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AFFORDABLE HOUSING MANDATES:

Regulatory Measures used by States, Provinces & Metropolitan Areas to support Affordable Housing

CMHC National Office

Aug 2001

EXECUTIVE SUMMARY

This report reviews the affordable housing mandates that have been used by upper-tier jurisdictions in the US and Canada. The mandates include those in the four states of New Jersey, California, Massachusetts and Connecticut; the two provinces of British Columbia and Ontario; and the two metropolitan areas of Portland, Oregon and Minneapolis/St Paul, Minnesota (also called the Twin Cities).

Overview

These mandates in various but similar ways harness the planning regulations and associated development approval process to assist in the provision of affordable housing[1].

These mandates go well beyond expecting municipalities to use what might be called good planning practices — like providing sufficient development land, zoning for higher densities and cutting municipal red tape.

Under these mandates, municipalities are obliged to support the provision of affordable housing in an affirmative way. That means that the municipalities are required to assist in some way that will lower the cost of the housing, and make it affordable specifically to lower-income households.

These mandates set quantified targets for the municipalities as a way of defining their obligations or measuring their performance. In some cases, these targets are set through a specific allocation assigned to each municipality, and in others, through a standard minimum quota applied to all.

Some of these allocations also require some municipalities to take a portion of the wider regional housing need. This provision is directed particularly at those suburban municipalities that have resisted taking affordable housing. The approach is founded on a widely held principle known as “fair share”. The basis of this principle is that all municipalities in a market area or larger jurisdiction should assist in the provision of needed affordable housing on some common and equitable basis.

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1 The term ‘affordable housing’ in this report is used in a particular way that is recognized across the US, but not in Canada. It is “lower-income” housing provided on a permanent or long-term basis specifically for households with a low- and moderate-income (or lower-income in short). These are household earning no more than 80% of the local median household income. In effect, this also means “below-market” housing provided a reduced price or rent due to some form of financial or regulatory assistance. The housing can be provided for-profit as well as non-profit and public developers

As a way of ensuring that these obligations are met, the mandates typically make available special approval procedures for affordable housing projects. The grounds upon which municipalities can deny approvals for these projects are narrowly defined. When the applications are denied, the developers have access to appeals tribunals, where the municipality has the burden of proof to defend its decision.

The mandates do not prescribe how the municipalities must support the assigned housing. Municipalities are provided with a range of options. Recognizing the limited financial resources of most municipalities, these options rely mainly on regulatory concessions that can be used to provide a subsidy through the development approval process.

The main regulatory concessions generally available in these mandates to municipalities to support the provision of affordable housing are these:

- density bonuses;
- expedited approval procedures;
- reduced development standards; and
- waivers to various application fees or development charges.

The concessions are aimed mainly at enabling for-profit developers to provide the affordable housing. Non-profit developers also can take advantage of these provisions, but they must rely in the first place on securing deeper subsidies available from government funding programs. Some municipalities will help non-profit developers by providing other assistance like loans and grants, land at a reduced cost, and relief from property taxes.

For-profit developers typically participate through what are variously called inclusionary, set-aside or mixed-income projects. All of these are mainly market-rate housing projects that reserve a small proportion — typically, 10 to 25% — of the units for lower-income households. The affordable units are included in exchange for density bonuses and the other regulatory concessions.

In these projects, the for-profit developers also must put in place legal agreements ensuring that only income-eligible households occupy the affordable units, and their rent or price is capped at an affordable level for a specified period — typically at least 20 years, and sometimes permanently or for the life of the building.

In summary, these mandates all share one or more of these key features:

- directing their constituent municipalities to make affirmative efforts to support the provision of affordable housing;
- setting quantified targets for specifically defining the amount of affordable housing each municipality is expected to accommodate;
- directing the municipalities, as part of those targets, to accommodate a share of the regional housing need;

- providing regulatory concessions for supporting the provision of affordable housing, especially by for-profit developers; and
- providing special approval procedures for developers to use when the municipalities do not meet their affordable housing obligations.

Summary of Mandates

These mandate vary widely in their contents, origins and development, and their effectiveness. The most demanding mandates are those in New Jersey, California and Massachusetts. Portland's mandate, which is still evolving, could be comparable in time. The mandates in British Columbia and Ontario, along with those in Connecticut and the Twin Cities, are the least comprehensive and effective examples. Ontario's mandate has been included, although it has been dismantled.

New Jersey

New Jersey's affordable housing mandate is based upon two landmark rulings of the state's top court, called the Mount Laurel rulings, that started as an attack on the exclusionary zoning practices of a suburban community.

In its 1975 ruling, the court ruled that all growing municipalities in the state had an obligation through their planning instruments to provide a "realistic opportunity" for meeting a "fair share" of the affordable housing needs of their regions. Known as the 'fair share doctrine', this is the conceptual foundation of the state's mandate.

In its lengthy 1982 ruling, in the absence of any response to its earlier decision, the court set about vigorously enforcing the doctrine. In effect, it obliged all developing municipalities to support the provision of a prescribed amount of affordable housing. To this end, it also endorsed the use of various "affirmative measures" including inclusionary zoning, density bonuses, tax abatements, and donated municipal lands for affordable housing.

The ruling led to the development of a detailed methodology for precisely calculating the "fair share" of every municipality. This methodology took account of their existing needs, projected regional needs, building capacity and a great many other factors.

The lower trial courts, which were responsible for implementing the doctrine through development litigation, started expediting the proceedings and imposing the so-called 'builder's remedy'. This involved requiring — either through individual approvals or wholesale changes to municipal policies — that all for-profit residential projects contain a proportion of affordable housing. Typically, those mixed-income projects were required to set-aside 20% for affordable housing, and in exchange were given a density bonus of 20%.

The state legislature passed its Fair Housing Act of 1985 in response to these forceful actions of the courts. It established a new state agency that took over the administration the fair share doctrine, including responsibility for codifying the regulations within the principles set by the courts. While the statute has never been revised, the regulations have evolved over time.

The statute resulted in a new state-wide planning system for affordable housing. All municipalities are expected every six years to prepare and adopt local plans addressing their affordable housing needs, and to submit them to the state agency for certification. Those municipalities with certified plans regain control of housing development in their communities; those that do not continue to be vulnerable to court-imposed remedies.

The municipalities are able to meet their affordable housing obligations in various ways. Most notably, they are able to use inclusionary zoning requiring all residential developments to contain a certain proportion of affordable units, and to charge new commercial and residential construction with development fees dedicated to the provision of affordable housing.

California

California's affordable housing mandate is the product of many statutes passed and modified over the years. The foundation is the 'housing element law', first passed in 1980, which sets out the requirements for local comprehensive plans. This law is supplemented by many other statutes addressing specifically affordable housing.

Under the 'housing element law', all local governments must use their vested planning powers "to make adequate provision for the housing needs of all economic segments of the community". As part of this, they must address their assigned share of the regional housing need, determined first by regional projections of housing growth made by the state's housing department every five years, and then by municipal allocations made by regional councils of government using both technical and political considerations.

The state's housing department is also responsible for certifying if the adopted comprehensive plans substantially comply with the law. The department does not have the authority to compel compliance. Enforcement of the laws depends upon civil litigation brought mainly by housing developers and advocates. Local governments without certified plans are vulnerable to court-imposed development freezes or other remedial interventions.

One of the most important supplementary statutes is the 'density bonus law', first passed in 1979. Under its provisions, local governments are required to provide every affordable housing project with a minimum density bonus of 25%, and also additional incentives when needed to make the projects financially feasible. Among the possible additional incentives are reduced development standards, expedited

approvals, waived fees, and financial assistance. Non-profit projects are eligible for these incentives, and so are for-profit projects containing a prescribed percentage of affordable units.

The state's 'anti-NIMBY law', first passed in 1991, provides special approval and appeal procedures in local governments found not to be providing appropriately for affordable housing. First of all, the statute severely limits the grounds upon which they can deny affordable housing projects. Furthermore, any adverse decision can be challenged through expedited procedures before the courts, where the local governments have the burden of proof in defending their decisions. The courts are able to override local land-use controls, including density limits and even land-use designations in some cases.

Inclusionary zoning has been adopted by many local governments to meet their affordable housing needs, due in large part to the state's early advocacy. Nevertheless, there is no state law explicitly authorizing inclusionary zoning, nor prescribing how it must be implemented.

Massachusetts

This state's mandate is founded on its comprehensive permit process, which is a special approval procedure for affordable housing projects. It was introduced in 1969 through the Housing Appeals Law — once popularly called its 'anti-snob zoning law'. The legislation has not changed, but some key amendments have been introduced through creative re-interpretation of the statutory regulations.

As originally conceived, the process was intended to facilitate the approval of housing subsidized by government funding. Since that time, particularly due to the funding cutbacks, the eligible housing has been extended to other types of affordable housing, including mixed-income projects built by for-profit developers.

The comprehensive permit process benefits affordable housing developers in various ways. First of all, it provides a single expedited approval procedure that encompasses all local regulations and must be completed within tight time limits. As part of this process, the developers are able to obtain exemptions to any local regulation — including density limits — when necessary to make their projects economically feasible. Municipalities are able to deny these applications only under very limited conditions — namely, when there are serious health, safety, environmental, or planning concerns that clearly outweigh the need for affordable housing.

In most municipalities, the developers can appeal any adverse decision to a state board dedicated solely to this purpose. After expedited hearings, the board is authorized to override any local decisions not properly made. In the hearings, the burden of proof rests on the municipalities to provide documented evidence justifying their decision.

The appeals procedures applies only in municipalities not meeting their affordable housing needs. This refers mainly to municipalities where at least 10% of the total housing stock is not affordable housing. This 10% criteria does not fully reflect the housing needs, but it does represent an easily understood benchmark that has been accepted as the measure of "fair share" in the state. Only a handful of municipalities in the state meet this criteria.

This process operates in the absence of an effective state-wide planning system. So, it can be seen as an indirect way of overcoming municipal barriers to affordable housing, and also encouraging them to accommodate the housing.

Connecticut

Connecticut enacted its affordable housing provisions through it Affordable Housing Land Use Appeals Act, passed in 1989 and amended in 1995 and 2000. The law established special approval procedures for affordable housing projects that are modeled on those in Massachusetts. Like Massachusetts, Connecticut also has a weak state planning system.

Connecticut's procedures are different — and less effective — than those in Massachusetts in certain key aspects. The procedures address most, but not all, of the local development regulations. The approvals and appeals are not controlled by tight time limits. The appeals go to the civil courts, where they are heard by one of six trial judges assigned to these cases. Finally, there are no provisions that enable or encourage the local municipalities to support affordable housing.

Portland Metropolitan Area, Oregon

The metropolitan government for the Portland area introduced its mandate, called a "regional affordable housing strategy", in early 2001. The mandate assigned a proportional "fair share" of affordable housing needs to each municipality, based upon 5- and 20-year region-wide projections for households earning 50% or less of the area's median income. It also identified an array of regulatory and financial tools that can be used by the municipalities to meet their allocations. Municipalities are required to consider these allocations and tools when preparing their local plans. The metropolitan government will assess their efforts after three years, and decide then if more demanding or specific directives are necessary.

These provisions build upon an earlier and extant mandate, the state's 1981 Metropolitan Housing Rule. Among other planning requirements, all of the municipalities were directed to use specified minimum average densities when planning for new residential development, and to plan for at least 50% of the residential units to be attached or multi-family housing. These requirements were aimed at making housing more affordable generally, but not at providing for housing affordable for lower-income households specifically. The requirements, nevertheless, have been important for breaking down the barriers to the more

affordable types of housing, and for laying the basis for a collective approach to dealing with housing problems.

Twin Cities Area, Minnesota

The affordable housing regulatory provisions for the Twin Cities metropolitan area are contained in the Housing Incentive Program, which was created as part of the state's Livable Communities Act in 1995. As part of this program, through negotiation with the metropolitan government, the local municipalities are expected to agree to a number of housing goals to be met by 2010. Among these goals are ones that will increase the density of residential development and increase the percentage of affordable housing.

In return for agreeing to meet these housing goals, the municipalities become eligible for funding administered by the metropolitan government. That funding, which was authorized by the legislation, is raised through a metropolitan-wide property tax levy. It can be used for various specified types of community improvements projects sponsored by the municipalities. The projects are not limited to affordable housing; they are directed at diversifying housing in terms of both cost and type, intensifying development around transit stops and clearing contaminated lands for commercial and industrial development.

This approach is different than the others reviewed in this report. Instead of imposing mandatory obligations on the municipalities, it uses discretionary funding as an incentive for setting negotiated goals. Furthermore, the goals are not directed at meeting projected housing needs, but at making practical improvements to past development practices.

The program does not give the municipalities any additional tools. They are expected to take advantage of available federal and state funding, and their own financial resources to support affordable housing. These include the authority to use property tax levies, tax abatements and tax increment financing, and to issue government bonds.

British Columbia

This province through legislation passed in 1992-94 established various municipal planning obligations for affordable housing. All municipalities for the first time were required to plan for affordable, rental and special needs housing. To assist in providing this housing, they were also authorized to use density bonusing and comprehensive density zoning, and to sell or lease municipally-owned land at less than market value.

This legislation, however, does not impose any binding obligations specific to lower-income households. Although the legislation uses the term 'affordable housing', it does not define the term, nor does it set any targets for affordable housing. As a

consequence, the municipalities have wide latitude in how they define and meet their affordable housing needs.

Ontario

Ontario's affordable housing obligations, which existed for only seven years, were contained in two 'provincial policy statements'. In the first issued in 1989, Ontario set out a variety of policies directing the municipalities to plan for a full range of housing types. In the second in 1994, it extended those policies and also set specific requirements for lower-income housing. Most of these provisions, including all related to lower-income housing, were dropped from a revised statement released in 1996.

These former obligations were less demanding that those in the state mandates. The municipalities were expected to plan and zone appropriately for affordable housing, but not to assist its provision in any way. Unlike the other mandates, the municipalities were not expected to use regulatory tools to support non-profit or for-profit developers in providing that housing. All of the necessary subsidies were to come from senior levels of government.

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1 Introduction

This report reviews the affordable housing mandates that have been used by various states, provinces and metropolitan areas.

Through these mandates, the jurisdictions have required their constituent municipalities to use their planning regulations and associated development approvals to support — not just plan for — the provision of affordable housing. To that end, they typically have set specific numeric targets for the municipalities to achieve, and also provided various regulatory tools to be used in achieving those targets.

The mandates examined in this report include those in four states — New Jersey, California, Massachusetts and Connecticut; two provinces — British Columbia and Ontario; and two metropolitan areas — Portland, Oregon and Minneapolis/St Paul, Minnesota (also called the Twin Cities).

These mandates vary widely in their content and purpose, but they all share one or more key components. Those in New Jersey, California, and Massachusetts are the most long-standing and demanding. The two Canadian examples from British Columbia and Ontario — which is now defunct — are among the least comprehensive and demanding.

Contents of Report

The report is presented mainly through a series of profiles that describes the origins, provisions and achievements of the mandates in the eight jurisdictions. These profiles are based upon information gathered from past studies and surveys, government legislation and reports, as well as recent interviews with housing officials and other experts in all of the jurisdictions. The interviews were conducted and information collected mainly in late 2000 and early 2001.

An overview explaining the main features shared by these mandates is presented in a separate chapter.

A glossary of planning terms used in the report and a list of selected references used in preparing the report are presented in the appendix.

Background to US Mandates

The provision of affordable housing in the US has evolved considerably over the last twenty years. The changes were triggered largely by the substantial cuts made in the early 1980s to federal funding for affordable housing construction. What has emerged is a system that is very different than used previously in the US, and also to date in Canada.

From the 1960s into the early 1980s, the US system was dominated by federal housing programs. Those programs provided extensive funding that covered nearly all of the development costs. They supported mainly rental housing, generally built by public and non-profit providers, and often exclusively for low-income households. The programs were run by federal bureaucracies that retained considerable control over the design and operation of the housing.

With the decline in government funding, the means used to support affordable housing have become much more diverse and locally-based. It now involves many other sources and forms of assistance, and many other types of participants — including local governments, non-governmental institutions, community-based organizations and private developers.

The affordable housing mandates examined in this report represent only one of the many new ways that have emerged in the US for supporting affordable housing. Two of their fundamental features particularly reflect how the US system is diversifying and also changing in ways not seen in Canada. These two features are their pro-active use of the regulatory process to support the provision of affordable housing, and to support particularly for-profit developers in the provision of that housing.

Purpose of the Mandates

All of these mandates are directed in some way at making better use of the regulatory system to provide for affordable housing. This makes sense for two reasons. First of all, municipalities have limited financial resources or other capabilities that can be tapped to address the growing need for affordable housing and replace the reduced federal funding. Furthermore, many municipalities — particularly, some growing and wealthy suburban ones — have employed restrictive regulations to frustrate the provision of affordable housing. This has exacerbated the housing problems in the cities, while also unfairly limiting access by many lower-income and minority households to the job, school and other opportunities outside of those cities.

Because of these two reasons, most of these mandates have both a production and a redistribution goal. They are directed generally at increasing the production of affordable housing, and also particularly at increasing production in suburban communities that have not appropriately provided for this housing in the past.

The redistribution goal of these mandates is typically founded on a principle called "fair share". The basis of this principle is that all municipalities in a market area, region or jurisdiction should assist in the provision of needed affordable housing on some common and equitable basis. This principle is most associated with an influential ruling of New Jersey's top court, but has been adopted — often explicitly but sometimes implicitly — in many other jurisdictions.

These mandates meet these goals in one or both of two ways. They provide special expedited procedures to facilitate the approval of affordable housing, aimed particularly at breaking down regulatory barriers in municipalities that have resisted the construction of that housing. They also provide various regulatory concessions capable of generating indirect subsidies that assist developers in reducing the cost of that housing.

Use of Regulatory Concessions

Under these mandates, municipalities are obliged to support the provision of affordable housing in an affirmative way. These mandates go well beyond expecting municipalities to use what might be called proper planning practices — such as, zoning sufficient developable land at the appropriate density. They demand that the municipalities provide some type of local support that effectively lowers the price of the housing so that it is affordable to lower-income households.

The mandates do not prescribe how the municipalities must support the housing. Municipalities typically are provided with a range of options. Recognizing that the financial resources of most municipalities are limited, these options rely mainly on regulatory concessions that can be used to provide a subsidy through the development approval process.

The main regulatory concessions[1] generally available to municipalities for supporting the provision of affordable housing are these:

- density bonuses;
- expedited approval procedures;
- reduced development standards; and
- waivers to various application fees or development charges.

All of these regulatory measures provide some modest but measurable assistance. Depending upon the circumstances, they are capable of reducing the cost of each new unit by roughly $10-25,000. This cost reduction is not sufficient to help those

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1 This list does not catalogue all of the tools used locally to support affordable housing. It identifies only those most associated with these mandates. Some of these tools are examined in a 1998 CMHC report entitled Municipal Regulatory Initiatives: Providing for Affordable Housing.

households in greatest need, but it can benefit the many households just failing to qualify for market-rate housing.

The concessions are available to both non-profit and for-profit developers, but they are aimed mainly at the for-profit sector. Non-profit developers take advantage of these provisions, but they must continue to rely principally on the larger subsidies available from government programs.

Some municipalities also supplement these regulatory concessions with financial assistance reserved only for non-profit developments. Among the most common forms of financial assistance are these:

- loans and grants;
- provision of municipal land at no or a reduced cost;
- property tax relief; and
- local infrastructure improvements.

The loans and grants come from various sources, including property taxes, bond issues, and development fees. The last represents another important way that the regulatory system is used to support affordable housing. Many municipalities are authorized to charge development fees on new market development, and use the collected fees to support affordable housing through their housing trust funds[2].

Role of For-Profit Developers

The earliest of these mandates were designed to facilitate the development of subsidized housing by non-profit developers and public agencies using government funding. As these subsidies declined, both the early mandates and the more recent ones have turned to assisting the for-profit sector to build affordable housing.

For-profit developers typically participate through what are variously called inclusionary, set-aside or mixed-income projects. All of these are mainly market-rate housing projects that contain a small proportion — typically, 10-25% — of the units reserved as affordable units. The affordable units are included in exchange for density bonuses and the other concessions coming out of the regulatory system.

The conditions of the exchange — that is, what affordable housing must be provided by the developer and what concessions most be provided by the municipality — are generally governed by rules set out in the mandate. The conditions usually allow for some flexibility to reflect local conditions and needs.

As one of the key conditions, the developers must put in place legal agreements that ensure the benefits are not lost through windfall private gain. These

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2 Housing trust funds are examined in a 1999 CMHC report entitled Housing Trust Funds: Their Nature, Applicability and Potential in Canada.

agreements are generally handled through covenants registered on the deeds that stay with the property through changing owners for some set period of time — typically, at least for 20 years and perhaps for the life of the building. For that time, only eligible lower-income households are permitted to occupy the affordable units, and the rent or sales price is capped in some way so that the units remain affordable to these households.

Definition of 'Affordable Housing'

The term ‘affordable housing’ is used in this report in a particular way that is recognized across the US, but not necessarily in Canada. Having an understanding of this term is important to understanding these mandates.

The term in the US is generally defined, depending upon the jurisdiction, in one or the other of two fundamental ways that emphasize different aspects — one the underlying concept and the other the income eligibility. Both are interchangeable because in most jurisdictions they encompass virtually the same housing.

Affordable housing in the US means both of the following:

- ‘below-market housing’: This refers to housing provided, as a result of financial and/or regulatory subsidies, at a cost below the market level for an equivalent unit, and for a permanent or long period. It includes housing provided by public agencies and non-profit organizations using conventional government subsidies, and also housing provided by for-profit developers supported by regulatory concessions.

- ‘lower-income housing’: This refers to housing affordable to households with ‘low- and moderate-incomes’. The upper limit in most jurisdictions for ‘low- and moderate-income’ — or ‘lower-income’ for short — is 80% of the median household income of the local housing market[3]. For the housing to be affordable at these income levels, its cost typically cannot exceed 30% of the gross household income. Adjustments are also made to the income eligibility to allow for the needs of households of different sizes.

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3 One source of confusion also must be noted. Due to contradictory language in the key federal statute, one set of states — mostly, those in the north and east and including New Jersey and Massachusetts — refers to the 120% threshold as middle-income, 80% as moderate-income and 50% as low-income. The other set — mostly in the south and west, and including California — refers to 120% as moderate-income, 80% as low-income, and 50% as very-low-income. While the same names are used in slightly different ways, the key point is that they all utilize the same thresholds.

The former of these two practices has been used throughout this report for all of the US examples except in the chapter on California. A footnote has been included in this chapter to clarify the differences.

The 80% threshold in widely used and recognized because it is a key eligibility limit for most federal housing funding. For example, the federal HOME program — the main subsidy program for new affordable housing — only assists housing for households earning up to this income level.

Although the 80% threshold is widely used, there are other thresholds used in many programs to target other income groups. To give just two examples, many states operate homeownership programs that assist households earning up to 100% or 120%, while the federal tax credit program for rental housing assists those earning up to 60%.

Canadian Definitions

The term ‘affordable housing’ is used in Canada as well, but not in the same way or with the same consistency. For example, in some places it is used in reference only to government-assisted housing, while in others it is used to mean housing at the low end of the market.

This inconsistency is illustrated by the two provinces profiled in this report. Ontario formally introduced, but later deleted, a definition of 'affordable housing' based on a different yardstick than used in the US, and using a higher income threshold that included low-end-of-market housing (see page 78). On the other hand, British Columbia uses the term 'affordable housing' in its legislation, but does not define it.

The term ‘core housing need’ might be the most comparable term consistently used across Canada. It was introduced by CMHC to measure the number households in a jurisdiction that cannot find suitable housing without spending more than 30% of their gross income. However, this term does not incorporate an upper limit on the eligible household income; so it cannot be used in same way as ‘affordable housing’ in the US.

2 Overview

The mandates profiled in this report in various but similar ways harness development regulations and the associated approval process to support the provision of affordable housing.

The mandates vary in the features that they incorporate, but they all share one or more of the following (see chart 1):

- directing their constituent municipalities to make affirmative efforts to support the provision of affordable housing.
- setting quantified targets to define the amount of affordable housing each municipality is specifically expected to accommodate.
- directing the municipalities as part of those targets to accommodate a share of the regional need for affordable housing.
- providing regulatory concessions to support the provision of affordable housing, especially by for-profit developers.
- providing special approval procedures for developers to use when the municipalities do not meet their affordable housing obligations.

Affirmative Obligations

In most of these jurisdictions, the municipalities are required to address their affordable housing needs as part of statutory comprehensive local plans. In these plans, the fundamental obligation of the municipalities is to plan appropriately for the housing. In the case of new development, this obligation can be satisfied by following what might be called conventional good planning — namely, by designating an appropriate range of sites with the relevant densities and standards.

Three of these jurisdictions — New Jersey, California and Portland — also place an additional and significantly more demanding obligation on their municipalities. They expressly direct their municipalities to make affirmative efforts to support the provision of affordable housing. While this obligation falls short of requiring them to ensure that the housing is built, it goes well beyond just expecting them to plan appropriately for the housing. In effect, they must provide some assistance that measurably reduces the price of housing so that it is affordable to lower-income households on a permanent or long-term basis.

Chart 1: Comparison of Principal Affordable Housing Provisions of the Profiled Mandates

	Affirmative Obligations	Quantified Targets	Regional Housing Needs	Regulatory Concessions	Special Approval Procedures
New Jersey	**X**	**X**	**X**	**X**	x
California	**X**	**X**	**X**	**X**	**X**
Massachusetts		x		x	**X**
Connecticut		x			x
British Columbia				x	
Ontario		x	x		
Portland	x	**X**	**X**	**X**	
Twin Cities		x	x		

Note: an '**X**' indicates that the provision is a major component in the mandate, and am 'x' that it is a minor component.

In New Jersey, this obligation was enunciated in the founding ruling of the state's top court. The court ruled that all growing municipalities in the state had an obligation through their planning instruments to provide a "realistic opportunity" for affordable housing. The court recognized that meeting this obligation would require substantial incentives and subsidies from the municipalities. Therefore, it endorsed various "affirmative measures" that could be used by the municipalities to cut the price of housing. These included mandatory set-asides, density bonuses, tax abatements, and donated municipal lands. Since that time, additional tools have been provided — most notably, the authority to collect development fees dedicated to affordable housing.

In California, the municipalities are required "to make adequate provision" for their affordable housing needs as a principal tenet of the state's planning law. To that end, they are expected to address how their housing needs can be met through the use of regulatory concessions and incentives, land use and development controls as well as government financing and subsidy programs. These provisions have been interpreted to mean that the municipalities must make the best effort within their resources and powers to support the needed affordable housing.

In Portland, municipalities so far are obliged through their local comprehensive plans and related land-use regulations to consider and apply where appropriate a wide array of regulatory and financial tools that have been identified for assisting affordable housing.

The Twin Cities take a different approach. Rather than imposing obligations, the metropolitan government has used access to discretionary funding as an incentive for each municipality to include negotiated housing goals in their local plans.

Massachusetts and Connecticut are the major exceptions to the above practices. Both of these states have weak state-wide planning systems. As a consequence, they have built their mandates on special approval procedures rather than comprehensive planning requirements. Their mandates essentially impose penalties on municipalities that do not provide adequately for affordable housing, rather than impose obligations on them to provide for the housing.

Quantified Targets

Most of these mandates set some type of quantified targets for the municipalities as a way of specifying their affordable housing obligations and/or setting a standard for measuring their performance. In setting these targets, some rely on a specific allocation assigned to each municipality, while others rely on a minimum quota applied to all. As described in the next section, some of these allocations reach beyond the local needs by including some part of the wider regional needs as well.

Quantified targets based on a specific allocation of units to each municipality are made in three mandates:

- In New Jersey, the state's affordable housing agency determines each municipality's obligation every six years using complex calculations that attempt to incorporate rigorously every factor affecting housing need and distribution.
- In California, a state agency is responsible for determining the housing need for each region based on future growth projections, while regional councils are then responsible for allocating that need to the municipalities using both technical and political considerations.
- In Portland, the metropolitan government has given each municipality 5-year and 20-year targets based upon the projected affordable housing needs of the entire metropolitan area.

In Massachusetts and Connecticut, the mandates are based on a simple quota applied to all municipalities. Each is expected to provide at least 10% of its housing stock as affordable housing. This standard is recognized as being arbitrary, but has the merit of being easily administered and readily understood.

Ontario combined both of these methods. Municipalities were obliged to plan for at least 30% of their new housing to be affordable. Also, they were required to plan for

the projected housing needs whenever these were greater. Regional governments were to be mainly responsible for making the projections.

Under the different approach taken in the Twin Cities area, the metropolitan government has negotiated 15-year housing goals with the municipalities. Those goals set various numeric targets for new housing, including the percentage of affordable housing to be achieved. The goals are not based upon projected housing needs, but are meant to make modest but practical changes to the current development practices.

Regional Housing Needs

In many of these mandates, the allocations assigned to the municipalities reflect not only their projected and unmet internal needs, but some portion of the affordable housing needs of their regions. In this way, the allocations are used either explicitly or implicitly to redistribute affordable housing — particularly, towards the growing suburbs that have not provided for it in the past, and away from the urban areas where it has been concentrated.

These efforts to redistribute the affordable housing are typically founded on a principle widely known as ‘fair share’. The basis of this principle is that all municipalities in a market area, region or state should be expected to assist in the provision of needed affordable housing on some equitable basis. The principle was enunciated by New Jersey’s top court in its seminal rulings attacking the exclusionary practices of suburban communities. The court’s ‘fair share doctrine’ remains the conceptual foundation of the state's mandate.

The regional distribution of affordable housing is also an important part of these mandates:

- In Portland, the affordable housing allocations — originally called ‘fair share allocations’ — are based on achieving “an equitable distribution” of housing in each municipality.
- In California, one of the fundamental directives of its planning law is that every local government must plan to take “the locality’s share of the regional housing need”.
- In Ontario, the municipalities were required to plan for an appropriate share of the affordable housing needs of their housing market area as determined by the regional government.
- In the Twin Cities, the goal-setting process has been explicitly directed at increasing the proportion of affordable housing taken by the growing suburban areas.

In Massachusetts and Connecticut, while there is no explicit objective to redistribute housing regionally, the mandates have had their most significant impact by fostering the development of affordable housing in the suburban municipalities. The reason is that the special approval procedures particularly enabled for-profit developers to

build affordable housing, and these developers are most active in the suburban markets.

Regulatory Concessions

Most of these mandates oblige the municipalities to grant regulatory concessions to affordable housing projects, including especially mixed-income projects built by for-profit developers. The concessions are intended to offset the costs incurred by for-profit developers in providing the affordable housing units, and also possibly provide some additional incentive to encourage their participation.

California has codified its minimum obligations in its 'density bonus law'. The law requires local governments to provide affordable housing projects a minimum density bonus of 25%, plus other incentives sufficient to make the projects financially feasible. It identifies a wide range of possible supplementary concessions — including reduced development standards, financial assistance and additional density bonuses — but leaves the selection open to meet local circumstances. Eligible projects include those providing at least 20% of the units for moderate-income households or 10% for low-income units.

In New Jersey, the regulatory concessions are based upon precedents established by the court-imposed ‘builder's remedy’. In those court settlements, a density bonus of 20% was typically granted to mixed-income projects setting aside 20% as lower-income housing. The same approach is now used by most municipalities in their inclusionary zoning programs.

In Massachusetts and Connecticut, the regulatory concessions are not prescribed by law or regulations, but are determined case-by-case through the special approval procedures. In both mandates, the developers are able to apply for increased density, reduced standards and other regulatory relief when necessary to make affordable housing projects viable. In Massachusetts, the fast-tracked approvals associated with these procedures also represent another important concession. In Massachusetts, for-profit developers must provide at least 25% of the units in mixed-income projects for lower-income households. In Connecticut, at least 15% must be for moderate-income and 15% for low-income households.

In Portland, the municipalities are obliged to consider a large array of regulatory and financial tools that have been identified for meeting their affordable housing targets. Among the identified regulatory tools are density bonusing, incentive-based inclusionary zoning, transfer of development rights and reduced development standards. The municipalities have been given an initial three-year trial period in which to test these tools. At the end of that time, the metropolitan government will assess their efforts and then possibly issue more definitive directives.

British Columbia has enabled its local governments, but does not oblige them, to use density bonuses and ‘comprehensive density zoning’ to support the provision of

affordable housing by for-profit developers. No conditions have been set by the province regarding the eligible projects.

Special Approval Procedures

Three of the four state mandates incorporate special procedures to facilitate the approval of affordable housing projects, while the fourth uses a broadly comparable mechanism for a somewhat different purpose.

The special approval procedures are available to all affordable housing developers, including for-profit developers building the mixed-income projects previously described. The procedures principally limit the grounds that can be used by municipalities to deny, or impose restrictive conditions on, the approval of affordable housing projects. To re-enforce those limits, they also provide a process for developers to appeal any adverse municipal decisions.

The limited grounds that can be used by municipalities vary somewhat in each mandate:

- In Massachusetts, the project must raise serious health, safety, environmental, or other planning concerns that clearly outweigh the need for affordable housing.
- In Connecticut, the denial must be based on the need to protect a "substantial interest" in health and safety that clearly outweighs the need for affordable housing.
- In California, the project must have clear and unavoidable adverse impacts on health and safety, be contrary to state or federal law, or disproportionately increase the concentration of affordable housing in an area.

The appeals can be made only in municipalities not sufficiently providing for affordable housing. In California, that means municipalities not having local plans and programs reflecting their affordable housing targets. In Massachusetts and Connecticut, that means municipalities not having 10% of their housing stock as affordable housing.

The appeals are made to an independent body. In Massachusetts, the body is a state appeals board dedicated solely to that purpose. In Connecticut and California, it is the civil courts. To facilitate the hearings, certain judges have been assigned to these appeals in Connecticut, and expedited procedures have been established in California.

The appeals are subject to special rules that distinguish them from conventional zoning appeals. Most importantly, the burden of proof is shifted from the developer to the local authority. Furthermore, the local authority must defend itself only using evidence placed in the record when the decision was made.

The ‘builder’s remedy’ in New Jersey is also broadly comparable to these special approval procedures in many ways. The main differences are in its purpose and origin. The ‘builder’s remedy’ was used by the courts essentially to punish municipalities that were not providing appropriately for affordable housing. The special approval procedures were created by legislation to provide a facilitative way for developers to secure approvals for affordable housing.

3 New Jersey: *Mount Laurel Mandate*

New Jersey's affordable housing mandate originated in the 1975 and 1982 'Mount Laurel' court rulings, which have been called landmark judicial attacks on exclusionary zoning. The main provisions of these rulings were subsequently incorporated in the state's Fair Housing Act in 1985, which established comprehensive and demanding regulations concerning the provision of affordable housing by municipalities.

Background

This mandate is rooted in a series of court rulings emanating from the small but rapidly growing suburban community of Mount Laurel. The first, a 1972 decision by a trial court, found that the municipality's zoning ordinances violated the state constitution because they had the effect of excluding housing for the poor.

Upon appeal, the state's top court in 1975, not only confirmed this decision, but also significantly extended its scope and impact. In this ruling called 'Mount Laurel I', the court found that all "developing" municipalities in the state had an obligation through their land-use policies and regulations to provide a "realistic opportunity" for meeting their "fair share" of the regional need for lower-income housing. Now known as the 'Mount Laurel doctrine' or 'fair share doctrine', this is the foundation of the state's affordable housing mandate.

The obligation to consider regional housing need was a significant departure. It was based upon a new interpretation of a key provision in the state constitution that required municipalities to protect the "general welfare" when regulating the use of land and property. Until this time, "general welfare" had been taken to refer only to the needs of people living within a municipality, and not to those living in the surrounding area.

The Mount Laurel case came back again to the state's top court in 1980. In the intervening years no affordable unit had been built in the community. Elsewhere in the state, the decision had generated extensive litigation, but little change in municipal attitudes and little affordable housing. After two years of deliberation, the court handed down its unanimous 'Mount Laurel II' decision in 1982. The opinion, which ran 150 pages, was intended "to put steel into the doctrine". Through its strong language and detailed response, the court expressed its serious dissatisfaction with the continued municipal intransigence over providing affordable housing.

Provisions: Judicial Mandate

The Mount Laurel II decision imposed an elaborate, comprehensive and enforceable set of measures aimed at implementing the court's fair share doctrine set out in Mount Laurel I. Included were detailed rules and procedures for determining each municipality's affordable housing obligation, and for ensuring that each planned appropriately for that obligation.

Housing Allocations

In its second ruling, the court deliberately sought numeric housing allocations based on precise definitions and calculations. From its viewpoint, this approach was necessary to prevent the municipalities from evading their responsibilities, and to curtail the continuous involvement of the courts.

The responsibility for developing the allocation methodology fell upon the lower trial courts. It was developed during the first two cases by a special working group of planners and other experts. This methodology was then used in all subsequent cases.

The methodology developed was complex because it attempted to deal comprehensively and rigorously with all of the factors affecting housing need and distribution. In brief, it involved delineating six housing regions, determining the overall housing need in each, and then distributing this need among the constituent municipalities according to their building capacity. It relied substantially on the existing state development plan and available census data.

The allocations are based upon three components of lower-income housing:

- the unmet existing needs (measured by the existing inadequate housing),
- the projected new needs, and
- the redistributed regional need, or “fair share”.

In these allocations, all of the municipalities were obliged to provide for their own existing lower-income needs. Those municipalities — typically, urban cities — having a higher proportion of lower-income housing than the average for their regions were relieved from providing for their own projected needs. Those projected needs were distributed to "growth areas" — typically, suburban communities — in their regions. As a consequence, the growing suburbs had to provide for their own projected needs as well as those of their urban neighbours.

The regional distribution of the projected housing needs of the urban areas was called the "fair share allocation", or "fair share" for short. According to the calculations made for the court, it amounted to 244,000 lower-income units over six years for the entire state.

The numbers used in these allocations did not address all of the state's lower-income housing needs. They only included the housing needs of households earning within 40% to 80% of the household median income. According the experts developing the methodology, the limited and one-time subsidy coming out of the development approval process was not capable of supporting housing for the households with still lower incomes. Housing for these households required the deeper or on-going subsidies provided by conventional government programs.

Affirmative Obligations

In its second ruling, the court continued to demand the removal of restrictive and unnecessary cost-producing zoning regulations that blocked the development of lower-income housing. At the same time, it recognized the removal of exclusionary practices on its own would not be sufficient to provide a "realistic opportunity" for lower-income housing. Especially in light of the then declining federal funding, that would require substantial incentives and subsidies from the municipalities.

In order to create this opportunity, the court also demanded that municipalities assist in creating this housing. It called attention to various “affirmative measures” that were available to municipalities for supporting this housing. Specifically identified were mandatory set-asides, density bonuses, property tax abatements, and donated municipal lands.

The lower courts, which were responsible for adjudicating the civil litigation coming out this ruling, adopted various procedures for expediting those actions. Three judges were nominated to hear all cases. Procedures were also established for consolidating cases, limiting appeals, appointing experts to advise the municipalities, and handling similar cases.

Most importantly, following the lead of the higher court, the lower courts in their settlements proceeded to impose their own affirmative measure — the so-called ‘builder's remedy’ — in municipalities failing to meet their affordable housing obligations. It was imposed in response to challenges to municipal decisions made by developers, housing advocates or others. What makes this remedy particularly effective was that it was applied not just to individual sites, but often to all future housing development across an entire municipality.

The builder’s remedy in effect is a court-ordered approval given to for-profit housing projects on the condition that they include a certain amount of affordable housing. The rules governing the remedy evolved during the initial lower court decisions. The most common practice was to require the developers to build one lower-income unit for every four market units, while allowing the lower-income units to added on top of the permitted density. Put in another way, a 20% density increase was given in exchange for a 20% set-aside for lower-income housing. The density increase was intended to offset any cost to the private developers in providing the lower-income units, while possibly also including a modest incentive toward participation.

This remedy represented a much more aggressive solution than simply invalidating zoning ordinances. The latter might punish a recalcitrant municipality, but it did not provide a means for producing affordable housing. This remedy proved to be very effective in forcing municipalities to meet their obligations. As a consequence, it also became one of the most controversial aspects of the court's mandate.

Housing developers and affordable housing advocates, sometimes together and sometimes separately, initiated most of these actions. Developers typically made their challenges when approvals were denied, and advocates when approval were made without providing for affordable housing. Although they had different objectives, they often worked together because the developers had the financial resources and the advocates had technical expertise and credibility.

The courts used the builder's remedy as a last resort on recalcitrant municipalities. The courts preferred that the municipalities adopt housing programs and zoning ordinances that recognized their affordable housing obligations. When they did so, the courts gave them immunity from these legal challenges for up to six years.

Public and Political Impact

The court mandate in general, and builder’s remedy in particular, caused considerable controversy. As one supporter has written, "it is difficult to adequately convey the intensity of public reaction to the Mount Laurel process ... it stirred up a firestorm" (Payne 1987).

While some hostility could have been expected, the courts appear to have aggravated the problem in how they made the fair share allocations. The courts started with a total obligation that was based on only part of the lower-income housing needs of the state, but which greatly exceeded its capacity to build within a reasonable time. When distributed to the municipalities, the public and politicians felt that their communities were being forced to take massive levels of new development — not just affordable housing — that they did not want. This factor probably did more than any other in raising the hostility against the mandate.

The opponents sought various ways of overturning the ruling, but eventually turned their attention to passing legislation that would curb the intervention of the courts. After heated debate and negotiations, a bipartisan compromise was passed in the state's Fair Housing Act of 1985.

Provisions: Legislated Mandate

The state's Fair Housing Act of 1985 was the legislated response to Mount Laurel II. In this way, the state legislature took over the role appropriated by the judiciary. In a 1986 ruling commonly called 'Mount Laurel III', the state's top court validated the legislation by declaring it to be constitutional.

The state established a new affordable housing agency, called the Council on Affordable Housing and dedicated solely to administering the doctrine. This agency, under the direction of governor-appointed members, is responsible principally for the following:

- determining the affordable housing obligations for each municipality;
- setting the regulations to be followed by municipalities when addressing their obligations; and
- determining when they have met their obligations.

The agency, it should be noted, is not a conventional housing department. It does not produce or fund housing. Furthermore, while it has the responsibility to review housing plans, it does not have any authority to require that these plans be prepared and submitted, nor to change the plans.

The state agency released its administrative regulations in late 1986 so that the system could start operating in 1987. The regulations were considerably expanded and changed over the first year. Revisions have been made regularly since then, sometimes in response to new court decisions. The regulations, which govern all aspects of this mandate, are comprehensive, detailed and voluminous.

Housing Elements

Under this legislation, all municipalities are directed to prepare and adopt a housing element as part of their municipal master plan. The essential purpose of the housing element is to catalogue the existing and future housing needs of the municipality for the next six years, and to set out a housing program for addressing those needs. Those municipalities with a fair share obligation are also expected to include a 'fair share plan' addressing those specific needs.

These plans should be submitted every six years to the state affordable housing agency, which is responsible for certifying them when properly provide for their housing obligations. The principal benefit of certification is that it gives the municipality protection from affordable housing litigation for the life of the plan, and particularly from the prospect of a court-imposed solutions that pre-empt their control of housing development. Also, having a certified plan is a pre-condition to receiving state housing funds, charging development fees and entering into regional transfer agreements.

Enforcement of the affordable housing provisions continues to depend on the courts through lawsuits brought by interested parties. Although the use of the builder’s remedy has been curbed, it still remains available where there is no compliance.

Housing Allocations

The housing allocations of lower-income housing need to each municipality are now made by the state agency using a methodology modeled on the court system, but

incorporating various refinements over time. The allocations have been made for two six-year periods: initially 1987-1993 and then 1993-1999. The allocations for the current 1999-2005 period have been postponed until sometime in 2001, so they can incorporate the 2000 census data.

1987-1993 Allocations

The 1987-1993 allocations were based on a projected overall need of about 146,000 lower-income units. This figure, which is considerably less than the court's earlier projection, is said to reflect a more conservative estimate of the state's growth. It also might indicate an attempt to start with a more achievable target.

The court's allocation methodology was revised in various ways, most notably by taking into account various additional local constraints on development. These methodological refinements, together with the lower overall projections, generally produced lower housing allocations in most municipalities.

Following earlier court practices, the allocations to the growing municipalities were related to the building capacity of their developable land. In determining that capacity, the state affordable housing agency "presumptively" assigned a density to the developable land. As a general rule, the presumptive capacity of most suburban developable land was based upon 6 units/acre (2.4 u/ha), which incorporated a 20% density increase for lower-income units. This figure could be adjusted according to local circumstances, such as the existing permitted density, land values, improvement costs, site conditions, municipal subsidies and other factors.

This allocation process suggests that the growing municipalities were expected to utilize inclusionary zoning to meet their new housing obligations. While most took advantage of this approach, as is explained shortly, they also had a range of other options.

1993-1999 Allocations

In the second round of allocations, the overall housing need was determined to be about 78,000 units. The number was the result of a revised method of calculation, coupled with new census and other data.

The allocations were affected particularly by the state's new development plan adopted in 1992. Among other changes, the plan introduced new regional boundaries, was based on an assessment of the growth potential of the various areas across the state, and established a set of new development priorities.

Based on the new development priorities, housing development now will be directed principally to designated suburban areas, depressed inner cities and certain mixed-use centres and corridors having infrastructure capacity. Only limited growth will be allowed in undeveloped rural areas, and no growth in environmentally sensitive

areas. These priorities are different than those used in the earlier allocations, in which new housing was largely assigned to suburban and rural areas having large areas of vacant developable lands.

In another key change, the allocation methodology was adjusted to reflect past performance. Municipalities with certified plans, and those having substantially built their earlier allocations, were given reduced assignments. The units taken from those municipalities were shared among the non-compliant municipalities.

Housing Options

Under the legislated mandate, the municipalities are able to meet their lower-income housing obligations in a number of different ways:

- sponsoring new construction, substantial rehabilitation of existing vacant units, and conversions of older non-residential buildings;
- purchasing existing units and providing them for sale or rent to eligible households;
- creating accessory apartments within existing houses;
- donating municipally-owned land to non-profit housing developments;
- using regional contribution agreements; and
- using inclusionary zoning.

Municipalities are able to raise funds to support the provision of affordable housing by charging development fees on new development. These fees have become an important source of funding for municipally-supported housing projects.

The provision of other types of housing for special needs — like group homes for the handicapped or disabled — also counts toward meeting their affordable housing obligations.

Many of these options have been added since the legislated mandate was started. Also, the regulations for inclusionary zoning, regional contribution agreements and accessory apartments have changed over time.

Inclusionary Zoning

This mandate is strongly identified with inclusionary zoning. As indicated, the housing allocations are essentially based on the assumption that the municipalities will use inclusionary zoning. Indeed, most do use it because it represents the easiest way for them to meet their affordable housing obligations. Nevertheless, the municipalities are not actually required to use inclusionary zoning, provided that they support the needed housing in other ways.

The inclusionary units are subject to many detailed rules regarding pricing, sizes, marketing, controls on affordability and many other aspects. The following highlights only a few key points.

The municipalities are able to accept payments from developers in lieu of building inclusionary units. The amount of the payment is not set by the regulations, but is determined by negotiation between the developer and municipality. The payments must be used to support affordable housing, and the units not built by the developer must be provided by the municipality in other ways. Therefore, the municipalities generally expect to receive payments at least equal to the value of the density bonus that the developer received for the required lower-income units. In the recent past, the minimum payments have been about $20,000 per unit, but there have been examples of $40,000 or more.

The inclusionary units must meet various affordability criteria. At least half of the units in any project must be targeted to low-income households, and the remainder to moderate-income households. According to rules recently introduced, the average sales prices and rents in any project must be affordable to households earning 55% and 52% respectively of the local median income.

The municipalities must develop affirmative marketing plans designed to reach all of the eligible households within their housing region. They are no longer able, as they were in the past, to establish their own occupancy preferences for up to 50% of the inclusionary units. These preferences formerly allowed them to favour households with members already living or working in the community.

Regional Contribution Agreements

Municipalities with certified plans are allowed to transfer, in exchange for cash payments, up to half of their fair share obligation to other municipalities within their regions. The payments are subject to negotiation, but must be at least $25,000/unit. (This figure was recently increased from $20,000, and from $10,000 before that.) The funds may be used to subsidize new construction, rehabilitation or conversions for lower-income housing.

In effect, under these provisions, suburban communities financially assist urban areas to upgrade or provide housing for some of their residents that otherwise might have relocated to the suburbs.

Regional transfers remain controversial. On the one hand, these agreements are seen to perpetuate the existing patterns of discrimination that the Mount Laurel doctrine was meant to attack. On the other, there is a large need for affordable housing in the inner cities, where there is an existing infrastructure and job base.

There is one important benefit of these transfers. When the units are transferred under these agreements, the receiving units must ensure than they are built within a specified period. Without these agreements, the sending municipalities would only be expected to plan for the affordable units, but not necessarily to have been built.

Development Fees

The municipalities are able to charge development fees on new developments in order to address their affordable housing obligations. The fees can be charged on all new residential and non-residential construction and conversions leading to more intensive use, but not on inclusionary developments and other affordable housing projects.

The use of development fees was not recognized in the initial court system, nor permitted by the early state regulations. They were sanctioned by the state's top court in late 1990 after a legal challenge mounted by a number of municipalities. Development fees have been authorized since mid-1994, when the state affordable housing agency released the necessary regulations in response to the court ruling.

The fees are generally limited to a maximum of 1% of the equalized assessed value for non-residential developments, and 1/2% of the value for residential developments. Higher fees are permitted only when density bonuses or tax abatements have been granted.

Before they are allowed to collect fees, municipalities must have a certified plan and an approved fee ordinance. Municipalities under the court's jurisdiction and certain urban communities without an housing obligation are also eligible.

Other Regulations

Municipalities are allowed to count a limited number of accessory apartments toward meeting their housing obligation. To count, the municipalities must contribute at least $10,000 toward their creation, and ensure that their rents will remain affordable for 10-30 years, depending upon circumstances.

Municipalities must provide for at least 25% (up from 20%) of their affordable housing obligation to be rental. They are able to use public funding as well as the resources previously noted to achieve that requirement. To promote this type of housing, rental units are credited as 2 units (up from 1.33) toward their affordable housing obligation when they are available for non-seniors, and 1.33 when for seniors only.

Achievements

Participation

As of mid-2000[4], about 60% of the state's 566 municipalities were participating in some way. That included 166 municipalities that had certified plans, and 94 that had plans under review (Annual Report 2000). There were 40 still under the jurisdiction of the courts because of earlier litigation. Another 42 urban

municipalities were deemed to comply without having to prepare plans because they had no affordable housing obligation.

Most of the remaining municipalities are in areas where little development is expected or allowed. Therefore, there is no benefit in participating, nor any penalty for not doing so. This includes those in environmentally-sensitive areas in remote rural areas.

These figures indicate a fairly high success rate in getting municipalities to plan for lower-income housing. There was only a handful of growing municipalities — including some of the state's wealthier communities — that have remained defiantly outside of the system.

Nearly 100 municipalities have approved programs for charging development fees, and have collected a total of $74.5 million.

Production

The mandate has provided for approximately 58,800 lower-income units since its inception. Included in this figure are about 26,800 units that have been built or are under construction, 14,600 that have been zoned, 6,700 provided through regional contribution agreements, and 10,400 that have been rehabilitated. These numbers are based on information only from municipalities under the legislative mandate; they do not include the output from municipalities under court jurisdiction.

The regional contribution agreements has been provided nearly $136 million for housing in more than 30 cities. These contributions represent the single largest source of housing subsidy in the state. This money comes mainly from development fees, and from government bonds.

The figures are well below the total housing obligations — 146,000 units for the 1987-1993 period, and 78,000 for 1993-1999. This production, on the other hand, compares favorably with the output of the public housing programs prior to the federal cutbacks.

Types of Housing

There is no comprehensive study of the results achieved by this mandate. A reasonably good picture can be obtained from several partial surveys and information from informed affordable housing advocates.

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4 Unless otherwise noted, all of the figures in this section are for mid-2000.

The most complete survey to date was prepared over 10 years ago, and examined the lower-income units that had been approved for development at the end of 1993 (Lamar 1989). At that time, three-quarters of the housing was to be in inclusionary developments, making it by far the principal source of affordable housing in the state.

The approved housing at the time was meeting at least two key targets. The units were roughly split between moderate-income and low-income units, and about 20% were rental.

One notable deficiency was found. Most of the rental housing was being provided for senior citizens through a federal subsidy program. Rental housing was not being provided for the many young low-income families not qualifying for the purchase of the sale units.

The inclusionary housing was provided typically in conventional two-storey townhouses, back-to-back two-storey townhouses, or three-storey walk-up apartments. In general, the inclusionary units had the same number of bedrooms as their market counterparts, but smaller rooms and fewer amenities. In most projects, the inclusionary units were intermixed with the market units, and had similar or matching exteriors.

More recent information indicates that most inclusionary units — and especially the family units — are sold rather than rented. They are occupied almost exclusively by non-minority families who had previously lived in the nearby suburbs. Very few are occupied by households earning less than 40% of the median income or coming from the cities.

One indirect result of the mandate is that a substantial amount of modestly-priced middle-income housing, consisting of the market-rate units in the inclusionary developments, has been built in suburban areas that previously would have used exclusionary zoning to prevent it.

Results of Judicial Mandate

The court mandate was only in effect for most of 1983 and 1984. In that brief period, over 100 lawsuits were filed by developers against some 70 municipalities. The courts settled suits involving 16,000 lower-income housing units in 25 of these municipalities. Faced with the threat of lawsuits, many other municipalities voluntarily developed their own affordable housing programs for the first time, and entered into judicially-approved compliance agreements. No information is available on the units produced in these municipalities.

Assessment

New Jersey's Mount Laurel doctrine is the best known affordable housing mandate in the US. The mandate originated in the forceful rulings of the state's top court. Those rulings are considered by many to be the most ambitious dealing with land use controls since the US Supreme Court validated zoning in 1926.

The doctrine is noteworthy for the court explicitly embracing a number of concepts fundamental to affordable housing mandates, including particularly these:

- fair share — that all municipalities, but especially developing ones, can be obliged to provide for the affordable housing needs of their regions, and that this obligation can be expressed through quantified targets;

- inclusionary zoning — that affordable housing can be provided by for-profit developers in mixed-income projects, supported through density bonuses and other regulatory concessions but no financial assistance;

- affirmative measures — that municipalities can be obliged to support the provision of affordable housing in some way, and not just plan for it; and

- builder's remedy — that the courts, in response to litigation brought by housing developers or advocates, can not only remove restrictive planning practices, but also impose effective corrective actions.

The mandate was conceived as an attack on the exclusionary zoning practices of many suburban municipalities. This conceptual origin can still be seen in many aspects. For example, the mandate directs lower-income housing toward growing suburban communities and away from established urban areas. It also works through for-profit developers building mainly homeownership housing made affordable through the shallow subsidies coming out of the regulatory process.

All of the key principles of the court's mandate were subsequently absorbed, with the court's approval and probably its relief, by the state legislation. The legislation was driven by the need to blunt the strong, but very unpopular, intervention of the courts into local development decisions.

The main contribution of the legislation was the creation of an administrative agency, which in turn was responsible for codifying the operational regulations. The resulting detailed and exhaustive regulations are now one of most distinguishing features of this mandate. They cover over 100 pages and deal with all aspects of the mandate — what is required in the housing plans, how the fair share is assigned, how the obligation can be met, how the affordability of the units must be protected, and so on.

The agency also established a new planning system through which the municipalities could meet their obligations. Participation in the planning process is voluntary, but strongly encouraged by the threat of the courts taking control of their local planning decisions if they do not. Responsibility for making this system work falls mostly on the municipalities. For many, the complexity of the regulations and demands of the paperwork have created a substantial and costly burden.

The agency has worked to soften the opposition in order to protect the mandate. It has reduced the fair share obligations to make the mandate more palatable to the suburban municipalities, and added more housing alternatives to make it more flexible. Although it also has made the regulations more demanding in some places, so far it has been unable or unwilling to force changes to make the mandate more effective.

The court's role in founding the mandate accounts for both its strength and the reluctance to address its shortcomings. The court is responsible for its far-reaching and demanding provisions, which would never have been introduced by the legislature on its own. On the other hand, the court's proprietorship over the mandate has made making changes difficult. Furthermore, making those changes risks re-igniting the deeply contentious debate associated with the enactment of the legislation.

Overall, New Jersey's mandate stands as an extraordinary achievement. The results after 15 years show that an affordable housing mandate based on regulatory measures can be used to produce large number of affordable housing units through private developments and without direct public funding.

Shortcomings of the Mandate

Despite its achievements, the mandate has various shortcomings that have limited its effectiveness in supporting the provision of affordable housing. Some of the key problems fall under the following headings.

Limits to Private Market Capabilities

The mandate is reliant almost entirely upon for-profit developers building the affordable housing, but they are not capable of addressing all affordable housing needs. These developers have shown that they are able to produce housing affordable to households earning between roughly 80% and 40% of median household income through the density bonusing provisions. On the other hand, they have not been able to provide housing for households with still lower incomes.

The mandate, to be fair, was not designed to reach the households with lower incomes. When establishing the mandate, the court set obligations that could be met within the limited resources available to the municipalities. Since that time, however, their resources have been considerably enhanced — particularly, by the

authorization to collect development fees — but their obligations have not been extended in a commensurate way.

The mandate also has not been placed within a broader housing strategy that addresses the full range of affordable housing needs. The state provides funding for the households in greater need, but that funding is not bound by the fair share principles of this mandate. There is no onus on the state funding to encourage a wider distribution of non-profit housing in suburban areas, nor upon the municipalities to make use of that funding to produce non-profit housing in their communities.

Scope for Municipal Non-Compliance

The mandate gives the municipalities considerable latitude to sidestep their responsibilities. Under the threat of the builder's remedy, the municipalities are forcefully encouraged to plan for affordable housing. Having planned for the housing, however, they are not compelled in any effective way to ensure that the affordable housing is built.

The affordable housing agency does not have the monitoring and enforcement powers to ensure that municipalities carry out their fair share obligations. Those functions rest primarily upon the developers and housing advocates. However, the developers do not generally challenge municipalities willing to approve developments without an inclusionary component, and the advocates do not have the resources to monitor the applications nor undertake costly court actions.

As a consequence, many developments take place without any inclusionary housing or alternative provision, even in communities with a certified plan. Also, a handful of municipalities — including some of the state's wealthier communities — have successfully used legal proceedings to stymie the provision of affordable housing.

Complexity of Fair Share Calculations

The court sought to establish a rigorous and objective process for determining precisely the number of units that each municipality was obliged to accommodate. The affordable housing agency has followed the same approach, albeit with various refinements. This approach was intended to protect the allocations from manipulation and complaints of bias, and free the courts from being continuously involved in adjudicating these assignments. Although laudable in intent, the calculations have raised various problems in application.

The allocation methodology used to date has been based largely on the capacity of each community to accommodate new residential development. The calculations have proved to be very complex, after all of the factors affecting capacity have been included, and all of the inevitable assumptions and qualifications made. They have been far too complicated for the public to follow and understand. They also have

provided fertile grounds for dispute when challenged by the municipalities; the resulting court hearings have been described as battlegrounds over statistics. All of this has undermined the political and public acceptance of these numbers and, by extension, the entire process.

There is also some uncertainty about what housing need is being distributed through the fair share allocations to the various municipalities. Even the courts based the initial allocations on something less than the full affordable housing needs of the state because these were known to be unachievable. Since that time, the number of units being distributed has been reduced in each succeeding round of new calculations. Although not explicitly stated, the most recent fair share allocations seem to have been adjusted to reflect more the capacity of the municipalities to accommodate the affordable housing than the need for affordable housing.

At least two alternatives have been proposed to replace the current allocation process:

- One would be based on a more comprehensive fair share allocations that recognizes the current capacity of municipalities to address a broader array of housing needs through the various local regulatory techniques and financial resources now available to them, and possibly even the assistance available from the state and federal government.

- The other would scrap these complex computations entirely, and simply require a 20% set-aside for affordable housing in all market residential projects. This approach, called "growth share" by its proponents, would be far easier to administer, more difficult to evade and, in the end, probably more credible to the public.

4 California: *Comprehensive Planning Legislation*

California's affordable housing provisions are contained in various places within its comprehensive planning legislation. The provisions have evolved over the years through many incremental changes to the legislation. The provisions now represent one of the most demanding state-level affordable housing mandates in the US.

Provisions: Housing Element Law

The state's affordable housing mandate is founded upon the 'housing element' of the local comprehensive plan. Since 1965, every city and county in the state has been required to adopt a comprehensive plan to govern its land-use and planning decisions. Since 1969, every comprehensive plan also has had to include a housing element.

The main statutory requirements for housing elements were established in a series of statutes passed in 1980. These requirements are directed at making the local governments use their vested planning powers "to make adequate provision for the housing needs of all economic segments of the community", including "its share of the regional housing need".

The local governments must use their housing elements to set out how they will meet all of their housing needs, including those for affordable housing. To this end, the elements must address how they will make appropriate use of their land use and development controls, regulatory concessions and incentives, as well as government financing and subsidy programs.

Through their housing elements, the local governments must also address their own constraints to the development of the needed housing. At a minimum, they must examine — and then demonstrate efforts to remove — any constraints associated with their local land-use controls, developer fees and exactions, building codes and permit processing procedures. Wherever possible, they also must remove regulatory requirements that render lower-priced housing infeasible and increase the cost of that housing unreasonably.

The local governments are also directed to meet various other obligations in their housing elements, including these particularly relevant to affordable housing:

- identifying adequate sites to facilitate and encourage the development of housing for all income levels;
- addressing the special needs of certain specified groups — the disabled, elderly, large families, farm workers, female-headed households and the homeless;
- assisting in housing development for lower-income households;

- promoting equal housing opportunities for all persons; and
- preserving existing publicly assisted affordable housing.

These various requirements have been interpreted to mean that local governments must affirmatively support the provision of needed affordable housing. Even when the needs exceed their resources, they still must put forward their best efforts.

Regional Housing Need

The housing elements must address the municipality's existing and future housing needs, including "the locality's share of the regional housing need".

The regional housing need for each local government is set through a two-step process. First, the state's housing department determines the projected household growth for each region. Then, regional 'councils of government' distribute that growth among their respective local governments. This process establishes the number of new units in four income groups[5] that must be accommodated in the local housing elements over the next five years.

The regional councils have been given specific criteria for allocating the regional housing need. They must consider such factors as the market demand for housing, employment opportunities, developable land and public infrastructure, and commuting patterns. The allocations also must not burden localities already having a high proportion of lower-income households. Despite these technical criteria, the allocations are ultimately decided by politicians influenced by political considerations as well.

This process in the past occurred on a five-year cycle, staggered by one year by the five regions across the state. The regional allocations are made one year before the updated housing elements are required. The process was interrupted in the early 1990s, however, when fiscal problems forced the state to curtail various activities.

The third and last complete cycle was finished in mid-1989. The process was started again in mid -1998.

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5 When referring to affordable housing, California uses various terms somewhat differently than how described earlier in this report (see page 5). To be specific, it relates these terms to the following income levels:
- 'middle-income' = 120%-150% of local median household income;
- 'moderate-income' = 80%-120%;
- 'low-income' = 50%-80%; and
- 'very-low-income'= 50% and below.

When the above terms are used in this chapter, they refer to the indicated incomes. The term 'lower-income' is still used with reference to incomes of 80% and below.

Compliance Procedures

The law requires that local governments update their housing elements every five years, and submit them to the state's housing department for review. The department is responsible for certifying the housing elements when they are found to be substantially in compliance with the law. Having a certified plan validates that the local government is providing appropriately for housing, including affordable housing.

The state has no powers to enforce compliance with the housing element and related statutes. Enforcement depends upon legal challenges brought through the civil courts, most commonly by developers and/or housing advocates when a local government denies or frustrates a development application. In some cases, the state has initiated or participated in selected actions having particular importance or broad impact.

Local governments without a certified housing element, when challenged in this way, are vulnerable to a variety of court-imposed remedies. In the past, the courts have issued orders approving proposed developments and changing restrictive development policies and regulations. In some cases, the courts have frozen all new developments — not just housing — until a valid housing element has been adopted.

Litigation can be an effective enforcement tool when it is used. It is used much less than warranted, however, because it is costly and time-consuming, and the results are uncertain. In any case, advocates of affordable housing do not have the resources to monitor all of the development applications, let alone instigate the needed court actions.

The provisions of the 'anti-NIMBY law', described shortly, are directed at addressing some of these problems specifically for affordable housing projects.

The state has begun to use funding as a means to encourage greater compliance. When allocating the state-administered federal and state funding for housing, the state now awards significant bonus points to applications from jurisdictions in compliance with housing element law. This incentive has recently assisted in improving the compliance rate, but the impact is limited by the modest funds affected, and by some local governments having direct access to federal grants.

Provisions: Other Legislation

Many of the key provisions specific to affordable housing are found either in particular sections of the housing element law or in other separate statutes.

Density Bonus Law

The state created its 'density bonus law' to establish a regulatory way for local governments to offer incentives for the production of affordable housing. It was first passed in 1979, but has been amended many times — including substantially in 1990 and 1999.

The law requires all local governments to adopt ordinances that grant both a minimum density bonus of 25% and additional incentive(s) to eligible affordable housing developments. The legislation states that the incentives must "contribute significantly" to the economic feasibility of providing affordable housing. The state's advisory on the legislation expands on this criteria by indicating that the value of the incentives must be sufficient to make the affordable housing financially feasible.

The additional incentive(s) may include, but are not limited to, the following:

- reduced site development standards, zoning code requirements, or building design requirements that exceed the state requirements;
- mixed-use zoning in which the non-residential development is used to reduce the costs borne by the affordable housing;
- other regulatory concessions like additional density bonuses, expedited processing and waived or reduced impact and other fees;
- public financial assistance (including redevelopment set-asides and federal funding) toward the costs of the infrastructure, construction or land; and/or
- other regulatory incentives or concessions that result in identifiable cost reductions or avoidance.

The local governments are given wide latitude in selecting the type and value of the additional incentive(s) so that they can apply or negotiate what is most suitable or beneficial in the community or for the project.

The eligible developments include those — both non-profit and for-profit — accommodating 20% of the units for low-income households, 10% for very-low-income households, or 50% for seniors. The affordable units must be controlled so that they are sold or rented only to lower-income households for a minimum of 10 to 30 years, depending upon the incentives given. These provisions initially were just for new construction, but recently have been extended to rehabilitation.

Anti-NIMBY Law

The statute informally called the ‘anti-NIMBY law’ is aimed at facilitating the approval of affordable housing projects in communities not meeting their affordable housing obligations. The statute was passed in 1990, and came into effect in 1991. It replaced less demanding strictures enacted in 1984. The provisions were further strengthened by amendments in 1999.

The provisions apply to local governments that do not have a current and certified housing element when dealing with an application for an eligible affordable housing project that is needed to meet its share of the regional need for lower-income housing. The eligible projects include those providing one of the following:

- 20% of the units for low-income households, or
- 100% of the units for middle-income households. (Earlier, this applied only to units for moderate-income households.)

The law prohibits these local governments from denying an application for one of these projects, or imposing conditions making the project infeasible, unless it finds substantial evidence of one of the following:

1) The project would have a "specific, direct, quantifiable and unavoidable adverse" impact upon the public health or safety, based on objective written standards at the time of the application; and there is no feasible way to mitigate or avoid this impact without rendering the housing unaffordable to lower-income households.

2) It would be contrary to state or federal law, and there is no feasible mitigation as described above.

3) It would increase the concentration of lower-income households where the numbers are already disproportionately high, and there is no feasible mitigation.

4) It would be built on land zoned for agriculture or resource preservation and meets certain other defined conditions.

Except in these narrow circumstances, the law in effect suspends most local development regulations. Jurisdictions with an approved general plan can still require that the project conform to the associated planning regulations (like residential land-use designations and any general density guidelines), but they can no longer impose any zoning restrictions (like built form, setback and density limits) that adversely affect the feasibility of the project. Jurisdictions without an approved general plan are more restricted; they can not even apply planning regulations, including that the project be located on residential lands.

When the local government's denial or imposition of conditions is challenged before the courts, it has the burden of justifying its decision. It must particularly establish that the decision was supported by substantial evidence in the record at that time.

When a court finds that a local government is in violation of the statute, the court must order the jurisdiction to comply with the statute within 60 days. If the local government fails to do so, the court may issue any order necessary to fulfill the purpose of the law, including an order to approve the development.

Legislation passed in 1999 made several significant changes that generally tightened the effect of these provisions on local governments. Among others, it

placed stricter guidelines on the type of evidence that must be provided by the local governments, provided for expediting the court proceedings, and extended the provisions to housing projects for middle-income households.

Zoning Law

The state's zoning law has various important provisions related to affordable housing. It prohibits exclusionary zoning, and the use of design criteria for the purpose of rendering affordable housing infeasible. It authorizes local governments to extend preferential treatment to residential developments for lower-income households, including specifically the reduction of zoning requirements and fees. By law, all development and zoning decisions also must be consistent with the housing element.

The associated 'least cost' law requires communities to zone in a way that makes the development of affordable housing feasible. It expressly obliges local governments to designate and zone sufficient vacant land for meeting its share of the regional housing need. Furthermore, the sites must be zoned with "appropriate standards ... that contribute significantly to the economic feasibility of producing housing at the 'lowest possible cost'".

Redevelopment Law

Roughly three-quarters of the local governments in the state — or about 400 in total — have established redevelopment agencies. These semi-autonomous agencies are authorized to undertake or sponsor infrastructure improvements and commercial, industrial and residential development and rehabilitation when revitalizing designated renewal areas.

These agencies are self-supporting, using a process called 'tax increment financing'. Through this process, they receive the increase in property taxes resulting from their renewal efforts. With the decline in federal subsidies, this source of financing has become increasingly important for lower-income housing.

The state's redevelopment law places a number of significant obligations on redevelopment agencies with regard to affordable housing:

- At least 20% of their tax increment revenues must be used for increasing, improving or preserving the supply of housing for moderate-income households.

- At least 30% of all new housing units developed or substantially rehabilitated by an agency within the redevelopment area must be for low-income households, and at least half of that for very-low-income. This requirement also can be met by purchasing existing units and guaranteeing their long-term affordability.

- At least 15% of all new units developed or substantially rehabilitated housing within a redevelopment area by other public or private entities must be for low-income households, and at least 40% of that for very-low-income.

- All lower-income housing units removed by redevelopment must be replaced, and at least 75% must be made available at a housing cost affordable to the same income level as the displaced persons.

Inclusionary Zoning

Inclusionary zoning has been adopted across the state by many local governments to provide for affordable housing. According to a comprehensive survey in 1996, inclusionary zoning was used in at least 75 jurisdictions (Calavita 1998).

California law, nevertheless, does not address inclusionary zoning. It neither expressly authorizes the use of inclusionary zoning, nor places limits on its use. On the other hand, the various affirmative measures in the housing element and zoning law are considered to provide sufficient implicit authority. The authority of local governments to adopt inclusionary zoning has never been challenged in the courts.

The widespread use of inclusionary zoning probably can be attributed to these two reasons. State officials in the past were vigorous advocates of inclusionary zoning; they prepared and disseminated a model inclusionary ordinance and legal opinions affirming the legality of these programs in general. Many jurisdictions more recently have adopted these programs to meet their affordable housing obligations, or — to put it in another way — to protect themselves from lawsuits attacking their lack of other efforts.

Achievements

The information on local government participation in the production of affordable housing is incomplete and generally out-of-date. The state has not tabulated their affordable housing output. (Reporting requirements recently added to the housing elements will now enable it to do so readily for the first time.) The information that is available comes from various independent surveys that only look at certain types of production.

The lack of current information are due in part to the state's fiscal problems arising from a recession that affected it for the middle years of the 1990s. This led, not only to a reduction in affordable housing programs generally, but also to a suspension of many associated activities, including the certification and review of the housing elements.

Planning Process

Compliance

The state's housing department annually reported on the status of housing element compliance until 1995. According to the last report, 52% of the municipalities had plans substantially in compliance with housing element law. This represented a doubling of the compliance rate since the state's first review in 1989, and the first time that a majority had complied.

This report explained that many of the local governments were not carrying out the state's affordable housing mandate because they saw no sufficient benefits in doing so, and no effective penalties in not doing so. As noted earlier, the state lacked effective sanctions for non-compliance because enforcement depended solely on litigation. At the same time, it also lacked significant incentives because of the limited funding support.

The report also noted that most local governments complained that developing a housing element was a difficult task, which required the dedication of staff resources and the expenditure of political capital, but offered little reward. The ever-changing revisions of the law also inevitably led to more work — and consequently, more frustration with the process.

Production

A 1989 independent state-wide survey found that the municipalities were generally not meeting their affordable housing allocations (Community Coalition for Rural Housing 1990). The statewide allocation for lower-income households at that time was almost 600,000 units. Only 96,000 of those units had been provided. Out of the communities surveyed, only 11% had met their allocation, while 24% had produced no lower-income housing at all.

A number of reasons were given for this poor performance. The state was not monitoring the efforts of the local government. Also, it had no effective enforcement mechanism. Finally, the local governments were not given sufficient resources to support implementation.

Other Results

The redevelopment agencies have become major providers of affordable housing. Over the four years between mid-1994 and mid-1998, the redevelopment agencies in total spent roughly $200-250 million per year on affordable housing production. This was used to support the provision of 37,600 units — 52% by new construction, 34% by substantial rehabilitation and the rest by purchase. Another 42,900 units were assisted in other ways, including minor rehabilitation, rental subsidies and homeownership loans.

The inclusionary zoning programs, according to the 1996 survey, had generated about 24,000 affordable units. This number, on the one hand, probably misses many units because many jurisdictions do not reliably record these units. On the other hand, it also includes some units serving households with incomes above that used to defined affordable housing this report.

Assessment

California's mandate has been built into its progressive statewide planning system through a variety of restrictions, directives, incentives and sanctions added and revised incrementally over the years. In this way, the state has created a comprehensive set of provisions that has been able to adapt and grow. On the other hand, it also created a complex and ever-changing body of law that is not well-understood by many of the key players — including the local developers, land-use lawyers and even municipal officials.

The mandate depends upon the active participation of the local governments. It obliges them to plan for affordable housing and, in doing so, also to "make adequate provision for [their affordable] housing needs". These represent two somewhat different obligations. The local governments have been more successful in meeting the first than the second.

Compliance with the planning obligation can be measured by the number of certified plans. This number has steadily increased over the years, and the state has the means to achieve a still higher number. When the state recently threatened lawsuits against the most delinquent communities, all but a handful complied. The threat of court intervention, and particularly the prospect of losing control of development, was too serious for most of them to ignore. The state also has started tying eligibility for more of its discretionary funding to having a certified plan. The effectiveness of this approach will depend upon the type and extent of the funding affected.

Compliance with the planning obligation, however, does not necessarily produce affordable housing. The mandate has been criticized for focusing too much on preparing plans, and too little on producing housing.

The "adequate provision" directive represents a key component of the mandate, but one that sets a flexible — and, therefore, somewhat uncertain — standard for compliance. These words and related measures have been taken to mean that the local governments must undertake affirmative efforts that go beyond good planning. As part of those efforts, they are certainly expected to make use of federal and state funding. In addition, in some way, they are also expected to engage their own resources to support the provision of affordable housing.

The state provides some clarification to this standard through its 'density bonus law'. It requires all municipalities to provide regulatory concessions or other assistance

sufficient to make affordable housing projects viable. This requirement still leaves the local governments considerable latitude in what and how much assistance they provide. To be more specific is probably not practical; in such a large and diverse state, no approach is likely to be widely applicable nor appropriate for all developments and conditions.

Because of the flexibility built into these key provisions, the interpretation and enforcement of the mandate ultimately rests the courts through civil litigation brought by the developers or housing advocates. Litigation can be effective, especially because of its potential for freezing development in recalcitrant municipalities, but it is used much less than warranted because of the cost, time and uncertainty of the results.

Getting more housing production through the mandate probably will depend upon making better use of civil litigation. This could be achieved by providing funding the non-profit sector or housing advocates, who are hampered by the lack of resources, to monitor the development applications and undertake more lawsuits.

The ‘anti-NIMBY law’ is a potent, but still under-utilized, provision that addresses some of the problems associated with litigation. The provision is similar to the effective ‘builder’s remedy’ in New Jersey and the special appeals procedures in Massachusetts. It seems to be under-utilized because, like with many other parts of this mandate, some of key players are unaware of its potential.

Although many local governments have failed to provide for affordable housing, credit must be given to the many others that have been active in developing locally-based ways of supporting affordable housing. Indeed, there is probably more local “bottom-up” innovation in this state than all of the other states combined. Many of the ways that have been developed — like inclusionary zoning and linkage fees — were not countenanced by state law, but are now widely used.

Although the demands of the mandate have been responsible for many of these efforts, there are other reasons for this active participation. Due the long-standing problems of housing affordability, which go back for over 30 years in the state, major constituencies in favour of local action have developed in many communities. The state courts also have been supportive of these efforts by consistently giving local governments wide latitude in zoning and planning whenever they acted in the public interest. The provision of affordable housing has been long held to be an important public interest.

5 Massachusetts: *Comprehensive Permit System*

Massachusetts introduced a special approval process for subsidized housing through its Housing Appeals Law in 1969 — once popularly called the “anti-snob zoning law” and now more commonly known as the “comprehensive permit law”. Since that time, through changes to the regulations, the provisions have been extended to assist a wider range of housing for lower-income households.

Background

Historical Context

The state’s Housing Appeals Law is the foundation of its regulatory approach to affordable housing. It established a special permit process, called a ‘comprehensive permit’ (CP), that limited the authority of municipalities to deny or frustrate the approval of affordable housing.

The process formally came into effect in 1970, but did not become operational until early 1973 when the state’s supreme court upheld the constitutionality of the provisions. In the interim, the operational regulations and procedures were developed; the initial applications were made, subsequently denied and later appealed; the first appeals were heard and decided; and then those decisions were challenged in the courts.

The statute itself has not been altered since then, but significant amendments have made on two occasions to the regulations. In this way, it has been adapted to meet changing economic and political conditions, as well as funding programs and local attitudes.

The most significant regulatory amendments revolve around the type of housing that is eligible for the CP process. As still prescribed in the statute, it is open only to ‘subsidized’ housing. At the time, that referred to housing for lower-income households constructed under any of the then relatively generous federal or state government assistance programs.

This term has been creatively stretched to include affordable housing subsidized in other ways. The first major change occurred in 1986, when private for-profit developers of mixed-income projects were given access to the CP process under certain conditions. The second was in 1990, when municipally-sponsored projects were added.

The latter change was the result of the recommendations of a special bi-partisan legislative commission established in 1989 to review the statute. This represents

the only formal review of the process to date. The commission found broad support for retaining the statute, but also for giving municipalities a more effective role.

Planning Requirements

The state has a weak state-wide planning system, due in large part to the long-standing and strongly-held views about local sovereignty over land-use and development. Under state law, local planning boards are directed to prepare master plans with a housing element providing for "a balance of housing opportunities." This planning obligation is widely ignored because there is no sanction for failing to comply. In any case, there is no requirement to adopt consistent zoning provisions.

At the time when the special approval procedures were introduced, most municipalities had ignored affordable housing in their land-use regulations. Many of them, especially the suburban ones, also had used various exclusionary zoning practices to preclude more affordable types of housing development.

In this context, these provisions can be seen to be an indirect way not only to encourage, but also to enforce, municipalities to provide appropriately for affordable housing.

Provisions: Initial Legislation

The basic provisions of the legislation fall in two main parts. First, in all municipalities, qualified developers seeking development approval for an eligible affordable housing project are able to apply for a comprehensive permit. Second, in most municipalities — mainly, those not meeting their regional and local needs for lower-income housing — the developers are able to appeal any adverse decision against these applications to a special state-level body.

Comprehensive Permits

Non-profit developers, local housing authorities and public agencies as well as 'limited dividend organizations' are eligible to apply for comprehensive permits. The last of these essentially are for-profit entities that have accepted limits on their profits.

Through the CP process, these developers are able to file a single all-encompassing application to one authority, the local zoning board of appeals. The board is statutorily responsible for conducting all local reviews of the application. It must deal with all of the other local bodies — such as, the board of health, planning board, conservation commission, and building inspector — necessary to making a decision. Furthermore, it must hold a public hearing within 30 days of receiving an application, and to render its decision within 40 days of the close of the hearing.

This consolidated approach has substantial benefits for the developers. Under the conventional permit process, they would be expected to file separate applications to each of these local bodies, which would work to their own schedules.

There is still another important benefit from this process. The developers are able to apply for exemptions to any local zoning and other restrictions necessary to make their projects economically feasible. For example, they can secure waivers of density limits, built-form controls, parking requirements, and even local building codes. Under the conventional process, they could seek these changes only through the more prolonged re-zoning or other supplementary procedures.

Housing Appeals

When a CP application is either denied outright by a local zoning board, or approved with conditions making the project uneconomic, the developer can make an appeal to an autonomous state body, except under certain limited circumstances. The appeals process is intended to give speedy redress to developers when the local boards do not deal with the CP applications appropriately. This provision also significantly benefits the developers, who previously had to rely on very lengthy and expensive court battles.

The adverse decisions of the local boards cannot be appealed in any of these three situations:

- when the municipality already contains at least 10% of its total housing stock as subsidized lower-income housing;
- when at least 1.5% of its zoned developable land is used for this housing; or
- when the development would be too large according to a detailed formula set out in the regulations.

Of these criteria, the 10% standard is by far the most important. In effect it has become the minimum threshold for affordable housing, or the “fair share” quota, for all municipalities in the state. While it does not fully reflect the affordable housing needs of the state, it still represents a rigorous standard. To wit, only 7% of municipalities in the state currently meet it.

The appeals are heard by a five-member state-level board, called the Housing Appeals Committee and created by the legislation solely for this purpose. The appeals board is authorized to conduct a hearing to determine whether the decision of the local zoning board was “reasonable and consistent” with the regional and local needs for lower-income housing. In making that determination, it must weigh those needs against any valid concerns identified by the local board.

According to the legislation, the only valid local concerns are those related to a “threat to public health, safety and planning that cannot be mitigated with specific conditions”. The board has ruled, and been supported by the courts, that an adverse effect on the local services or tax base is not a valid concern.

In cases where the CP has been denied outright, the burden of proof rests on the local board to show that its decision was justified by valid concerns that overrode the need for housing. This is a very significant requirement since historically the courts have given “presumptive validity” to the decisions of local authorities in zoning cases.

In cases where the permit has been approved with conditions, the developer first must demonstrate that they would render the construction or operation of the project “uneconomic”. That would include conditions preventing a reasonable return as defined by the subsidizing agency, or resulting in the subsidizing agency refusing to fund the project. When that proof can be made, the burden of proof shifts back to the local board to show that the conditions are justified by valid concerns.

In both of the above cases, when the local board fails to justify its decision, the appeals board is obliged to order the local board to issue the comprehensive permit.

The appeals board, like the local boards, must operate within a tight schedule. It must start a hearing within 20 days of receiving the appeal, and render a decision within 30 days of completing the hearing.

Provisions: Homeownership Opportunity Program

The statutory provisions were first extended in 1986 to include projects supported by the state’s Homeownership Opportunity Program (HOP). Until it was canceled in 1989, this program provided low-interest mortgages for young first-time lower-income homebuyers.

Two important regulatory amendments were made to the CP process in order to support this new program. First, the definition of “subsidized’ housing as used in the statute was widened to include new housing supported by low-interest loans. Also, for-profit developers were given access to the CP process for the first time.

Under this program, for-profit developers could apply for a CP for mixed-income projects setting-aside at least 30% of the units for lower-income homebuyers. In exchange for the CP, they had to place limits on their profits — thereby, becoming ‘limited dividend organizations' — and ensure that these units were sold to and remained occupied by only lower-income households. To that end, long-term affordability and occupancy controls were also introduced for the first time in the state.

This program was intended to appeal to suburban communities because it supported owner-occupied housing for local residents, rather than rental housing often for residents from the cities as in the more conventional programs.

These provisions, coupled with the hot development market in the latter part of the 1980s, produced a very dramatic increase in CP applications in suburban

communities. The program was very popular with private developers because they were able to obtain an expedited development approval that overrode the restrictive regulations in many communities. In many cases, those overrides also included density increases, which represented an indirect subsidy that enhanced the feasibility of the projects. Furthermore, in return for including the lower-income units, they were also able to build market-rate units in attractive municipalities that previously had restricted development.

The marked increase in projects generated a suburban backlash against the CP process, especially from the major suburbs where most of the development was occurring. They strongly complained that they had lost control of the housing being built in their communities. The response was probably triggered by a number of large townhouse projects built by a handful of developers. Nevertheless, the hostility led to various legislative attempts to revise or overturn the statute.

The hostility subsided when an economic downturn reduced the development pressure, and also caused a budgetary crisis that led to the state curtailing its support for the low-interest mortgages and other housing programs. Shortly after that, the state elections brought in a new government that was sympathetic to the local concerns.

The hostility did lead to the 1989 legislative commission that reviewed the CP process. Its main recommendation was implemented through the Local Initiative Program. Another relevant but unimplemented recommendation, which would have established a local planning system for affordable housing, is also briefly described later.

Provisions: Local Initiative Program

The Local Initiative Program (LIP) was initiated in 1990 and still is in operation. The underlying intent of this program has been described as allowing the local municipalities to re-assert some measure of control over affordable housing development in their communities. Until this time, their role under the CP process had been limited largely to reacting to proposals by developers.

Local Housing Initiatives

This program enables municipalities to support two types of local housing initiatives — one called ‘community-sponsored projects’ and the other ‘developer-initiated projects’. The Lower-income units in both count toward the municipalities’ 10% quota.

Community-Sponsored Projects

These are affordable housing projects supported by the municipality either alone or together with a community-based charitable, non-profit or similar organization. They

can involve new construction, building conversion, adaptive-reuse, or substantial rehabilitation. The projects must be approved by the municipality through its conventional approval process.

The municipalities are expected, but not explicitly required, to be involved in subsidizing these units through the following types of activities:

- donating buildings and land;
- granting regulatory concessions like density bonuses, fee waivers, and reduced development standards; and/or
- providing financial assistance like below-market financing.

Under this program, the CP regulations have been widened to recognize these local subsidies. Before this change, municipalities could only used subsidies available from federal and state programs.

Developer-Initiated Projects

These are mixed-income projects built by for-profit developers and containing at least 25% of the units for lower-income households. The subsidy for these units is provided through access to the flexible zoning and expedited approval of the CP process. The municipality must participate to the extent that it formally supports the project. No other government subsidy is permitted.

This program introduced an alternative “friendly” way to apply for a CP with the support of the municipality. Developers are still able to apply on their own, but the new procedures are directed at encouraging them first to negotiate with the municipalities over local concerns.

As in the earlier program, in exchange for the CP, the developers also must agree to limit their profits. The limit now is an annual return on equity of 10% for rental and cooperative housing, and 20% of the total development costs for ownership projects. Any excess is to be recaptured and used for lower-income housing. Profits are limited for the same duration as the affordability controls noted shortly. Limits are also placed upon the acquisition and carrying costs for the land to ensure that the price paid is reasonable and fair.

These limits are significant for addressing a municipal concern about the earlier permit process. In issuing a permit to eligible developments, the local boards are able to grant density increases beyond that permitted by the zoning when required to make the projects viable, but no cap was ever placed on the extent of the density increases. Now the increases will be capped by the prescribed profit limits.

State Involvement

The state has a limited role in this program. It provides technical assistance to the municipalities through its housing department. This is deemed to be the subsidy required under the statute.

It also sets various regulations and standards regarding the affordable units and municipal procedures. The following only identifies some of the key features:

- Income eligibility and affordability provisions: The affordable units must be made available only to eligible lower-income households, and the price or rent of these units must be maintained for a "substantial duration". The period is to be determined through negotiation according to local conditions and concessions, but it must be at least 5 years for community-sponsored units and 15 years for the lower-income units in the mixed-income projects.

- Marketing procedures: The municipality must have an approved marketing plan that provides for an equitable minority representation in these projects, identifies any local municipal preferences to be used in selecting the occupants, and establishes a fair and equitable selection process for tenants and purchasers. The local preferences can be used for selecting the occupants in up to 75% of the units.

- Design standards: The lower-income units on the outside must look no different than the associated market-rate units, meet prescribed minimum sizes and contain the specified facilities and appliances. Also, they cannot be segregated within certain parts of the buildings or sites, be built on unusually isolated or substandard sites, or excessively concentrate lower-income units in particular neighbourhoods.

Provisions: Related Measures

Local Housing Plans

A second major recommendation of the 1989 commission would have had the effect of establishing for the first time a statewide local planning system for affordable housing. While the before-mentioned LIP program was intended to enable municipalities to sponsor and support affordable housing, this new system was intended to enable them to plan for it appropriately.

Under this recommendation, municipalities would have been encouraged — but not required — to plan for lower-income housing. It was aimed particularly at the communities not meeting the 10% quota. By preparing these plans, they would have been deemed to be meeting their affordable housing needs and, thereby, gained substantial relief from the CP process. Developers still could have sought

CPs in these municipalities, but they would have had to prove first that the municipalities were acting unreasonably when denying their applications.

These provisions are very similar to those already in use under the corresponding special development procedures in California and New Jersey.

The provisions were included in the regulations in 1991, but never fully implemented and then subsequently deleted in 1996. Various reasons have been given for this. The procedures were considered to be too cumbersome, and beyond the resources of the state and the municipalities. The strongly-held views about local sovereignty in land-use matters probably also influenced the decision. Finally, the new administration reduced further the state's even then limited role in housing and planning.

Recent Board Decision

The state appeals board in 1999 opened another way to support affordable housing through the CP process. It held that below-market construction loans to developers from a new private lending consortium qualified as a subsidy under the statute. The eligibility requirements for these loans are less strict than those for CP projects. According to the board's decision, projects receiving these loans would be eligible for CPs when they met the current LIP requirements.

Funding Restrictions

The governor of the state in 1982 issued an executive order that declared affordable housing to be a critical need, and directed all state agencies to withhold discretionary funding from communities found to be "unreasonably restrictive" to affordable housing. The discretionary funding programs potentially affected by this order at that time included a large number of non-housing grants and assistance.

The risk of a potential funding cut-off was initially viewed as being an important lever in creating affordable housing, but it has not been used as much as might be warranted. This is due to the declining availability of discretionary grants as government resources become more constrained, and the compelling needs served by the funding that is available. Also, because the cut-off involves an all-or-nothing approach, the provisions are used with considerable reluctance. On the very few occasions it has been used, nevertheless, the denial of state discretionary funding has produced some notable examples of compliance.

Achievements

Production

The CP process has been used in the approval of more than 18,000 lower-income units constructed between the early 1970s and late 1999[6]. Another 3,000 market-rate units in mixed-income projects were also approved and constructed. The initial CP applications contained proposals for a total of over 50,000 units.

Out of the 18,000 units, about 55% were for families, 30% for the elderly, 12% for mixed family and elderly, and 3% for special needs.

The CP units represent about 20% of all lower-income units added in the state over the same period. The remainder were produced through conventional federal and state subsidy programs.

There have been significant shifts over time in what has been built and proposed under the CP process. Those changes correspond to these periods:

- 1970-73 was dominated by almost unanimous local opposition to any development proposals, and many legal challenges to the provisions. This situation ended in early 1973, when the state's top court ruled on the first challenges and
  upheld the constitutionality of the statute. None of the initial applications led to units being built due to the delays in approval, and the following downturn in the market.

- 1973-84 saw a steady rise in CP applications, as the developers began to understand the process and its benefits. The projects were virtually all rental by non-profit providers and housing authorities using federal and state funding subsidies.

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6 Comprehensive information on the CP process has not been collected by the government. Various outside studies over the years — mainly by academics and housing advocates — provide a good picture of the overall results.

The figures in this report come principally from the most recent and comprehensive study completed to date (Krefetz 2001). It covers 290 out of 351 municipalities in the state, and most of those likely to have CP units. On the other hand, there are some notable omissions — particularly, Boston and a number of its suburbs.

Except where otherwise noted, the numbers used in this section are based on data provided by the above-mentioned report, and are for the period up to late 1999.

- 1985-89 saw a marked increase in CP applications due to the fast-growing economy and the new HOP program, but coupled with strong hostility from suburbs. HOP supported about 2,000 lower-income ownership units, which represented nearly 40% of the CP units during this time. Most were in townhouses, and often in relatively large projects. During this time, there also was a marked decline in the construction of subsidized rental housing due to the cuts in federal and state funding.

- 1990-99 has seen modest production and limited controversy under LIP. The program has supported about 500-600 lower-income units, representing nearly half of all CP units during this period. Nearly all of CP units under LIP are single-family homes built by private developers in small (i.e., less than 25 units) mixed-income projects and sold to moderate-income households. Because the projects are small, they each typically provide only a handful of lower-income units.

Participation

The 10% quota, as indicated earlier, has become the standard measure of whether a municipality is providing adequately for affordable housing. As of mid-1997, only 23 of the state's 351 municipalities met this standard. For example, Boston had 19% of its housing stock as affordable housing, while the city with the highest proportion had slightly more than 20%. Overall, the state in 2000 recognized 203,000 affordable units under the terms of this legislation, or 8½% of its total housing stock.

On the other hand, there has been a substantial improvement in this number of municipalities meeting the 10% quota over the years. In 1970, only 3 jurisdictions — all major cities — met this standard. The number of communities falling in the 7-10% bracket also has increased from 4 to 44 over this time.

CP units have been added in over 170 municipalities, or nearly half of the municipalities in the state. The number of communities without subsidized housing also has declined significantly from 173 to 55. Those without any are mostly very small and remote rural towns with low housing costs and low demand.

Applications and Appeals

A total of 655 CP applications have been made in 221 municipalities. Most the applications were approved by the local zoning boards in some way — 17% outright and 54% with conditions.

For-profit developers operating as 'limited dividend organizations' have filed about 60% of these applications. They have built mainly in suburban and rural communities.

Local housing authorities filed 28% of the applications and non-profit organizations the remainder. These developers typically rely on conventional subsidies in the first place, but sometimes used the CP process to expedite approvals or gain regulatory concessions.

The developers have appealed about 90% of the applications receiving an outright denial, and nearly half of those approved with conditions. Nearly 300 appeals have been heard by the state board.

The developers have been successful in a large majority of these appeals. The developers have won outright 32% of their appeals, and accepted a negotiated settlement in 28% of the cases after a hearing but before a board decision. The board ruled in favour of the local decisions in only 6% of the appeals, while dismissing another 6% before a hearing.

Half of the unsuccessful appeals were denied because the local concerns about health, safety or some other valid substantive matter. Most of the others failed when the developer or project was found to be ineligible for a CP.

The courts have stood by the decisions of the appeals board. Over 30 of the board decisions have been appealed to the courts, but none have been overturned.

Over the life of the CP process, the applications and appeals have followed these trends:

- The proportion of CP applications denied outright by the local boards has declined, while the outright approvals or approvals with conditions have increased.
- The proportion of local decisions appealed to the state board have declined, while the percentage decided by negotiation have increased.

Impact

The CP process has had the greatest impact in the suburbs surrounding the major cities, particularly in the high cost and high growth areas around Boston. In the past, these areas would have been closed to subsidized housing because they used restrictive zoning and/or did not have local non-profit providers to serve them.

Most of these communities actively fought CP applications in the early years. After their initial CP denials were overturned by the appeals board, and board's decisions were supported by the courts, these communities realized that they had limited grounds for rejecting CP applications. Many of these communities then turned from fighting the projects outright to negotiating with the developers to get a more acceptable project. The consequence over the years has been a steady increase in the percentage of applications approved, and steady decrease in the number appealed.

There are some indications, although not well-documented, that the CP process has also had other effects. More projects with affordable housing are being approved without using the process, because it is known that developers can resort to the CP process when they are not reasonably treated. Also, the process has spurred some communities to using other approaches — like inclusionary zoning and land contributions — to provide for affordable housing. The housing produced in this way is not shown in the CP results.

Some communities, on the hand, have successfully used delaying tactics to frustrate affordable housing developments. They are known to drag out the hearings, and appeal decisions to the courts. Even when the developer ultimately wins, the delays often derail the proposals as market conditions change, subsidy commitments expire or the cost of holding the land becomes too high.

Despite these changes, when all types of affordable housing are included, most still continues to be built in the large cities and other urban areas typically by housing authorities and non-profit developers using conventional government subsidies. These jurisdictions still attract most of the limited subsidies available because they have the greatest housing needs, and also the most experienced providers.

Many of the large cities also have creatively used the CP process. Most are not subject to the appeals process because they meet the 10% standard. Nevertheless, they have used access to the fast-tracked CP approval as a bargaining tool to secure various benefits from the developers, such as larger numbers of affordable units, longer periods of guaranteed affordability for these units, or better physical design for the developments.

Assessment

Massachusetts' mandate is founded on its special approval procedures for affordable housing projects. Through these procedures, developers are able to apply for fast-tracked approvals providing exemptions to existing local regulations — including density limits — when necessary to make the project financially viable. The local authorities have very limited grounds for denying these approvals. To ensure that the local authorities act properly, the developers also have access to an appeals board, where the authorities must defend its decisions using evidence on the record when the decision was made.

The state's appeals board, which was created for this purpose, has had a critically important role in implementing these procedures. With the backing of the courts, it has consistently supported these limits on municipal authority, while forcefully affirming the need for affordable housing. As a consequence, the municipalities have been forced to change their response towards affordable housing.

These procedures, it is important to note, are used in a state with a weak planning system. The state does not effectively require municipalities governments to

prepare local plans — let alone plan for affordable housing. In the absence of any planning obligations, the approval procedures can be seen as an indirect way for the state to attack regulatory barriers to affordable housing, and to encourage them to provide for the housing in some way.

These procedures have the advantage of operating with little state involvement. Except for funding the appeals board, the state's role is limited to enumerating the subsidized units in each municipality and providing technical advice when requested.

The procedures rely on a standard quota to define minimum amount of housing each municipality is expected to accommodate. The quota does not fully reflect the need for affordable housing in each municipality, but it has the merit of being readily administered and applied. Furthermore, it seems to have been accepted without the contention that has surrounded some of the calculated allocations in other states.

The procedures have been adapted to changing conditions, particularly to cuts to the subsidy programs and changes in the political climate. These adaptations were made through adroit modifications to its administrative regulations rather than through new legislation, which might have opened the process to damaging amendments.

Shortcomings of the Procedures

The production of affordable housing under the CP process is driven almost entirely by developers, whether non-profit or for-profit. Despite changes introduced in 1990, most municipalities still continue to take only a nominal role, mainly one of reacting to the developer proposals. Meanwhile, the state has reduced its even limited role in the process. As a consequence, the CP process has lost much of its effectiveness in facilitating the production of affordable housing, especially outside of the urban areas.

The non-profit providers initially were active participants in the CP process, but their efforts have been more recently hampered by the inadequate subsidies available to support the production of lower-income housing. The scarce subsidies that are available now go mainly to the urban areas because they continue to have the greatest needs.

In the absence of an active non-profit sector outside of the urban areas, the development of affordable housing is currently reliant almost entirely upon for-profit efforts. These typically involve mixed-income developments in which the fast-tracked approvals and regulatory concessions provide the necessary assistance for the affordable units.

This approach has produced uneven results because it is dependent upon favourable market conditions. Those conditions occur in high growth areas like

developing suburban areas when the housing market is strong. They do not occur in times when or places where the market is sluggish. Even when this process works, it favours a limited range of housing — particularly, ownership rather than rental housing, moderate-income rather than low-income units, and conventional family rather than special needs housing.

The provisions introduced in 1990 were directed at enhancing the role of the municipalities, first, by enabling them to use regulatory concessions and local resources to support affordable housing. Nevertheless, few municipalities outside of the large cities plan for or support affordable housing. This should not be surprising: the municipalities have limited resources and expertise and are often confronted by local NIMBYism. Furthermore, they are not compelled, or effectively assisted in any way, by the state to support affordable housing.

Those provisions also gave municipalities more say in shaping the affordable housing projects of others. While this has increased local acceptance, it has reinforced rather than expanded the limited choices provided by the for-profit sector. For example, suburban officials tend to favour small projects that do not strain local infrastructure or invite local objections. The latter includes ownership housing for local families rather than rental housing or housing for households coming from elsewhere.

Under these provisions, the state has largely removed itself from the procedures. The state subsidy available under the current program — if it can even be called that — is no more that technical assistance. The state is not even monitoring the results to ensure that the municipalities are meeting their administrative commitments, like controlling the affordability of these units or undertaking affirmative marketing.

6 Connecticut: *Affordable Housing Appeals Procedures*

The state of Connecticut introduced special approval procedures for affordable housing projects in mid-1990 through its 1989 Affordable Housing Land Use Appeals Act. These procedures was modeled to some extent on the comprehensive permit system of neighbouring Massachusetts.

Background

Historical Context

The creation of the special approval procedures was the principal, and most controversial, recommendation of a commission on affordable housing, appointed by the governor in 1987 and reporting in 1988. The commission included elected state representatives as well as lawyers, land-use planners, housing advocates and service providers, and state and municipal officials.

The commission was established at a time when housing prices were rapidly rising in many parts of the state, and state and federal funding assistance was declining. It was formally charged with examining the housing market in the state, the need for lower-income housing, and the legal and economic impediments to the production of affordable housing. Although not explicitly stated, the commission was also expected to determine how affordable housing could be provided without government assistance.

The legislation was so controversial that it only narrowly passed after the second try, despite various compromises and the strong support of the governor and leaders in the legislature. The proposals also included a commitment to provide extensive funding and bonuses to municipalities that approved affordable housing, but these were never provided.

This legislation from its outset has attracted many supplemental bills — most directed at curtailing or hobbling it, but others at closing loopholes or otherwise strengthening it. These contradictory attempts reflect the pressure coming mainly from two camps: representatives from the affluent suburbs that feel the provisions interfere too much with local control of development, and those from the older and less affluent cities that feel they shoulder too much of the affordable housing burden. Despite these many attempts, legislative changes were made only in 1995 and 2000.

A second commission of housing experts and elected representatives was appointed by the governor in 1999 to review the legislation, and particularly the operation of the procedures. The commission submitted 36 recommendations to

the legislature. Roughly a dozen were passed into law in 2000, while some of the others are still under consideration. The legislation has modified certain aspects, but left the fundamental features of the procedures unaffected.

Planning Requirements

State law requires the municipalities to prepare comprehensive 'plans of development' on a regular basis. Since 1991, they also have been obliged to use their zoning and planning regulations to encourage the creation of housing opportunities for all residents of their community as well as their planning region; and also to promote housing choice and economic diversity, including specifically housing for lower-income people.

These obligations generally have not been met. Due to the strongly-held views in the state about local sovereignty over development matters, the municipalities have successfully resisted state-level planning. As a consequence, there is no state agency that reviews these plans or monitors the municipal performance, nor any effective state penalties for not complying.

Within this context, the special approval procedures can be seen as an indirect way of overcoming restrictive zoning practices and encouraging municipalities to accommodate affordable housing, while using the courts to enforce the provisions.

Provisions

The law facilitates the provision of affordable housing by establishing a special approval procedures for new projects. Under these procedures, the local zoning and planning authority can deny approvals of eligible projects only under narrow grounds. Furthermore, the denial can be appealed to the state courts, where the local authority must defend the decision.

Approval Procedures

These procedures are available in all municipalities for developers of affordable housing projects needing a development permit that involves relief from local zoning and planning regulations. On the other hand, these procedures do not deal with the permits needed from state agencies, nor from the local commissions that regulate wetlands and the local water and sanitary systems.

The housing eligible for the special procedures includes government-assisted housing for lower-income households[7]; and so-called 'set-aside' affordable housing — both rental or ownership — that receives no government assistance, but must provide on a long-term basis at least a minimum specified percentage lower-income units.

The requirements for the 'set-aside' projects have toughened over time. The 2000 legislation introduced these changes:

- The minimum percentage of units that must be provided for lower-income households was raised to 30% (up from 20% initially and 25% as of 1995).
- The minimum percentage that must be reserved for households earning at or under 60% of the area's median income was raised to 15% (up from 10% as of 1995).
- The minimum time that these units must remain affordable has been lengthened to 40 years (up from 20 years initially and 30 years as of 1995).
- Lower limits were also imposed on the rents that can charged.

The local authority can deny the applications for eligible projects only when their decision is supported by "sufficient evidence in the record", and also meets all three of these criteria:

- it is necessary to protect a "substantial interest" in "health or safety";
- these interests clearly outweigh the need for affordable housing; and
- these interests cannot be protected by making reasonable changes to the project.

The last of these criteria is meant to allow, and encourage, municipalities and developers to reach negotiated settlements.

The terms "substantial interest" in "health or safety" were not defined, so that the courts upon appeal could identify what was relevant in the particular situation.

Appeals Procedures

If the permit is denied by the local authority in most municipalities, the decision can be appealed to the local trial division of the top state court. The appeals are heard by one of six trial judges assigned to these cases. Although these judges also hear other types of litigation, focussing these appeals on a limited number of judges has enabled them to develop a familiarity with the issues and precedents that serves to facilitate the proceedings.

The force of the special appeals procedure lies in its shifting of the burden of proof from the developer to the local authority. The authority must be able to show, using evidence on the record when the decision was made, that all three of the criteria noted earlier are met. This sets a higher standard of evidence than that used in

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7 Lower-income housing is defined as housing affordable to households earning at or below 80% of the lower of either the local or state median income. Before 1995, the standard referred only to the local median. It was changed because this allowed wealthy communities to meet their obligation through relatively expensive homes.

conventional zoning appeals, but comparable to that used in civil litigation. Furthermore, it reverses the conventional practice of presuming that the local authority acted properly, and expecting the developer to prove the contrary.

Certain municipalities are not subject to the appeals procedures. It does not apply to those where 10% of the housing stock is already available only to lower-income households on a guaranteed permanent or long-term basis. That housing includes all of the following:

- housing receiving financial assistance under a state or federal government program, either for the construction or substantial rehabilitation, or through rental assistance;

- housing currently financed by reduced-interest homeowner mortgages provided by a federal or state agency;

- housing built without direct government assistance but controlled by covenants or restrictions on deeds limiting their sale or rental to lower-income households for the specified period; and

- housing obtained in exchange for a property tax relief from the municipality, and secured for lower-income households for the specified time.

This last category was introduced by the 2000 legislation, in order to give municipalities another optional way of supporting affordable housing that does not involve capital subsidies.

The 10% threshold is considerably less than the state's affordable housing needs, and is not meant to represent a housing goal. It is used as an arbitrary, but administratively simple, standard for identifying those municipalities that deserve a permanent exception from these procedures because they had provided for affordable housing in the past.

Short-term Moratoria

Municipalities not meeting the 10% threshold are able to receive a short-term moratorium from the appeals procedures when they meet certain, and recently revised, conditions. This provision is intended to reward those municipalities that are working toward meeting that threshold, and thereby, encourage them and others to continue those efforts.

Previously, municipalities could qualify only once for an one-year moratorium, when they had recently completed — or were currently engaged in creating — affordable housing through one of two state programs. Also, the new or prospective housing had to amount to at least 1% of the municipality's current housing stock.

This provision was not widely used for various reasons. The moratorium could be earned only once and the period was too short to be beneficial. In any case, the specified housing programs had become defunct in recent years.

Under the new provision introduced by the 2000 legislation, the moratoria are longer and easier to get. Municipalities now are able to obtain a three-year moratorium each time they add housing units measured in one of two ways: either 2% of the total housing units or 75 points under a special weighted scale. The latter scale is a complicated way of counting that gives preference to certain types of units (like rental units and units for low-income families).

Certain government-funded developments, on the other hand, can no longer be stopped by a moratorium. These include developments of 40 or fewer units, and developments with 95% or more of the units for households earning at or below 60% of the local median income.

Court Decisions

The courts have influenced the effect of the legislation through their interpretation of its provisions. Most of the decisions have turned on what the courts considered to be a valid substantial interest that outweighed the need for affordable housing. For example, the courts have rejected preserving neighbourhood character, protecting property values and preventing an increase in school children as sufficient grounds for stopping affordable housing. On the other hand, municipalities were allowed to deny projects that would have created a traffic hazard, had inadequate sanitary drainage or water supplies, or been located in a flood plain or on steep slopes.

Two of the court's interpretations have been subsequently over ruled by legislative amendments. In the very first appeal, a trial court approved an affordable housing project on industrially-zoned land. As a result of the 1995 legislation, the courts are no longer allowed to change the land-use designation in these special appeals; all projects must now be on residentially-zoned lands.

In a 1999 decision the top state court effectively lowered the standard of evidence required in these special appeals to that used in conventional zoning appeals. On the recommendation of the second housing commission, which considered that this undermined the law's intent to bring more rigour to the special appeals, the 2000 legislation explicitly re-imposed the higher standard.

Achievements

Participation

The number of municipalities meeting the 10% threshold has not changed substantially over the years. Originally, 26 of the state's 169 municipalities were

exempt from the procedures. At the end of 2000, the number was 30. In the interim, it has fluctuated somewhat, mostly due to changes in the data bases used.

As a point of comparison, the percentages of affordable housing in the three largest cities in the state — Bridgeport, Hartford, and New Haven — were 22%, 35% and 30% respectively in 2000.

Appeals

As of the end of 2000, applications for 51 projects had been appealed by the developers to the trial courts. Approximately three-quarters of the appeals have been successful — 37 on the basis of some substantive issue and 4 on some narrow procedural point. The entire process, from the filing of the application to the decision of the trial court, has typically taken about three to four years. The lower trial court decisions were taken to the appellate courts on five occasions and top court on three, but were substantially upheld every time.

Production

State figures

The state annually records information provided by the municipalities on the number of affordable units in each jurisdiction. The information on the units provided through these special procedures, however, is known to be incomplete because of the unreliable municipal data. That data often overlooks affordable housing projects that were started by applications for special approvals, but were eventually approved after negotiation through the conventional process.

According to the state figures, between mid-1990 and early 2000, there has been a net gain of 29,500 lower-income units in the state. About 78% were added through government assistance, and another 15% took advantage of below-market government mortgages.

The remainder — roughly 1950 units — was developed by private developers as part of mixed-used projects. Out of that figure, only 925 definitely can be attributed to the special approval process. The remainder might have been due to conventional approvals of projects initially seeking special approvals, or possibly to inclusionary zoning, which is used by a handful of the state's municipalities.

Independent survey

According to an independent survey (Ethier 1997), the procedure had led to the approval of at least 1630 affordable housing units — 1040 through local negotiation and settlement and 590 through appeals by the end of 1996. The later figure was considered to be accurate because it was based upon a review of the court records.

The former figure, although based on interviews with municipal staff, was still considered to be an underestimate because of the unreliable municipal data.

In comparison, 57,000 residential building permits were issued by the state over the same time. So, the approvals taking advantage of these special procedures represented at least 3% of the total authorized for construction.

Most of these units were provided by private developers. These units are typically in mixed-income projects built without government subsidy or assistance, and located in the suburban municipalities surrounding the four largest cities in the state. The affordable units typically were sold to families earning at or just below 80% of the local median income. Many of the market-rate units in these projects, though not priced low enough to qualify as affordable units, were still less expensive than the other new housing available in their respective communities.

The remaining units were supplied by non-profit developers. Their units typically are rental, located in urban areas, and aimed at households earning at or below 60% of the local median income. Most of these units have been built in the last few years because state funding was severely cut in the early 1990s and only recently has been partially restored.

The survey identified two other benefits of the legislation. It has succeeded in raising state-wide awareness of the need for affordable housing, and also prompted many municipalities to amend their regulations to be more receptive to affordable housing.

Assessment

Connecticut's mandate is based upon its special approval procedures, which are principally directed at facilitating the approval of affordable housing projects by preventing the use of inappropriate regulatory restrictions. This is achieved, first of all, by limiting the grounds upon which the municipalities can deny these approvals or impose restrictive conditions. In addition, these limits are buttressed by an appeals process in which the municipalities have the burden of defending their decisions on the basis of sound evidence on the record.

Because of these procedure, the developers are much more likely to get development approval for affordable housing, either eventually through these procedures, or through conventional means after negotiation with the municipalities. Faced with the likelihood of the developer getting an approval through these procedures, the municipalities are now more willing to consider these proposals and work with the developers while they have the opportunity.

The procedures also encourage the provision of affordable housing by giving certain benefits to the developers. Through these procedures, the developers are able to

secure regulatory concessions — including increased densities — that provide an indirect subsidy toward the affordable housing units.

The procedures also open new development opportunities, particularly for for-profit developers. For the price of incorporating a portion of affordable housing units in their projects, they also are able to get approval for other highly marketable types of housing — like moderately-sized housing on smaller lots — in many municipalities that previously would have denied this type of housing.

These procedures have an important merit from the government's viewpoint. They do not add to the administrative burdens of either the state or the municipalities. The state's role is limited mainly to tabulating the affordable housing units toward the municipal quotas. The courts are responsible for interpreting the law and enforcing the provisions.

The provisions of this mandate are modeled on those in Massachusetts. Like that state, Connecticut has a weak state planning system. Although the municipalities are required by state law to plan for affordable housing, this obligation is widely ignored. Within this context, the special approval procedures can be seen as an indirect way of ensuring that the municipalities accommodate affordable housing to some extent.

Connecticut's procedures are different, and less far-reaching, than those in Massachusetts in certain key aspects. They do not encompass all local permits, but only those related to zoning and planning. Neither the local authorities nor the courts are expected to make their decisions within strict time limits. Finally, there are no provisions that either encourage or enable the local municipalities to support affordable housing using their own resources.

Shortcomings of the Procedures

These special procedures so far have not facilitated the provision of very much affordable housing. There are various apparent reasons for their lack of effectiveness.

The non-profit developers have not been able to take much advantage of these procedures. Cuts in state and federal funding have hampered non-profit development generally, and the limited money now available goes mainly to the large cities that are mainly exempt from the appeal procedures. Furthermore, non-profit developers are unable to sustain drawn-out litigation, because they lack the resources and the ability to hold their subsidy commitments for a long period.

In the absence of an active non-profit sector, the mandate relies heavily on the interest of for-profit developers in building mixed-income projects. These projects are sustainable only in certain markets — namely, where the high demand for market-rate units is sufficiently strong to enable them to incorporate the below-

market units. This level of demand, even in periods of high growth, so far has occurred only in parts of the state.

Despite these provisions, the municipalities still have been able to block affordable housing in various ways. The local water and sewer commissions, which are not subject to the provisions, have refused to supply the necessary infrastructure in some cases. The municipalities have re-zoned residential land to industrial, and also used their powers of eminent domain to purchase sites subject to an affordable housing application. At least one municipality is known to have negotiated with developer to remove affordable housing from the proposal. Finally, some municipalities or local residents have taken advantage of the lengthy appeals process by litigating just to delay projects until they can be no longer sustained.

The last problem points to the single most serious shortcoming to these provisions. There are no effective measures either compelling or encouraging the municipalities to plan or provide for affordable housing. The worst outcome of their failing to approve affordable housing is that it will be eventually approved without their input. The state does not impose any penalties when the municipalities do not support affordable housing, nor does it provide any benefits when they do so.

7 British Columbia: *Affordable Housing Legislation*

The province of British Columbia passed legislation in the early 1990s that directed local governments to plan for affordable housing, and authorized various regulatory tools that could be used in providing for that housing. In doing so, this legislation provided some of the key components of an affordable housing mandate.

Background

The affordable housing legislation was fostered principally by two factors. The continued strong economic and population growth in the province into the early 1990s was making housing unaffordable for an increasingly large number of families. Also, after having cut back its support, the federal government announced in 1993 its intent to withdraw entirely from the funding of new assisted housing in the following year.

The legislation was based on the advice of a commission appointed by the province in mid-1992. The two members of the commission came from the private and the non-profit housing sectors. The commission's purpose was to identify ways for the province and municipalities to meet their affordable housing needs within shrinking government resources. After extensive consultations with the public, municipalities and community organizations, the commission released a report at the end of 1992 that contained 57 far-ranging recommendations.

Provisions

The province's affordable housing mandate is based upon legislation passed in 1992, 1993 and 1994 amending its Municipal Act (now, the Local Government Act). There has been no changes to the provisions since that time.

Planning Obligations

The 1992 legislation requires local governments to include in their official plans policies addressing affordable housing, rental and special needs housing. This represents the first time that the municipalities were explicitly directed to plan for these needs.

The approach taken by the province is directed at enabling and encouraging the local governments to provide for affordable housing through their planning activities, but not to prescribes how they should do it. This approach is described as giving local governments the opportunity to develop different approaches that best match their own resources and needs.

As a consequence, the legislation gives the municipalities considerable latitude in how they both identify and meet their needs. Notably, although the legislation uses the term 'affordable housing', it does not define the term. The local governments are each able to set their own standards and targets.

When the legislation was passed, the province issued an accompanying guide that identified the tools available to local governments in meeting this obligation. Reference was made to the following:

- providing fast-tracked development approvals;
- using inclusionary zoning;
- providing public lands;
- establishing housing funds; and
- levying special fees or charges.

Regulatory Tools

Legislation in 1993 and 1994 added to the tools available to the municipalities in providing for affordable housing. That legislation explicitly granted the municipalities authority for the following:

1) to use density bonusing and 'comprehensive density zoning' for affordable housing;
2) to sell or lease municipally-owned land at less than market value to non-profit providers; and
3) to obtain additional powers through 'empowerment by regulation'.

The tools identified above were not introduced by the legislation. Many local governments had already employed them prior to the legislation. The legislation was mainly intended to clarify that these practices were legal and appropriate.

In a related matter, local governments also were given the authority to enter into housing agreements with developers when using these and other similar tools. These agreements can be used to secure the long-term affordability of housing, both ownership and rental, provided by the developers. For example, these agreements can be used to fix such aspects as the tenure, management, price or rent, and eligibility of the occupants of a specified set of units.

<u>Density Bonusing</u>

Under this provision, local governments are authorized to increase the allowable density on a site in return for the provision of affordable housing, special needs housing and/or public amenities. Before using the authority, a municipality must enact a zoning by-law defining in advance such aspects as the base density for the relevant zones, the additional density available, and the housing and amenities that must be provided by the developer.

Comprehensive Development Zoning

This provision enables local governments to use customized zoning regulations for the redevelopment of large, complex and/or multi-use sites. It generally will involve a rezoning negotiation, through which the local government can offer the developer increased densities and other regulatory benefits in return for the provision of affordable housing and/or amenities in the development.

The community's official plan must first establish the conditions governing the use of comprehensive development zoning, including where this type of zoning is applicable, the uses and densities that are permitted, and the housing and amenities that must be provided by the developers.

Below-Market Sale and Leases of Land

This provision authorizes local governments to lease or sell land at prices below market value to non-profit corporations. It is subject to the condition that the property not be used for private gain. While aimed primarily at non-profit housing, non-profit organizations providing other community services also are eligible.

‘Empowerment by Regulation’

This provision — also called "enabling by regulation" — enables local governments to apply to the province for innovative, special or temporary powers that will be granted without passing authorizing legislation. It is intended to enable them to be more innovative in how they meet their particular housing needs, and the province to monitor the results before deciding about making the powers more widely available.

Various limitations are placed on the use of this provision. The authority is not intended to be used instead of legislation on contentious public policy issues. Also, it cannot be used to validate retroactively, authorize new taxes or tax exemptions, override legislated prohibitions, nor sidestep electoral approval requirements. The granting of new powers can be made subject to conditions, like giving due notice and obtaining voter approval.

Other Recommendations

Many, but not all, of the recommendations of the commission have been adopted by the province. Some of the other recommendations deserve mention because their adoption would make BC’s mandate more comprehensive and comparable to the major state mandates in the US.

The commission also made the following key recommendations:

- that the province establish a definition of affordable housing that would target households earning at or below 80% of the average household income for the local urban area;

- that all municipalities be required to establish annual housing production targets for affordable housing; and

- that the municipalities be given the authority for the following:
  - to use inclusionary zoning for affordable housing,
  - to raise money for affordable housing through loans and/or debentures,
  - to establish special reserve funds for affordable housing; and
  - to use linkage fees and development cost charges as other possible funding sources.

Achievements

The province has surveyed the response of local governments to this legislation, first in mid-1996 and most recently in mid-2000 (MSDES, 2000). These surveys identified the various policies and programs initiated by the local governments[8].

According to the most recent survey, many local governments have started using tools capable of supporting affordable housing. The tools being used (along with the number of examples) include the following:
- density bonusing (32);
- comprehensive development zoning (44);
- inclusionary zoning (15);
- fast-tracked approvals (19);
- development fee waivers (8);
- housing reserve funds (8); and
- below-market provision of government-owned land (20).

These surveys, on the other hand, did not tabulate the housing produced or supported by these initiatives. Therefore, no information was provided on how these initiatives have succeeded, and on which are being used to provide affordable housing rather than rental or special needs housing.

Most of the initiatives appear to be directed at creating market housing — particularly, rental — that is more affordable, and at allowing smaller and more diverse types of units.

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8 Some of these initiatives have been profiled in a 1998 CMHC report, entitled Municipal Regulatory Initiatives: Providing for Affordable Housing.

The most effective, and widespread, form of support for below-market housing probably has been through providing government lands at no or low cost for non-profit housing projects funded by the province.

The city of Vancouver, which is not subject to the legislation due to its separate charter, continues to be the single jurisdiction making the most concerted efforts to support the production of affordable housing.

As indicated, a number of local governments in BC started using inclusionary zoning, although they have not been given the explicit authority to do so. The province has taken no position either against or in favour of this practice.

The local governments have adopted a variety of definitions for affordable housing. Most incorporate some variation of 'core need housing'. Few have set limits on income eligibility.

Assessment

The fundamental approach taken by British Columbia is primarily to enable the municipalities to support affordable housing, and to advise them in those efforts. To that end, the province has given them a number of regulatory tools for supporting developers in providing that housing, but it has not set specific targets.

The major shortcoming of this approach is the lack of a provincial definition of affordable housing, and even a standard yardstick for measuring affordability. Because the municipalities are able to use their own definitions of affordable housing, they are able to define the problem in a way that minimizes their obligation.

The lack of a common definition and yardstick also has wider implications for the province. It means that the province will be hampered in monitoring what housing is being produced, determining to what extent it is actually affordable, identifying what tools need to be added or changed, and assessing how effective the legislation is.

As they stand, these provisions do not effectively commit the municipalities to provide for affordable housing as defined by this study. Without a stronger provincial directive, the extensive experience in the US clearly shows that few municipalities will support the provision in a substantial way. At best, their efforts can be expected to focus on the low-end-of-market housing, but not on below-market housing that requires municipal participation or subsidies.

8 Ontario: *Housing Policy Statement*

The province of Ontario introduced affordable housing provisions through a provincial policy statement that came into effect in 1989. The provisions were strengthened in 1994, but were subsequently rescinded in 1996. Although less comprehensive than the provisions in the US mandates, they represented the most demanding affordable housing requirements by a Canadian province at that time.

Background

Ontario's affordable housing mandate originated in a housing policy statement entitled 'Land Use Planning for Housing' and coming into effect in 1991. Through this statement, Ontario's major and growing municipalities were directed for the first time to plan for a full range of housing types. Although this statement made reference to affordable housing, its main thrust was to increase the diversity and affordability of housing generally.

The housing statement was prepared in response to the rapid growth in the late 1980s that occurred across the province but most particularly in southern Ontario. During this period, the private building industry had focused primarily on building higher-priced single-detached dwellings and luxury condominiums, while ignoring much needed smaller and more affordable housing. The land-use planning process also was seen to be part of the problem because the regulations too often impeded the provision of this housing.

The province has used policy statements since 1983 to express its authority "on matters relating to municipal planning that ... are of provincial interest". These statements provide a binding planning framework for the municipalities. All official plans, and the associated land-use regulations and development decisions, "shall have regard to" the provincial policy statements. The wording is interpreted as limiting the discretion of the municipalities, while still leaving them with some flexibility to consider local conditions and objectives.

The role of the policy statements has become more important since the planning reforms introduced in 1995. Until that time, the province had reviewed and approved local municipal plans. The reforms curtailed that responsibility. As a consequence, the statements have become the primary vehicle for expressing provincial direction on key province-wide planning issues.

In preparation for these reforms, all of the existing policy statements, including the 1989 housing policy statement, were revised and released in a new format in 1994. The new housing policies were extended to apply to all Ontario municipalities. Most

importantly, new requirements were added that targeted housing roughly equivalent to affordable housing as used elsewhere in this report.

Following the election of a new provincial government, the housing policy statement was revised again in 1996, and all provisions specific to affordable housing were removed. The result was the dismantling of the province's affordable housing mandate.

Provisions

The stated goal of the housing policies in the 1989 and 1994 statements was "to provide opportunities in each municipality for the creation of housing that is affordable, accessible, adequate and appropriate to the full range of present and expected households in the housing market area."

The two housing statements were not devoted specifically to affordable housing. They contained a series of detailed policy directives on a broad range of issues, including land supply, housing types, residential intensification, development standards and others.

Affordable Housing Definition

The 1989 and 1994 statements both defined affordable housing essentially as housing affordable to households in the lowest 60% of the household income distribution for the housing market area[9]. For housing to be affordable, the household's annual housing costs could not exceed 30% of the gross annual household income.

The 1989 statement stated that affordable housing was for "low and moderate income households". This reference did not appear in the 1994 statement, but the

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9 Although Ontario's housing statement and the American mandates use different yardsticks and thresholds when defining affordable housing, a comparison can be made by using the income data for any specific area. Based upon the 1995 household income data issued by Ontario for the Greater Toronto Area, for example, the respective household incomes at the key reference points were these:

- Ontario's upper threshold (the lowest 60% on the income distribution) was at 119% of the median income for this area, and its lower threshold (the lowest 30%) at 64%.
- The US moderate-income threshold (80% of the median income) was approximately at the lowest 39% of the income distribution, and the low-income threshold (50% of the median income) at the lowest 22%.

associated implementation guidelines described it as housing affordable to “middle- and lower-income households”.

All references to affordable housing, including this definition, were removed in the 1996 statement.

Housing Targets

The 1989 and 1994 statements set two housing targets for every municipality. They were expected to achieve the higher of these two targets:

- Every municipality had to plan at least for its projected housing needs, including those specifically for affordable housing.

  As indicated by these figures, the former Ontario definition of affordable housing incorporated a somewhat higher income threshold than that typically associated with this term in the US.

- According to the 1989 statement, out of the new housing opportunities created through development and intensification, every municipality had to plan at least 25% as affordable to the lowest 60% of the household income distribution for the housing market area.

  The 1994 statement amended this requirement so that every municipality had to plan at least 30% as affordable to the lowest 60% of the household income distribution. Furthermore, out of that housing, at least half "wherever feasible" had to be affordable to the lowest 30% of the household income distribution. The latter was called the ‘low-income sub-target’.

Strictly speaking, only the 1994 statement contained requirements specific to affordable housing as used in this report. These were introduced by adding the requirements specifically for the ‘low-income sub-target’.

The upper-tier regional governments were responsible for projecting the overall housing needs, and allocating an appropriate share of these needs to their constituent local municipalities. To assist in these projections, the province issued a standard methodology.

Planning Obligations

To comply with the provisions of the statement, the municipalities were required to prepare comprehensive housing studies, and reflect the findings in their official plans. According to provincial guidelines, this meant that they were obliged to assess their existing and future housing needs, including those for affordable housing; examine their housing market and development conditions; and prepare a

housing strategy for addressing their housing needs through the private market and available government programs.

In the case of new development, the municipalities were directed to provide the necessary opportunities for affordable housing by planning and zoning appropriately. As noted in the implementation guidelines, the municipalities were mainly able to promote affordability by using density, lot size, built form and unit size restrictions.

The opportunities for affordable housing were to be provided at least in each 'community planning area'. The municipalities were given wide latitude in how these areas were defined, provided the affordable housing was distributed reasonably across the community. The policies did not require that the affordable housing be provided in every project, but that would have been possible if appropriate policies and conditions had been established in advance.

The municipalities were also required to do the following:

- to maintain a sufficient supply of land for residential development, so that the price of housing would not be affected by shortages;

- to permit rooming houses, accessory apartments, infill development and other small-scale intensification where appropriate; and

- to plan for affordable housing on surplus provincially-owned lands.

Municipalities were also encouraged to use development standards that facilitated affordable housing and more compact development.

Achievements

No study has been undertaken of the impact of the 1989 and 1994 provincial housing statements. The following is based upon informal interviews with a number of provincial and municipal planners in the mid-1990s.

The 1989 and 1994 housing statements did not appear to have any substantial impact on the housing built over the brief time that they were in effect. During that time, housing construction was sluggish due to the economic recession. In that economic climate, the market focused on building more compact and modest forms of housing, which it would have produced even without the housing statement.

The most significant impact of the statements was probably in making a timely contribution to changing political attitudes toward this type of housing. So, when the builders sought permission to build the housing, the municipalities had already begun to designate land for it.

The municipalities responded to the statements mainly by zoning for a broader range of density types, particularly in the attached and multiple forms, and relaxing standards to allow for a greater variety of housing types. No examples could be found of any municipality using regulatory mechanisms, such as inclusionary zoning or incentive bonusing, to achieve affordable housing.

The overall housing targets were handily met in most municipalities. The targets were met by the construction of townhouses and other types of attached family housing that were within the affordability criteria in most communities.

Although these results appear to be positive, two important qualifications should be made. First, the more modest and compact housing was a significant part of a reduced volume of building activity. The targets were met, not because the amount of this housing had significantly increased, but rather because the construction of other housing was dramatically down.

Second, the broader goal of providing a full range of affordable housing was not met. Virtually no private rental housing was built outside of some cities. Neither were condominiums, which were an indirect source of rental accommodation. With the exception of housing provided by the non-profit sector, no housing was provided for households at the lowest 30% of the income distribution.

Assessment

Under Ontario's mandate, the municipalities were not responsible for, nor capable of, supporting affordable housing as defined in this report. The municipalities were expected to rely upon proper planning and development standards, but as acknowledged by the province's implementation guidelines, proper planning by itself was not capable of providing housing affordable to the 'low-income sub-target'. For this reason, the municipal obligation to this income group was qualified by terms "wherever feasible", which were defined as meaning whenever government assistance was available to support non-profit housing.

The statements did not provide any effective mechanisms for achieving and maintaining below-market housing through the for-profit sector. Unlike in the US mandates, and even BC's legislation, Ontario municipalities were not given the necessary regulatory tools, nor the authority to control either the initial or future price of housing built by the private sector.

At best, the municipalities were able only to plan for what the guidelines called "inherently affordable" housing. That referred to housing that could remain affordable in the marketplace by virtue of its density and size. This approach, could have only a limited impact, especially in any marketplace subject to inflationary price pressures.

9 Portland Metropolitan Area OR: *Regional Affordable Housing Strategy*

The affordable housing mandate for the Portland area is contained in its regional affordable housing strategy, which was adopted by the metropolitan government in early 2001. This mandate builds upon an earlier and widely known state provision, the Metropolitan Housing Rule issued in 1981.

Background

Metropolitan Government

The metropolitan area for Portland is the state's largest urban area, and has the state's most serious housing problems. At the present time, it has a population of 1.7 million within its designated urban growth boundary, which includes 24 incorporated cities and the parts of 3 counties.

The area has had its own regional government — officially called Metro — since 1992. Metro is the only regional government in the US that has its own directly elected council and full-time elected executive officials. The regional government was given authority over regional planning. Under that authority, it can compel the local municipalities to make their comprehensive plans and associated implementing ordinances comply with regional land-use policies as well as specific performance standards. Under earlier arrangements, regional planning was undertaken through the collective agreement of the constituent municipalities.

Historical Context

Oregon in 1973 passed comprehensive planning legislation that became an early model for many other states. This legislation was spurred in large part by the unprecedented growth that led to concerns about urban sprawl and environmental damage. Under the legislation, all local jurisdictions have been required to develop local comprehensive plans that address a number of state goals. The goal for housing specifically has required that they provide for housing meeting the financial capabilities of all households.

Through the Metropolitan Housing Rule issued in 1981, the state extended the statewide planning goals into more detailed housing requirements for the Portland metropolitan area. These requirements are still in effect. While they do not specifically address affordable housing, they have been important for establishing a shared approach to housing and planning across this metropolitan area.

Metro's regional affordable housing strategy was prepared by a multi-disciplinary committee appointed in 1997. Among its 28 members were home builders, affordable housing providers and advocates, major employers, as well as representatives from financial institutions and state and local governments. The committee was charged with determining numerical "fair share" targets for each jurisdiction in the metropolitan area, and identifying the planning tools and other related measures needed to meet those targets. After extensive consultations, its final recommendations were released in mid-2000 and implemented by Metro in early 2001.

Provisions: State Mandate

The purpose of the state's Metropolitan Housing Rule was to limit urban sprawl around Portland by creating an urban growth boundary and more compact development within that boundary.

To that end, all of the municipalities in the metropolitan area, when planning for new residential development, have been required to use these minimum average densities:

- 6 units/net building acre (2.5 u/ha) in the smallest cities on the urban fringe with limited growth potential;
- 8 units/acre (3.2 u/ha) in the mid-range central jurisdictions, which represented a majority of the jurisdictions; and
- 10 units/acre (4.2 u/ha) in the largest, most urbanized and central jurisdictions, including the city of Portland.

These jurisdictions must also plan for at least 50% of new residential units to be attached or multi-family housing, and include provision as necessary for government-subsidized and manufactured housing.

Under its own authority, Metro has expanded upon this mandate through various supplementary housing policies and requirements. Among the most important of those specific to affordable housing are these:

- The minimum density built in any residential zone must be at least 80% of the minimum densities permitted by the state planning requirements.
- Accessory units must be permitted in all detached single family dwellings.
- Higher specified housing densities must be planned around light rail transit stops.

Provisions: Metropolitan Mandate

Under the provisions passed by Metro at the beginning of 2001, the local jurisdictions are now obliged to ensure that their local comprehensive plans and related land-use regulations reflect the regional affordable housing strategy.

As part of that process, they must also do the following:

- adopt the “fair share” allocations — now, called ‘affordable housing production goals’ — and use them as affordable housing targets for their planning efforts; and

- consider and apply where appropriate the various tools and measures identified by the committee.

Metro will monitor their progress and make a full assessment in 2003. At that time, the municipalities will be expected to defend their performance, and Metro will determine what additional directives are warranted.

The mandate implemented so far takes no action on another important recommendation of the committee — namely, that a new regional or other funding source be established to support the provision of housing for the targeted households. The committee looked at various options — including linkage fees and bond measures — but recommended focusing on a real estate transfer tax as a new dedicated source. Metro does not have the authority to use such a funding source, but intends to seek it from the state legislature.

Fair Share Targets

The methodology developed for determining the fair share targets was directed at working toward “an equitable distribution of housing opportunity ... within each Metro jurisdiction that reflects the regional income distribution as a whole”. The methodology started with the projected 2017 growth assigned to each jurisdiction by the regional functional plan. It then assumed that the growth in each jurisdiction would be directed toward producing the same proportion of lower-income households as the projected regional average. After allowing for the existing lower-income households in each jurisdiction, the outstanding units became its ‘affordable housing production goal’.

The allocations focused on households earning 50% or below the area’s median income, as these were considered by the committee to be the households in greatest need. The projected need for these households for the entire region was an additional 90,500 units at 2017. To produce what was considered to be a realistic short-term target, each jurisdiction was given a five-year goal amounting to 10% of its 2017 projected need.

Current federal and state resources are currently providing about $27 million per year in financial assistance for affordable housing development. That money has been used toward 1150 units per year serving households earning 80% or below. To meet the larger number of targeted households earning 50% or below, the committee estimated that an additional $97 million annually would be needed from a new regional source of funding.

Municipal Tools

A large array of regulatory and financial tools and other measures for facilitating the provision of affordable housing have been identified and evaluated in the strategy. The intent was to provide a range of choices for the local governments, rather than to prescribe any particular measure or range of measures.

The most relevant of the identified tools are the following:
- density bonusing;
- incentive-based inclusionary zoning;
- transfer of development rights;
- reduced development standards;
- expedited approval procedures;
- donated land;
- permit fee waivers or reductions;
- development charge waivers or reductions; and
- property tax exemptions.

Mandatory inclusion zoning was not included. During the committee's deliberations, due to the efforts of the building industry and various municipalities, the state legislature in 1999 prohibited this type of zoning.

Achievements and Assessment

The impact of Metro's regional affordable housing strategy can not be yet assessed. The provisions were introduced in early 2001, and the municipalities have been given three years to test the provisions and try different solutions. What the municipalities can achieve also will depend on the availability of additional regional funding, which has yet to be secured.

Metro so far is taking a non-confrontational approach to implementing these measure. It is proceeding on the assumption that the municipalities will actively participate and willingly work toward meeting their obligations. It will decide only after the three-year trial period if more demanding or specific directives are necessary.

The strategy does contain most of the necessary components of an effective mandate — the affirmative directive to provide for affordable housing, the specific targets assigned to each municipality, and the regulatory and financial tools needed to support the housing. What it lacks so far is a means of compelling municipal compliance, like special approval procedures.

The provisions of the strategy represent a significant enhancement to the requirements of the Metropolitan Housing Rule. The rule did not address affordable housing as defined in this report. By establishing minimum planned densities, the

rule did potentially make housing more affordable generally, but it did not provide for housing that was affordable to lower-income households specifically.

The rule, nevertheless, has had a number of positive impacts. It served to break down the barriers in many of the metropolitan jurisdictions to the more affordable types of housing like attached and multifamily units. In doing so, it also laid the basis for a collective approach to planning for housing, and to the acceptance that all communities must share in some equitable way in providing for affordable housing.

10 Twin Cities Area MN: *Housing Incentive Program*

The affordable housing mandate for the Twin Cities metropolitan area is set out in the Housing Incentive Program, which was established by the state's Metropolitan Livable Communities Act in 1995. That program became fully operational in 1997 when the first funding was made available.

Background

Metropolitan Government

The Twin Cities metropolitan area consists of 189 cities and towns in seven counties surrounding and including the Minneapolis and St Paul. This area had a population of 2.4 million in 2000.

The metropolitan area since 1967 has had a 'council of government' that co-ordinates or operates various major region-wide services. In that capacity, it is also responsible for establishing regional policies for land use and affordable housing, and providing planning and technical assistance to the local municipalities in these matters.

Under state planning law since 1976, the local governments must plan for affordable housing. They are required to adopt a comprehensive plan with a housing element "providing adequate housing opportunities to meet existing and project local and regional housing needs, including ... land for the development of low and moderate income housing." The plans are now submitted roughly every seven to eight years.

The metropolitan government has only limited authority over the local planning. It has the power to review and approve the housing elements of local comprehensive plans, but not to impose changes to the housing elements nor the associated zoning ordinances in order to make them consistent with regional policies. There are no penalties for not preparing the housing elements or providing for the affordable housing.

Historical Context

The metropolitan government has fostered a regional approach to various urban problems like urban sprawl, property tax inequities, traffic congestion as well as affordable housing.

Of particular note is an early affordable housing mandate that was introduced through the first set of comprehensive plans in the region. As authorized by the state's 1976 planning legislation, the mandate set out the number of government-

assisted housing units that each municipality was expected to provide. The allocations were based on the projected needs, but qualified by what was practical under the available federal and state funding. This approach was directed at obliging each municipality to provide its reasonable share of subsidized housing by taking advantage of relatively generous federal funding at the time.

This mandate, which still remains in text of the legislation, faded away after the severe federal funding cuts in the early 1980s. These cuts reduced the amount of subsidized housing that could be built, and also the leverage of the metropolitan government over the local governments in this matter.

The need for a regional housing policy re-surfaced in the early 1990s. Like many American cities, the Twin Cities area saw widening disparities in race, income and tenure between central cities and suburbs.

In response, the state legislature developed a legislative package that established a "fair share" affordable housing approach for the suburbs, pooling property taxes, and restructuring regional infrastructure development subsidies. The package initially also tied those subsidies to affordable housing performance. This package – less the last component – was passed by the legislature for three straight years, but vetoed each time by the state governor.

The Metropolitan Livable Communities Act was passed in 1995 by the state legislature after its failure to implement the above package. The act established the Housing Incentive Program with the expressed purpose to “expand housing opportunities for low- and moderate-income families and revitalize communities in the Minneapolis-St Paul region”.

Provisions

Under the Housing Incentive Program, the metropolitan government is authorized to provide funding to participating local municipalities for a number of specified community improvements. To be eligible for this funding, the municipalities must negotiate housing goals with the metropolitan government, and then file a action plan with the government showing what steps will be taken and resources used to meet the goals. The goals apply to new housing developed for a 15-year period ending in 2010.

Goal-Setting

The housing goals are tailored to each municipality through negotiations with the metropolitan government. Those goals set numeric targets for these six measures:

- the percentage of affordable ownership housing[10];
- the percentage of affordable rental housing[10];
- the percentage of family detached and mobile units;
- the split between owner and renter housing stock;
- the density of single-family detached development; and
- the density of multi-family development.

As the starting point for negotiation, the metropolitan government set two benchmarks for all six of these measures for each community. The two benchmarks were based upon the average for all communities within the same sub-regional market area, and the average for all communities in the same stage of development — fully developed, still developing, rural with sewered centres, and rural only.

Neither these benchmarks, nor the subsequent negotiated goals, are directed at meeting projected housing needs. They are meant to reflect practical changes to the current development practices that might lead to greater housing affordability and diversity generally.

Once negotiated, most municipalities continue to use the same goals in succeeding years. A few have sought to make adjustments to one or more measures. New benchmarks will be set, followed by a new round of goal negotiations, after the 2000 census data has been released.

Implementation

In order to meet their housing goals, the municipalities are principally expected to plan properly — for example, by making sufficient land available at appropriate densities — and to take advantage of federal and state housing programs.

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10 Affordable ownership housing is for households earning at or below 80% of the local median income, and affordable rental housing is for households at or below 50% of median income.

Affordable rental housing is generally subject to federal or state funding requirements that control the affordability for at least 20-25 years. The affordable ownership units so far have been subject only to controls established by the municipalities; the metropolitan government is strongly recommending that their affordability be protected for at least 10 years.

The municipalities also have the authority, but are not required, to raise financial support for affordable housing through the following:

- property tax relief;
- local bond issues;
- tax increment financing; and
- property tax levies.

The legislation did not give the municipalities any additional fiscal resources or regulatory tools to meet their housing goals.

Funding

Under this program, the funding is available specifically for four kinds of projects:

- contaminated land clean-up projects providing for commercial and industrial development;

- life-cycle[11] and affordable housing projects — both rental and ownership — serving housing needs at all incomes and stages of life;

- innovative mixed-income housing projects incorporating both market and affordable units; and

- compact transit- and pedestrian-oriented projects containing both residential and commercial uses.

As can be seen, the funding is for a range of community projects, and not just affordable housing, or even housing. In the case of housing, the funding is directed at diversifying the choice of housing available. While projects with affordable housing are eligible, the municipalities are primarily expected to secure any subsidy needed to develop the housing primarily from federal and state programs.

The funding is administered by the metropolitan government. It is made available each year in the form of loans and grants, and awarded on the basis of competitive applications.

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11 Life-cycle housing refers to housing that extends the diversity of housing, both in cost and type, available for residents at the various stages of their lives. For example, this could include housing targeted to young people and first-time buyers, empty nesters and the elderly, and other special needs.

The funding is raised from a metropolitan-wide tax levy authorized specifically for this purpose. Funding was initially raised in 1996 for expenditure in 1997. In the four-year period covering 1996-1999, a total of $51.2 million has been made available for the four types of projects. A total of $15.1 million was made available in 1999 alone for expenditure in 2000. Within that, $4 million was set aside for the first time for mixed-income projects.

Achievements

Participation

The initial round of goal-setting was completed in early 1996. In that first year of operation, 97 of the 189 municipalities agreed to participate in the program. The participation has steadily increased up to 105 municipalities in 2000. One municipality has chosen to drop out of the program.

The participating municipalities now represent virtually all of the large municipalities and those with significant growth prospects. The non-participants are nearly all outlying and relatively static rural areas.

Results of Goal Setting

As of mid-2000, the 105 participating municipalities have set goals that through 2010 would add approximately 12,700 affordable rental units (out of nearly 40,000 additional rental housing units) and 68,800 affordable ownership units. As previously noted, these goals should be taken as an indication of what is practical, and not what is needed. To show the difference, the above numbers can be compared with the estimated need for roughly 100,000 more rental units by 2010 for the metropolitan area.

At the end of 1998, the participating municipalities had built an additional 9,300 affordable ownership units and 1,150 affordable rental units. If this present rate of construction continues through 2010, the output will fall below the goals by roughly 15% and 25% respectively.

The shortfall in affordable rental reflects the lack of adequate public resources. The slippage in affordable ownership units probably is due mainly to the recent rapid escalation in house prices. Until recently, it was possible to meet the 80% income threshold in many suburban communities by building market-rate townhouses, or maybe even small single-detached units. Now, that potential has receded at best to the most remote metropolitan communities.

In the view of the metropolitan government, the process has been successful because the negotiated goals represent an improvement over what was likely to happen without them. Most importantly, all of the fast-growing suburban communities have agreed to improve their performance, and most in a substantial

way. Meanwhile, all of the urbanized areas, which in the past have accommodated the bulk of the affordable housing, have agreed at least to meet their past performance.

A recent detailed and independent study, on the other hand, presents a less favourable assessment (Goetz 2001). It found that even if the communities fully achieve their goals, the metropolitan area will have proportionally less affordable housing in 2010 than in 1996. The shortfall can be traced back to the benchmarks, which did not establish targets that were high enough to meet the growing need for affordable housing. Then, on top of that, many municipalities were allowed to negotiate goals that were below their benchmarks. Overall, although the fast-growing suburbs did commit to accommodating larger amounts of affordable housing, these gains will be offset by lower commitments elsewhere.

Results of Program Funding

In the first four years from 1996 through 1999, over $50 million in grants was awarded. Out of that, $4.6 million was given specifically for affordable and life-cycle housing projects. These projects, in turn, have been used in conjunction with another $98.8 million from other public and private sources of development investment.

The housing supported in part by this funding has included the following:

- the development of nearly 600 new rental units — including 465 affordable to lower-income households and 76 public housing units;
- the rehabilitation of over 410 affordable rental units;
- the development of nearly 260 new affordable ownership units; and
- the rehabilitation of roughly 100 affordable ownership units.

In 1999, the first grant of $348,000 was awarded to an innovative mixed-income housing project. It went to assist 33 units out of a total 162 rental units for households earning at or below 30% of the median income.

Assessment

The Twin Cities program is unlike the other mandates reviewed in this report. Instead of imposing mandatory obligations on the municipalities, it uses an incentive-based approach with negotiated goals. The program essentially offers discretionary funding to municipalities for various community improvements in exchange for their agreeing to provide for affordable housing.

The program does make available a considerable part of its funding for projects enhancing the affordability and diversity of housing. Much of that funding can be used for affordable housing, but none of it is specifically earmarked for that purpose. The funding for the affordable housing is expected to come predominantly from the existing federal, state and local subsidy programs.

The municipalities are responsible mainly for plan appropriately for affordable housing, and pursuing the available subsidies. Unlike the other mandates, they have not been given additional regulatory tools to achieve that housing. On the other hand, they already have a number locally-based financial tools.

This incentive-based approach represents a compromise between government-imposed obligations and market-dominated preferences. It was developed only after a more demanding and direct approach had been repeatedly passed and vetoed by the governor. It does engage the metropolitan municipalities in a collective approach to providing the affordable housing, but gives them the choice about whether and how much to participate.

This approach reflects a reluctance to demand significant changes in the development practices of local governments and private developers. This reluctance is clearly seen in the benchmarks that were used as the starting point for the goal-setting. The benchmarks were not based on affordable housing needs, but on modest changes to what the market had produced over the years in the metropolitan area.

The program, in operation for less than five years, is still evolving. Drawing upon the initial experience, adjustments are being made that will allocate more of the program funding to affordable housing.

There are growing indications, nevertheless, that the program will not be effective. The results to date are falling behind even the modest goals that have been set. Furthermore, those results came during a time when housing within the income targets had been buildable by the private market in many suburban communities. In the last few years, however, the rapid rise in house prices across the metropolitan area has eroded this possibility.

Due to its voluntary nature, the results will depend on what the municipalities are willing to do within the available financial resources. As the housing prices continue to rise faster than incomes — as they have done for many years — the need for affordable housing increases, and so do the subsidies needed to support it. If this increasing burden falls substantially on the municipalities, they can be expected to ignore their goals, seek to lower them, or opt out of the program entirely. For this voluntary approach to continue to work, the funding will need to be expanded on a regular basis so that the benefits available to the municipalities are greater then the burden.

APPENDIX: Glossary of Terms

Affordable housing, as used across the US and in this report, refers to housing provided on a permanent or long-term basis for households with low- and moderate-incomes. In effect, this also means "below-market" housing supported by some form of financial or regulatory assistance (see page 5 of main text for additional information.)

Builder's remedy refers generally to a court order directing a local authority to issue a development approval for a project that it has improperly denied. In this report, it is used in reference to a specific practice in New Jersey, where the courts attacked exclusionary zoning by ordering the approval of residential projects providing a percentage of affordable housing (typically, 20%) in exchange for building more units (typically, 20%).

Comprehensive development zoning refers to site-specific zoning dealing with all aspects of large and complex developments, and generally determined through negotiations between the local government and developer. This mechanism can be used to secure affordable housing and other public amenities in exchange for increased densities and other regulatory concessions.

Core housing need is a measure used in Canada to identify the number of households in a jurisdiction that cannot find suitable housing while not spending more than 30% of their gross income.

Council of government is a voluntary association of local governments in a metropolitan or regional area established to assist them in planning for or providing collective needs like affordable housing, public transit or water supply. It does not represent a formal level of government because it typically does not have its own elected officials, fiscal authority, nor the authority to impose its decisions on the individual jurisdictions.

Density bonusing is a zoning mechanism through which developers are able to receive approval to build more floor space or units in exchange for providing some specified public benefit. In this report, it refers to residential developments providing affordable housing, but it also can be used with commercial developments to support affordable housing, and also to secure other public amenities.

Development exactions refers to the practice of making development approvals — mainly for commercial uses, but sometimes also market-rate housing and other uses — contingent on the payment of fees toward the provision of affordable housing The justification is that these new developments must mitigate the adverse impact of the developments on housing affordability, caused either directly (by attracting lower-income workers or displacing lower-income residents) or indirectly (by driving up house prices generally). The best known of these are 'linkage" fees',

but there are also many other examples variously called impact fees, development levies, and excise taxes.

Exclusionary zoning refers to the practice of using land-use regulations with the intention of excluding lower-income households — and, by extension, racial and other minorities — from a community. Among the most common exclusionary practices are requiring large minimum lot or house sizes, prohibiting multifamily or rental housing, or setting excessively high contributions for local improvements like parks and schools.

Fair share refers to the principle that all municipalities within a certain multi-jurisdictional area (i.e., region, metropolitan area, or state) should share in some equitable way in meeting the area's overall affordable housing needs. This obligation is often expressed through some numeric target or quota for each municipality. Although the principle was first used elsewhere, fair share is most identified with the Mount Laurel decision in New Jersey where the courts gave it legal recognition. The principle underlies most efforts directed at regionally allocating housing needs, and particularly at overcoming the exclusionary zoning practices of many suburban communities.

Housing agreement is a legal agreement between a developer and a local government used to ensure that the affordability of certain housing units is maintained over a specified time, and the units are occupied only by eligible households. The agreement is typically placed on the land title and is binding on all future property owners for the specified time.

Inclusionary zoning is a zoning practice that enables developers of market residential projects to provide some prescribed percentage of the housing for lower-income households, in exchange for density bonuses and other regulatory concessions that off-set the cost of providing the affordable housing. Inclusionary zoning is most associated with New Jersey and California, but is also used widely elsewhere. The provision of the housing is mandatory in some programs as a condition of development approval (when it sometimes is called a 'mandatory set-aside') or encouraged in others through the offering of adequate incentives (when it is sometimes called 'incentive zoning').

Low- and moderate-incomes, as used generally across the US and in this report, refers to incomes at or below 80% of the median household incomes for the respective area. The term can be split into its two parts: low-income (referring to incomes at or below 50%) and moderate-income (referring to incomes between 80% and 50%).

Lower-income housing is a short-form version that means the same as housing affordable to low- and moderate-income households. Therefore, it is another way of saying affordable housing.

Mandatory set-asides is used in some jurisdictions when referring to the minimum percentage of lower-income housing units that must be included in a mandatory inclusionary program or a mixed-income housing project.

Mixed-income housing refers generally to projects designed to accommodate households with a range incomes through the provision of different types of housing, sizes, densities and/or tenures. In this report, the term is used specifically in reference to projects built by for-profit developers with a mix of both market and below-market housing.

NIMBY, an acronym for “not-in-my-back-yard”, refers to local opposition to proposed projects that are considered to be undesirable. In this report, it refers to opposition to lower-income housing, but it also could refer to high-density or special needs housing and many other types of projects.

Tax increment financing is a process used to fund the activities of redevelopment agencies in urban renewal areas across the US. In this process, the increase in property taxes resulting from these activities goes to the redevelopment agency rather than to the local government. The funds are used generally to payback investment capital obtained from bonds and used in the initial improvements.

Transfer of density rights in a regulatory mechanism that allows the unused development rights of existing structures to be transferred and built on other sites on the condition that the existing structures be rehabilitated and maintained. The mechanism can be used to retain and upgrade existing affordable housing as well as other types of buildings.

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