs of low-income tenants is consistent with the shelter poverty analysis of the entire family budget. These two approaches offer significant potential for enabling very low-income families to live in decent housing and to live within their own means while growing and developing their potential to become responsible members of their community.

F. *Toward a Right to Housing*

Repeated attempts to deal with the affordable housing needs of shelter-poor households have sparked efforts to articulate a right to housing. While these efforts have gained notoriety from time to time, by and large they have tended to be unsuccessful, at least at a national level.²⁰⁰

As Michael Stone correctly observes, a right to housing is an ideological and political idea rather than a legal idea. To the extent that the shelter poverty analysis is accepted, the right to housing corollary has potential. However, careful attention must be paid to how such a right is articulated, lest it be relegated to the "special interest" cacophony that threatens to undermine the basic consensus of our democratic society. As the depth of the problem of shelter poverty becomes more evident, however, potential for collective response to shelter poverty is greater. As with many other social movements, the broader the base of the persons articulating the concern, the greater the potential for collective action.

A privatization approach to affordable housing offers a way to organize and articulate the shelter housing concerns. Viewed in the light of a privatization strategy, shelter poverty affects a major portion of the "traditional community." Shelter poverty affects not just the occupants of public housing, not just the people in the ghettos, but one-third of the country. If that group of people coalesced around techniques of cooperatives, mutual housing associations, and joint venture agreements, the stage would be set for a significant reallocation of the resources available for housing with a corresponding impact on the housing needs of low-income families.

where in the area, provided such location conforms with existing program limitations. *Id.*

199. Under the stalled 1994 housing authorization bill (S.2281), The Choice in Residency Program would have provided support and counseling for minority families aiding them with the process of applying their Section 8 subsidies in areas beyond racially-isolated public housing neighborhoods. Mary Lou Gallagher, *HUD's Geography of Opportunity*, PLANNING 12, 13 (July 1994).

200. See, e.g., STONE, *supra* note 65, at 314-17; see also Frank Michelman, *The Advent of A Right To Housing: A Current Appraisal*, 5 HARV. C.R.-C.L. L. REV. 207 (1970).

CONCLUSION

Robert Kratovil wrote widely during his long professional career, most of which focused on real estate matters. His focus tended to be on the more traditional practice of real estate law with its focus on mechanics liens, title insurance, commercial lease transactions and the like. Running throughout his writings is a theme of ethics and justice that offers a valuable backdrop for affordable housing discussions. For example, he concluded an article on the application of the contract concept of unconscionability to real property²⁰¹ with the observation that "the concept of unconscionability has created nationally a new standard of morality across the board in all contract law. . . . It is a call for fairness and justice. . . . The quest for justice is as difficult in law as it is in philosophy. . . . But we are all doomed. We shall have to seek it."²⁰²

He concluded another article about the development of group homes and the land use controversies associated with their location with the observation that a "trend toward a more humanitarian attitude toward the helpless" can be seen in the cases.²⁰³ In still another article, he argued that the police power cannot be used to permit "barriers of prejudice" . . . cannot be used to "hold back needed undertakings."²⁰⁴

This sense of duty, this sense of justice and honor that infuse his writings is a critical part of a successful affordable housing strategy. People must find a way to come together. Laws by themselves will not resolve the problems. Shared expectations, shared values, shared commitment can. The professional standards exemplified by Robert Kratovil offer an example of the role that lawyers and other leaders of the community can and should play. Enlightened leadership coupled with a compassionate sense of the needs of people struggling to achieve their potential are the vital ingredients of a successful strategy.

201. Robert Kratovil, *Unconscionability-Real Property Lawyers Confront a New Problem*, 21 J. MARSHALL L. REV. 1 (1987).

202. *Id.* at 19-20.

203. Robert Kratovil, *Group Homes*, 15 REAL EST. L.J. 223, 235 (1987).

204. Robert Kratovil, *Group Homes: Building Restrictions in the Police Power*, 7 ST. LOUIS U. PUB. L. REV. 465, 472 (1988).