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*Symposium on Land Use Law: Rights with Responsibilities*

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# AFFORDABLE HOUSING AS AN ADEQUATE PUBLIC FACILITY

Marc T. Smith\* and Ruth L. Steiner\*\*

## I. INTRODUCTION

Suburban and exurban communities have adopted a range of land use regulations that have had the effect, intended or not, of excluding affordable housing from within their boundaries.<sup>1</sup> These impacts have been well documented, from studies of exclusionary zoning to those considering land use regulations more broadly. As a result of these policies, central cities have, by default, become the location of most of the affordable housing in the typical metropolitan area.<sup>2</sup>

The fragmentation of local governments and the competition among them makes it unlikely that inequalities between city and suburb will be solved at the local level. Recognizing the regional nature of housing markets, a number of efforts over the past thirty years have sought to develop regional approaches to housing.<sup>3</sup> The federal government has attempted to address the spatial issues of providing affordable housing through several demonstration programs, but those efforts have had little impact on the spatial distribution of affordable housing at the local level. While several recent programs, such as the Moving to Opportunity program, have a spatial component, most of the recent federal initiatives have devolved decision making from the federal level to the local level. In fact, a recent article suggests that regional organizations might better operate one locally implemented federal program, the Section 8 Voucher program, and that more affordable housing in suburban areas is also needed.<sup>4</sup>

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<sup>1</sup> See Arthur C. Nelson, *Exclusionary Practices and Urban Sprawl in Metropolitan Atlanta*, 17 GA. ST. U. L. REV. 1087 (2001); Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS'N 125 (2000).

<sup>2</sup> See Angela Glover Blackwell, *Promoting Equitable Development*, 34 IND. L. REV. 1273 (2001).

<sup>3</sup> See, e.g., Robert E. Lang & Steven P. Hornburg, *Planning Portland Style: Pitfalls and Possibilities*, 8 HOUSING POL'Y DEBATE 1 (1997).

<sup>4</sup> See Bruce J. Katz & Margery Austin Turner, *Who Should Run the Housing Voucher Program? A Reform Proposal*, 12 HOUSING POL'Y DEBATE 239 (2001).

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While the federal government is generally not the appropriate level to address the spatial issues of housing provision, regional governments are generally weak and, therefore, not able to take on the role.<sup>5</sup> Hence, it falls to the states to address the inaction of local governments in the provision of affordable housing and the resultant lack of locational choice in such housing.<sup>6</sup> States control the land use regulatory powers of local governments and are able to impose mandates and requirements on the land use actions of these jurisdictions. Several states have imposed affordable housing requirements on local governments. These requirements have ranged from housing plans to fair share allocation models to regulatory relief and inclusionary housing, but the states have not coordinated planning, implementation, and enforcement.

This Article uses the concurrency requirements of Florida's growth management legislation as a basis to examine another approach to requiring local affordable housing provision. It considers the implications of including housing among the elements of infrastructure to which concurrency applies. Concurrency offers a different approach because it makes provision of affordable housing an explicit responsibility of local governments, with such responsibility tied to a local comprehensive plan prepared under a set of rules and regulations established by the state.

Concurrency is a form of an adequate facilities ordinance. These ordinances limit development in areas where the public infrastructure is insufficient or will fall below a minimum level of service standard. These limitations include prohibiting development in those areas, requiring the local government to provide the infrastructure, or requiring developers to bear the cost of solving the inadequacies. Florida's law requires that adequate facilities be in place across a range of infrastructure types. Concurrency does not apply to housing, possibly because housing is predominately provided by the private sector in the United States, and has been limited to publicly provided infrastructure such as transportation, water and sewer, and parks.

However, an argument could be made for housing concurrency to ensure adequate *affordable* housing. First, the public sector has provided

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<sup>5</sup> But see Janice C. Griffith, *Smart Governance for Smart Growth: The Need for Regional Governments*, 17 GA. ST. U. L. REV. 1019 (2001) (arguing that regional governments can best implement smart growth policies).

<sup>6</sup> Nelson, *supra* note 1, at 1099-1100.

some housing through various subsidy and assistance programs. Second, housing is important to economic development because employees require affordable homes. Finally, in the view of some, housing is a fundamental right that should be provided or facilitated by society.<sup>7</sup> In addition to these arguments, the reality is that while housing is one of the required elements in Florida's local government comprehensive plans, the lack of concurrency (and, therefore, the lack of an enforcement mechanism for implementation) implies that implementation of the housing plan relies on the interest of local leaders, rather than a state-wide, uniform mandate.

If concurrency applied to housing, it might require communities to ensure that adequate housing be in place before commercial, office, and other high-tax-ratable development can occur. In this application, concurrency would be similar to housing linkage programs implemented in some cities. Concurrency might also require that higher income housing development include a set aside of lower-cost units, as in inclusionary housing programs. While this may be implemented through the private sector, the use of these tools in the context of concurrency would place the onus on local governments to resolve housing availability issues in order for development to continue. As presently implemented, these tools transfer affordable housing concerns to developers without direct reference to the housing plan developed in a community and, therefore, without placing affordable housing units in the context of plan implementation.

## II. ATTEMPTS TO ADDRESS EXCLUSIONARY PRACTICES

There have been efforts to address housing needs on a regional level dating back at least to the 1960s. Goetz describes two periods of regional approaches to housing policy. During the first period, in the late 1960s and early 1970s, the United States Department of Housing and Urban Development (HUD) promoted fair share efforts, and several areas experimented with fair share.<sup>8</sup> Fair share programs allocate a portion of a region's low and moderate income housing needs to every jurisdiction in the region.<sup>9</sup> The early efforts were initiated by the federal

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<sup>7</sup> See Chester Hartman, *The Case for a Right to Housing*, 9 HOUSING POL'Y DEBATE 223 (1998).

<sup>8</sup> See Edward G. Goetz, *Fair Share or Status Quo?: The Twin Cities Livable Communities Act*, 20 J. PLAN. EDUC. & RES. 37, 37-38 (2000); see also W. DENNIS KEATING, *THE SUBURBAN RACIAL DILEMMA: HOUSING AND NEIGHBORHOODS* (1994); DAVID LISTOKIN, *FAIR SHARE HOUSING ALLOCATION* (1976); Charles E. Connerly & Marc Smith, *Developing a Fair Share Housing Policy for Florida*, 12 J. LAND USE & ENVTL. L. 63 (1996).

<sup>9</sup> Nelson, *supra* note 1, at 1101.

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government, and at least forty regional planning commissions or government councils adopted fair share housing plans by 1975 in response to these federal incentives.<sup>10</sup> HUD's Areawide Housing Opportunity Plan, created in 1976 but terminated in 1981, furthered efforts to create regional housing allocation plans.<sup>11</sup> More recently, the Moving to Opportunity program attempted to create regional approaches to housing.<sup>12</sup> However, since the 1980s, the decline in federal subsidies was among the factors that limited the success of these programs. The burden has increasingly fallen on state and local governments to create programs to achieve metropolitan housing goals.

The second period of regionalism discussed by Goetz, occurring in the 1990s, responded to concerns about spatial mismatch, interdependencies within regions, and concentrations of poverty.<sup>13</sup> Among the responses to these concerns was HUD's HOPE VI program.<sup>14</sup> This was also a period of efforts at the state level, as several states incorporated housing element requirements into state planning and growth management legislation. Goetz notes that regional housing programs address at least one of two objectives: "to increase the availability of affordable housing throughout a region or to spatially redistribute affordable housing opportunities within a region."<sup>15</sup>

As discussed, housing is best addressed as a regional issue, and an effective approach to housing provision probably requires mandates imposed on local governments by regional and state agencies. This is not a common approach, except in Florida, California, New Jersey (resulting from the *Mt. Laurel* decisions), and in several other states and regions.<sup>16</sup> Despite the mandates and requirements in these states, the total affordable housing units created do not approach the need for

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<sup>10</sup> See LISTOKIN, *supra* note 8.

<sup>11</sup> See generally ROBERT W. BURCHELL ET AL., U.S. DEP'T OF HOUSING & URBAN DEV., REGIONAL HOUSING OPPORTUNITIES FOR LOWER INCOME HOUSEHOLDS (1994).

<sup>12</sup> See Emily Rosenbaum & Laura E. Harris, *Residential Mobility and Opportunities: Early Impacts of the Moving to Opportunity Demonstration Program in Chicago*, 12 HOUSING POL'Y DEBATE 321 (2001); see also Susan J. Popkin et al., *The Gautreaux Legacy: What Might Mixed-Income and Dispersal Strategies Mean for the Poorest Public Housing Tenants?*, 11 HOUSING POL'Y DEBATE 911 (2000) (discussing the impact of Chicago's *Gautreaux* case on the placement of public housing).

<sup>13</sup> See Goetz, *supra* note 8, at 38.

<sup>14</sup> See generally Patrick E. Clancy & Leo Quigley, *Response: HOPE VI: A Vital Tool for Comprehensive Neighborhood Revitalization*, 8 GEO. J. ON POVERTY L. & POL'Y 527 (2001).

<sup>15</sup> Goetz, *supra* note 8, at 37.

<sup>16</sup> See *infra* Part III.

affordable housing opportunities.<sup>17</sup> This failure is the result of two factors: a lack of implementation tools and the shortcomings of local housing planning.

First, there is a lack of effective tools available to implement affordable housing plans. Subsidies to support the expansion of the supply of affordable housing, or to assist tenants in affording such housing, are generally provided at the federal level, such as HUD programs or the Low Income Housing Tax Credit. With the decline in federal support for new subsidized programs, and the more limited resources of state and local governments, funding has restricted responses to affordable housing needs and requires the use of regulatory tools such as inclusionary housing.

Implementation of fair share and regional housing programs has generally incorporated the use of inclusionary housing, which requires or provides incentives to include a portion of units as affordable to low and moderate income households and provides remedies by allowing an appeal of adverse zoning decisions to the state level.<sup>18</sup> Several states, including California, require local communities to provide opportunities for the development of affordable housing through their land use regulations.

Second, the housing element in local planning does not sufficiently guide and influence the provision of affordable housing in a jurisdiction. In general terms, the housing element should serve two purposes. First, it should identify the total expected housing demand in the community based on growth and household change, which should be coordinated with the land use element of the plan to provide sufficient locations for such growth. Second, the housing element should identify the affordable housing needs in the community and identify strategies to address those needs. It is the latter role of the housing plan that is the focus of this Article. For a community to address its affordable housing needs, it must first acknowledge the existence of those needs, and then it must identify sites to meet those needs. Jurisdictions that use their land use regulations for exclusionary purposes do not acknowledge their role in providing affordable housing. Thus, to ensure uniformity and

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<sup>17</sup> Sam Stonefield, *Affordable Housing in Suburbia: The Importance but Limited Power and Effectiveness of the State Override Tool*, 22 W. NEW ENG. L. REV. 323, 329 (2001) (noting that 18,000 affordable housing units have been produced in Massachusetts; 1600 in Connecticut; and 15,000 to 20,000 in New Jersey).

<sup>18</sup> See Nico Calavita et al., *Inclusionary Housing in California and New Jersey: A Comparative Analysis*, 8 HOUSING POL'Y DEBATE 109 (1997).

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participation by all jurisdictions, the responsibility to plan for affordable housing needs must be imposed by a regional or state entity. Consistency is required across communities and with regional and state plans.

Even when the housing element acknowledges the need for affordable housing, no response will be forthcoming without coordination with the agencies that control the expenditure of available resources and without the development of regulatory tools that result in affordable housing. Where implementation resources are available, a lack of coordination often exists between the housing element of the comprehensive plan and the expenditure of housing funds. The expenditure of funds may be based on a plan, but it is not the housing element. For example, HUD programs require the completion of a Consolidated Plan, but it does not necessarily incorporate elements of a state-mandated plan because the Consolidated Plan covers a shorter time frame than the housing element of a comprehensive plan. State resources may also require plans at the local level, which are prepared separately from a comprehensive plan. In other cases, the number of affordable housing units required in a community may be established at the state level, but the local jurisdiction is expected to provide programs to meet those needs with little state-level funding and oversight. Unless an effort is made at the local level, implementation of federal and state programs may happen without coordination with local housing plans. In states that have the power to override local land use and zoning decisions, the action to create affordable housing is initiated by a builder or developer and not necessarily undertaken in concert with a larger planning effort.<sup>19</sup>

This problem is exacerbated when different local agencies are charged with preparing a housing plan and administering the federal funds that flow into the community; however, this is often the case. Differing requirements and mandates may limit the interaction and coordination that occurs between program administrators and planners. Unlike this typical American system, Varady describes a British system in which plans emphasize strategy and implementation and are the basis for the allocation of funds from Great Britain's central government.<sup>20</sup>

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<sup>19</sup> These states include New Jersey, Connecticut, Massachusetts, and Rhode Island.

<sup>20</sup> See David P. Varady, *Local Housing Plans: Learning from Great Britain*, 7 HOUSING POL'Y DEBATE 253 (1996).

If housing is to be addressed as the regional issue that it is, coordination is necessary between communities, and among community, regional, and state plans. Without state mandates and cooperation across agencies and jurisdictions, consistency will not be achieved.

### III. STATE HOUSING REQUIREMENTS

State and regional efforts to address the spatial dimension of housing generally involve the use of mandates. These mandates may require the completion of a housing plan, but generally also require communities to facilitate the development of affordable housing. Numeric targets may be established for a community, and the municipality may be expected to take action, although the specifics are left to the jurisdiction. Options for supporting affordable housing generally involve regulatory tools, density bonuses, expedited approval procedures, reductions in development standards, and waivers from various application fees or development charges. Inclusionary housing is a commonly used tool. The following provides brief descriptions of several state and regional efforts.

#### A. California

Since 1981, local governments in California have been required to estimate local housing needs. These estimates are based, at least in part, on an assessment and an allocation of housing needs at the regional level. These determinations, in turn, must be consistent with the state Department of Housing and Community Development's determinations of state and regional needs.<sup>21</sup> Each community's share of regional affordable housing is based on a calculation that includes market demand for housing, employment opportunities, commuting patterns, and availability of suitable sites and public facilities. Based on this estimate, a locality calculates a basic housing construction need. Jurisdictions also set out goals and plans in order to provide a fair share of housing needs. The plans include the provision of adequate sites; however, the adequate sites provision does not appear to provide sufficient land for affordable housing.<sup>22</sup>

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<sup>21</sup> Charles E. Connerly & Nancy A. Muller, *Evaluating Housing Elements in Growth Management Comprehensive Plans*, in *GROWTH MANAGEMENT: THE PLANNING CHALLENGE OF THE 1990s* 185-86 (Jay M. Stein ed., 1993).

<sup>22</sup> See Brian Augusta, Comment, *Building Housing from the Ground Up: Strengthening California Law to Ensure Adequate Locations for Affordable Housing*, 39 *SANTA CLARA L. REV.*

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The state certifies that a local plan is in compliance with the law. Although the state reviews local housing elements for compliance, jurisdictions are not directly penalized for non-compliance, and the state cannot compel compliance.<sup>23</sup> In response to litigation brought by developers or housing advocates, communities without a certified plan may have court-imposed requirements, such as the issuance of building permits. Calavita and Grimes found that housing elements that meet state requirements do not have mechanisms to ensure they are enforced.<sup>24</sup> They also note that California communities have used inclusionary housing programs successfully, but that inclusionary housing is adopted locally and without a state mandate.<sup>25</sup>

B. New Jersey

New Jersey's affordable housing system was created through two rulings by the New Jersey Supreme Court.<sup>26</sup> It is perhaps the most widely known and studied of all state housing initiatives.<sup>27</sup> The *Mt. Laurel* decisions provide a builder's remedy that enables builders to challenge land use actions. To eliminate the builder's remedy and give control to the legislative and executive branches of government, New Jersey adopted the Fair Housing Act in 1985. Under this Act, municipalities develop housing plans to meet a fair share allocation assigned to each community by the state Council of Affordable Housing.<sup>28</sup> Municipalities that have an approved plan avoid the builder's remedy. The methodology, originally created by the court, includes among other factors: existing needs, projected regional needs, and building capacity in a community. Recent revisions to the methodology avoid placing housing in undeveloped rural areas, instead emphasizing areas with infrastructure capacity.

New Jersey mandates inclusionary housing as one approach to address the housing needs identified for each community.<sup>29</sup> The

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503 (1999) (discussing whether there is sufficient land available for the development of affordable housing).

<sup>23</sup> See Nico Calavita & Kenneth Grimes, *Inclusionary Housing in California: The Experience of Two Decades*, 64 J. AM. PLAN. ASS'N 150, 154 (1998).

<sup>24</sup> See *id.* at 151.

<sup>25</sup> See *id.*

<sup>26</sup> See generally CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996).

<sup>27</sup> See John M. Payne, *Fairly Sharing Affordable Housing Obligations: The Mount Laurel Matrix*, 22 W. NEW ENG. L. REV. 365 (2001).

<sup>28</sup> See generally Connerly & Muller, *supra* note 21.

<sup>29</sup> Payne, *supra* note 27, at 365.

involvement of the judicial system forces a degree of participation in New Jersey that is not apparent in other states.<sup>30</sup> Local jurisdictions are also able to transfer a portion of their obligation to other jurisdictions through negotiated payments. The presence of the court in starting the system resulted in considerable housing being produced, although not to the level of the specified need. After a community plans for its fair share of housing, there is little to require compliance because the state agency does not have enforcement powers.

### C. *Massachusetts and Connecticut*

Massachusetts and Connecticut have procedures to override local land use actions at the state level in order to provide development.<sup>31</sup> However, these state systems are not based on planning; rather, they generally place limits on the applicability of the law once a community reaches a threshold of affordable housing based on the size of a project. The laws require developers to bring an action to challenge a community's policies. In 1988, Connecticut also passed legislation that allowed regions to address affordable housing through a negotiated fair housing compact.<sup>32</sup>

### D. *Washington*

Washington's Growth Management Act requires local governments to "encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of the existing housing stock."<sup>33</sup> The comprehensive plan must identify sufficient land for housing and establish policies to provide affordable housing. It appears that the comprehensive plan and regulatory provisions for affordable housing have not been required of local governments.<sup>34</sup> In Washington, comprehensive planning is required at the county level with consistency between local plans and the county plan.

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<sup>30</sup> Calavita & Grimes, *supra* note 23, at 151.

<sup>31</sup> New Jersey and Rhode Island have similar procedures. See Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381 (2001); Stonefield, *supra* note 17; Terry J. Tondro, *Connecticut's Affordable Housing Appeals Statute: After Ten Years of Hope, Why Only Middling Results?*, 23 W. NEW ENG. L. REV. 115 (2001).

<sup>32</sup> Connerly & Smith, *supra* note 8, at 89-93.

<sup>33</sup> WASH. REV. CODE ANN. § 36.70A.020(4) (West 1991).

<sup>34</sup> PERKINS COIE LLP, A WHITE PAPER: THE WASHINGTON GROWTH MANAGEMENT ACT AFTER TEN YEARS: THE DUTY TO ACCOMMODATE GROWTH (2002).

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E. Oregon

Goals Ten and Fourteen of Oregon's growth management legislation address housing. This legislation is best known for urban service boundaries and attempts to impose higher density development as a means to lower housing costs.<sup>35</sup> Recently, a regional affordable housing strategy was introduced for the metropolitan government of Portland. This strategy assigns a fair share to each jurisdiction based on projections of low-income housing needs. Also specified are the tools available to jurisdictions to address their needs.

F. Twin Cities Area, Minnesota

While not a state program, the efforts in the Twin Cities through the Minneapolis-St. Paul Livable Communities Act are noteworthy because of the regional government structure. It is a voluntary program that provides incentives for local government participation and sets affordable housing goals relative to sub-regional benchmarks.<sup>36</sup> Goetz finds that "even in an urban area known for regional cooperation, the effectiveness of a fair share program can be significantly constrained at the implementation stage."<sup>37</sup> He notes the need for "subsidies, incentives, and sanctions to facilitate compliance and implementation."<sup>38</sup>

Generally, fair share and regional housing efforts have a limited effect due to the lack of a tie between planning to meet regional housing needs and implementation, or the ability to enforce compliance. The one exception is New Jersey, where the courts have acted to achieve a level of compliance. If there appears to be little teeth in housing elements, can regional housing efforts be improved, and is concurrency the mechanism to achieve that connection and result? The following Part discusses the spatial nature of housing demand and is followed by a discussion of concurrency.

IV. SPATIAL DIMENSIONS OF HOUSING NEED

The spatial dimension of the housing need is examined in a substantial amount of literature on the jobs-housing balance and spatial mismatch. This literature explores the suburbanization of employment

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<sup>35</sup> See Carl Abbott, *The Portland Region: Where City and Suburbs Talk to Each Other-and Often Agree*, 8 HOUSING POL'Y DEBATE 11 (1997).

<sup>36</sup> Goetz, *supra* note 8, at 40.

<sup>37</sup> *Id.* at 49.

<sup>38</sup> *Id.* at 50.

and the lack of affordable housing proximate to employment sites. Levine notes that the idea of work and residence matching is a long-standing tradition in planning.<sup>39</sup> If better matching was achieved, commuting would be reduced, and low and moderate income households would have better access to suburban jobs.<sup>40</sup> The problem is in the implementation of the jobs-housing balance. Measurement of the extent of the balance is limited by the geography used to define the issue; the balance exists at the regional but not the jurisdictional or neighborhood levels. Implementation is further limited due to job mobility, two-earner households, the inability to force people to live near work, and other issues. Levine notes that suburban land use policies have limited the choices available to households.<sup>41</sup> He argues that fiscal and exclusionary zoning practices and other regulatory limitations imposed by local governments are at the root of the jobs-housing balance problem.<sup>42</sup> The result is a mismatch between earnings and house values.<sup>43</sup>

Suburban communities have welcomed the jobs and resultant high-tax revenues from the warehouses and offices choosing suburban locations, and the high-priced housing that characterizes a suburban bedroom community, but not the affordable housing that should accompany such an economic expansion. The result is long commutes or a lack of access to jobs for individuals living in inner-city areas and other concentrations of affordable housing. While recognizing that individuals may not choose housing located close to their jobs, this Article asks whether local governments should be required to have affordable housing available as a condition of allowing higher-priced residential and non-residential development. A central question then becomes not whether a "better" jobs-housing balance with shorter commutes can be achieved, but whether more choice can be offered to individuals, and what the responsibility of local government is in providing such choice.

Ihlanfeldt and Sjoquist review parallel literature examining the spatial mismatch hypothesis, which explains that the suburbanization of

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<sup>39</sup> See generally Jonathan Levine, *Rethinking Accessibility and Jobs-Housing Balance*, 64 J. AM. PLAN. ASS'N 133 (1998).

<sup>40</sup> See, e.g., Robert Certero, *Jobs-Housing Balance Revisited: Trends and Impacts in the San Francisco Bay Area*, 62 J. AM. PLAN. ASS'N 492 (1996); Robert Certero, *Jobs-Housing Balancing and Regional Mobility*, 55 J. AM. PLAN. ASS'N 136 (1989); Genevieve Giuliano, *Is Jobs-Housing Balance a Transportation Issue?*, 1305 TRANSP. RES. REC. 305 (1991).

<sup>41</sup> See generally Levine, *supra* note 39.

<sup>42</sup> See generally *id.*

<sup>43</sup> *Id.* at 135.

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employment and segregation in housing markets has left African-Americans in inner-city areas without access to suitable jobs.<sup>44</sup> While the jobs-housing literature tends to be focused on transportation and commuting issues, the spatial mismatch literature addresses the racial dimensions of exclusionary practices. In other words, the spatial mismatch literature addresses the impact on the employment and earnings of African-Americans.

Fair share policies attempt to address the spatial inequities by requiring all communities in a region to provide for a portion of the region's low and moderate income housing needs. However, Freeman points out that such a policy, if successfully implemented, might result in pockets of scattered affordable housing throughout a metropolitan area with little connection to employment and other important linkages, such as services and businesses.<sup>45</sup> In Freeman's scenario, it is better to provide housing close to transportation and employment.<sup>46</sup> He encourages inclusionary zoning as one tool to achieve affordable housing.<sup>47</sup> Only California and New Jersey have seen widespread use of inclusionary zoning, although communities such as Montgomery County, Maryland, have also used this tool.

One conclusion to be drawn from the discussion of the spatial dimension of the housing need is that the tie of housing to jobs is important. Some cities, such as San Francisco and Boston, use linkage programs as a means to make that connection in their downtown centers. Concurrency might offer opportunities to develop a suburban type of linkage program by tying housing provision to the expansion of commercial uses in the suburbs.

#### V. HOW WOULD HOUSING CONCURRENCY WORK?

The concept of concurrency is to provide public facilities to support new development and is based on tying the comprehensive plan to implementation at the local, regional, and state levels. A fundamental

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<sup>44</sup> Keith R. Ihlanfeldt & David L. Sjoquist, *The Spatial Mismatch Hypothesis: A Review of Recent Studies and Their Implications for Welfare Reform*, 9 HOUSING POL'Y DEBATE 849 (1998); see also John F. Kain, *Housing Segregation, Negro Employment, and Metropolitan Decentralization*, 82 Q. J. ECON. 175 (1968); John F. Kain, *The Spatial Mismatch Hypothesis: Three Decades Later*, 3 HOUSING POL'Y DEBATE 371 (1992).

<sup>45</sup> Lance Freeman, *Fair Growth 2020: A Tale of Four Futures*, HOUSING FACTS & FINDINGS, Winter 2000, at 1.

<sup>46</sup> See generally *id.*

<sup>47</sup> See generally *id.*

aspect of this relationship is that the comprehensive plan must be vertically, horizontally, and internally consistent. Vertical consistency requires that "local plans be consistent with state goals and policies."<sup>48</sup> Horizontal consistency requires that local plans be consistent with those of neighboring jurisdictions.<sup>49</sup> Internal consistency requires that "development activities be consistent with their comprehensive plan."<sup>50</sup> Concurrency is a form of local internal consistency that requires the various elements of the plan to be consistent with each other and with the land development regulations that implement them.<sup>51</sup>

Thus, in the case of transportation, concurrency would require consistency between three related elements: one, the future land use plan (FLUP); two, the capital improvements plan (CIP); and three, traffic circulation or transportation.<sup>52</sup> The FLUP identifies areas of future growth and redevelopment and areas where transportation and roadway investments might be needed.<sup>53</sup> The CIP includes a list of public facilities, their estimated costs, when they are needed, their location, and the anticipated revenue sources.<sup>54</sup> The transportation element defines the location of existing and future roadways to support existing and future land uses and the level of service standard for each major roadway segment.<sup>55</sup> Local governments then issue land development regulations (LDRs) to insure that roadway facilities and services satisfy the comprehensive plan requirement in being "available when needed for the development, or that development orders and permits are conditioned on the availability of these public facilities and services necessary to serve the proposed development."<sup>56</sup> If transportation facilities are not available, the local government will pay for them, or the

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<sup>48</sup> RAYMOND J. BURBY ET AL., *MAKING GOVERNMENTS PLAN: STATE EXPERIMENTS IN MANAGING LAND USE 8* (1997).

<sup>49</sup> *Id.* at 8-9.

<sup>50</sup> *Id.* at 9.

<sup>51</sup> Ruth L. Steiner, *Florida's Transportation Concurrency: Are the Current Tools Adequate to Meet the Need for Coordinated Land Use and Transportation Planning?*, 12 U. FLA. J.L. & PUB. POL'Y 269, 279 (2001).

<sup>52</sup> See FLA. STAT. ANN. § 163.3177(6)(b), (j) (West 2000 & Supp. 2002). Transportation elements are only required for local governments located in urbanized areas under the jurisdiction of a Metropolitan Planning Organization (MPO). See FLA. STAT. ANN. § 339.175(1) (West 1991 & Supp. 2002). Other local governments are required to include a traffic circulation element. See FLA. STAT. ANN. § 163.3177(6)(b). The transportation element is more comprehensive than the traffic circulation element.

<sup>53</sup> FLA. STAT. ANN. § 163.3177(6)(a) (West 2000 & Supp. 2002).

<sup>54</sup> FLA. STAT. ANN. § 163.3177(3)(a)(2) (West 2000 & Supp. 2002).

<sup>55</sup> FLA. STAT. ANN. § 163.3177(6)(b), (j).

<sup>56</sup> FLA. STAT. ANN. § 163.3202(2)(g) (West 2000 & Supp. 2002).

developer might be asked to contribute the cost of building them. Like other elements of the comprehensive plan, all three elements must be consistent with each other and with the LDRs that implement them.<sup>57</sup>

Concurrency for affordable housing could be based on the existing concurrency or adequate facilities ordinances for other forms of infrastructure, with minor modifications to account for the differences in the provision of affordable housing. As with transportation, it might only apply in metropolitan areas with multiple jurisdictions, although non-metropolitan communities would continue to be required to address affordable housing needs as part of the comprehensive planning process. Because affordable housing is provided in partnership between the private and public sector, it is not a "public" facility in the same manner as other facilities covered under the concurrency requirement: roads, parks, sanitary sewers, public water supplies, and mass transit. Yet, the provision of affordable housing is arguably a public responsibility. Under the concurrency framework, service standards would be developed in the housing element for each local government based on the regional need for affordable housing. The housing element would detail the extent of the need (based on regional or state-generated numbers), the locations, and the strategies to provide the housing to be addressed by the community. Recognizing that most communities will have a deficit of affordable housing, the level of service would be a maximum deficit of affordable housing in the community. New development would increase the affordable housing need in the community by expanding population or employment and would be assessed against the affordable housing level of service.

Compliance with the level of service (LOS) standards would be monitored on an annual basis by the state, and where the LOS standards are not met, development could not proceed unless adequate affordable housing was available. At the comprehensive planning level, the FLUP would indicate the approximate location of affordable housing, based on the need identified in the housing element. Thus, the housing element would be coordinated with the FLUP, and each would be implemented with the LDRs. The difference here would be that commercial developers would be required to either develop a specified number of affordable housing units or provide equivalent housing, while residential developers would be required to set aside a specific number of units for new development. However, local governments would also

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<sup>57</sup> FLA. STAT. ANN. § 163.3177(2) (West 2000 & Supp. 2002).

be ultimately responsible for the provision of affordable housing and could use other means to provide housing within the jurisdiction, allowing the development to proceed.

Concurrency for affordable housing would thus incorporate many of the requirements of other forms of regulation. The local standards for the level of affordable housing could be based on a fair share allocation or other forms of needs assessment conducted at the regional or state level. The housing element would incorporate the housing need and develop a strategy to address that need. Local governments would be able to develop strategies to address housing needs based on federal and state resources, land use regulations, and imposition of affordable housing requirements on developers. Through inclusionary housing policies, local governments could require developers to provide affordable housing as a condition to developing higher-income housing. Similarly, through linkage programs, housing concurrency could require that new commercial, office, and other high-tax-ratable development provide housing for workers in those new employment locations. A housing concurrency requirement has the potential to improve the jobs-housing ratio and increase the dispersal of affordable housing throughout the region.

As stated, housing concurrency would have the additional benefit of ensuring that local government is ultimately responsible for providing its share of affordable housing within the region, with enforcement at the state level. Several states require a housing element in a comprehensive plan that is reviewed by the state and adjacent jurisdictions,<sup>58</sup> but in all of these states, except New Jersey where the courts implement the housing element, there is no direct tie to implementation. Concurrency would create such a tie.

#### VI. POTENTIAL IMPLEMENTATION TOOLS FOR LOCAL GOVERNMENTS

The fact that growth controls raise housing prices is well established in the literature.<sup>59</sup> Growth controls, even if they are not explicitly exclusionary, can have both direct and indirect effects on prices as they reduce the physical supply of land, restrict the development potential of sites, or add to the costs of development.<sup>60</sup> Direct effects include increases

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<sup>58</sup> These states include Florida, Oregon, New Jersey, and Washington.

<sup>59</sup> See generally Jan K. Brueckner, *Growth Controls and Land Values in an Open City*, 66 *LAND ECON.* 237 (1990).

<sup>60</sup> See, e.g., DAVID E. DOWALL, *THE SUBURBAN SQUEEZE: LAND CONVERSION AND REGULATION IN THE SAN FRANCISCO BAY AREA* (1984); BERNARD J. FRIEDEN, *THE*

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in land costs because the supply of land available for development is limited, increases in lot preparation costs, and the shift of development costs from the public to the project. Development costs are raised indirectly through fees, higher standards, required background studies, and the time delays added to the process.

In addition to using inclusionary housing and linkage programs, additional methods by which local governments might create an environment conducive to affordable housing development are available. Jurisdictions could facilitate affordable housing through expedited permitting, higher densities, lesser requirements on infrastructure, lot assembly, waiver of permit and impact fees, and accessory apartments and other land use types.

### VII. CONCLUSION

Housing markets and housing needs are regional, yet local governments have the primary responsibility to develop housing plans, adopt and administer land use regulations, and implement housing programs. The fragmentation of local governments and the competition among them has resulted in the adoption of land use regulations that have had the effect, intended or not, of excluding affordable housing from within the boundaries of many suburban communities. In states that have attempted to address affordable housing needs, a lack of consistency and coordination within jurisdictions, across jurisdictions, and between localities, regions, and states, as well as limited enforcement tools, have curtailed the effectiveness of efforts to respond to affordable housing needs.

Concurrency for affordable housing would address the weaknesses of current housing efforts by making local housing planning a key component of the response to housing needs and by providing an enforcement mechanism unlike those currently in existence. The local housing element would be based on a fair share allocation or other form of needs assessment conducted at the regional or state level. The plan would need to be consistent with regional and state plans. The local housing element would incorporate the assigned need and develop a strategy to address that need. Local governments would develop strategies to address housing needs, based on federal and state resources

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ENVIRONMENTAL PROTECTION HUSTLE (1979); see also Bernard J. Frieden, *The Exclusionary Effect of Growth Controls*, in *RESOLVING THE HOUSING CRISIS: GOVERNMENT POLICY, DECONTROL AND THE PUBLIC INTEREST* 19 (M. Bruce Johnson ed., 1982).

and land use regulations, and impose affordable housing requirements on developers. Housing concurrency would make local governments responsible for providing their share of affordable housing within the region, with enforcement at the state level.

Adequate facilities ordinances offer the potential of including housing as an element of infrastructure that must be provided. While such an approach would be politically difficult, it would have the effect of placing the burden and obligation on local governments to address affordable housing or be faced with a curtailment of other development. It would represent an affirmative placement of the need to address affordable housing on local governments, a unique approach in the United States, but one that may be needed as spatial structure evolves.

