Florida State University Journal of Land Use and Environmental Law

Volume 12
Number 1 *Fall 1996*

Article 3

April 2018

Developing a Fair Share Housing Policy for Florida

Charles E. Connerly
Florida State University

Marc Smith

DEVELOPING A FAIR SHARE HOUSING POLICY FOR FLORIDA

CHARLES E. CONNERLY*
MARC SMITH**

Table of Contents

---

* Associate Professor, Department of Urban and Regional Planning, Florida State University; B.A., Grinnell College; M.A., University of Connecticut; M.U.P., Urban Planning, University of Michigan; Ph.D., University of Michigan.

** Associate Director, Shimberg Center for Affordable Housing in the College of Architecture, University of Florida; B.A., Denison University; M.A., University of Pennsylvania; Ph.D., Ohio State University.

I. INTRODUCTION

One of the most intractable urban policy issues of our time is the social separation between whites and blacks. In 1968, the United States National Advisory Commission on Civil Disorders (Kerner Commission) wrote that the United States was "moving toward two societies, one black, one white—separate and unequal."[1] The Kerner Commission saw two options, one a strategy of ghetto enrichment *without* efforts to integrate blacks and whites outside the inner city and the other a strategy of ghetto enrichment *with* efforts at significant integration.[2] Although the Kerner Commission recommended the latter, integration has not been achieved. Various indices of residential segregation show that whites and blacks are as separated in the 1990s as they were in the 1960s. Despite fair housing laws that go back to 1968, evidence of discrimination in housing and housing finance is abundant.[3]

In the 1990s, racial segregation also means that African Americans no longer live in areas where there are a significant number of good jobs. The jobs, particularly the low skill, higher paying jobs that enabled cities to be engines of social mobility for migrants, have left the inner city. Some jobs have been relocated to the suburbs and rural areas while others have moved to other nations, usually with lower labor costs. According to John Kasarda, "essentially all of the national growth in entry-level and other jobs with low educational requisites has occurred in the suburbs, exurbs, and non-metropolitan areas, all of which are far removed from growing concentrations of poorly educated minorities."[4]

As Kasarda's quote implies, with the exodus of middle class minority groups from the central city, remaining inner-city neighborhoods have increasingly higher concentrations of poverty. The result, according to sociologist William Julius Wilson, is an increased *social isolation* of urban minorities that results in them being removed from the economic mainstream that is increasingly found in the nation's suburbs.[5] According to Wilson, "inner-city social isolation makes it much more difficult for those who are looking for jobs to be

---

1. U.S. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 1 (1968) [hereinafter Kerner Commission].

2. *See id.*

3. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 195 (1993).

4. John D. Kasarda, *Jobs, Migration, and Emerging Urban Mismatches, in* URBAN CHANGE AND POLICY 148, 192 (Michael G. H. McGeary & Laurence E. Lynn, Jr. eds., 1988).

5. *See* WILLIAM J. WILSON, THE TRULY DISADVANTAGED 58 (1987).

tied into the job network."[6] Consequently, inner-city residents have difficulties in finding jobs.

What, then, is to be done? Although evidence is still limited, the Kerner Commission's call for expansion of housing opportunities outside of the inner city is an alternative that could have significant impacts on promoting economic mobility.[7] Evidence for this call for expansion comes primarily from the Gautreaux Housing Demonstration.[8] The Gautreaux Demonstration was initiated in Chicago and places families eligible for public housing, most of whom are black and headed by a female, in suburban rental developments throughout the Chicago suburbs.[9] By comparing these families to other families who received subsidized housing support but who stayed in the Chicago inner city, James E. Rosenbaum has shown that adults moving to the suburbs are more likely to be employed and their children are more likely to excel in school and to get better jobs.[10]

What are the implications of these findings for housing policy? If housing initiatives such as the Gautreaux demonstration succeed in enabling poor, black households to live in the suburbs, then the Gautreaux data suggests that such programs will succeed not only in promoting racial integration but also will enhance economic mobility for disadvantaged families.[11] Based on this premise, in 1991 Congress authorized a five year residential mobility demonstration, Moving to Opportunity for Fair Housing,[12] which extends a

---

6. *Id.* at 60.

7. Kerner Commission, *supra* note 1, at 13.

8. The Gautreaux Demonstration is a court-mandated program resulting from the Supreme Court's decision in Hills v. Gautreaux, 425 U.S. 284 (1976). *See* James E. Rosenbaum, *Black Pioneers - Do Their Moves to the Suburbs Increase Economic Opportunity for Mothers and Children?*, 2 HOUS. POL'Y DEBATE 1179, 1181 (1991). In the *Gautreaux* decision, the Supreme Court recognized the court of appeal's determination that the Department of Housing and Urban Development (HUD) violated the Fifth Amendment and the 1964 Civil Rights Act by funding the Chicago Housing Authority's (CHA) racially discriminatory family public housing program. *Gautreaux*, 425 U.S. at 296. The *Gautreaux* decision "prohibited public authorities from placing housing projects exclusively in black neighborhoods." MASSEY & DENTON, *supra* note 3, at 83.

9. *See Gautreaux*, 425 U.S. at 296. The Supreme Court fashioned a remedy which required that "public housing be developed in areas that will afford respondents an opportunity to reside in desgregated neighborhoods." *Id.* The proposed remedial order provided that HUD and CHA create housing alternatives in the city of Chicago, as well as in the Chicago suburbs. *See id.* at 1547; *see also* Rosenbaum, *supra* note 8, at 1180 (commenting that the Gautreaux program "puts [black] families in proximity to the economic opportunities of the thriving suburbs, which offer more jobs than the inner city. It also puts their children in suburban schools, which may offer better educational opportunities.").

10. *See* Rosenbaum, *supra* note 8, at 1203.

11. *See* MASSEY & DENTON, *supra* note 3, at 231 (commenting on Gautreaux data and opining that "participants did not encounter the kind of white hostility commonly experienced by project inhabitants").

12. *See* OFFICE OF POL'Y DEV. AND RES., U.S. DEP'T OF HOUS. AND URBAN DEV., PROMOTING HOUSING CHOICE IN HUD'S RENTAL ASSISTANCE PROGRAMS vii (1995) [hereinafter PROMOTING

Gautreaux-like program to four other cities.[13] Moreover, in the Clinton Administration, HUD Secretary Henry G. Cisneros has made the promotion of geographic mobility of poor people a HUD priority.[14]

In addition to these efforts at the federal level, a small number of communities and states are attempting to remedy the problems of socioeconomic separation through "fair share housing" programs. Fair share housing programs determine "where housing, especially low- and moderate-income units, should be built within a region according to such criteria as placing housing where it will expand housing opportunity, where it is most needed, and where it is most suitable."[15] Fair share housing programs actively promote affordable housing opportunities in the suburbs for inner-city residents as a means of enhancing economic opportunity.[16] As described in subsequent sections of this article, the concept of fair share housing has been developed and refined over the past two decades.

Over the course of this period, however, fair share housing schemes have been adopted by relatively few jurisdictions. In general, the fair share housing movement has not spread very widely. The question therefore becomes: What are the prospects for the wider adoption of fair share housing schemes? Is it a limited reform that will continue to be practiced in a few places or are there reasons to believe that fair share housing might become more widespread? If the latter is a possibility, then one must ask which approaches to fair share housing will most likely appeal to jurisdictions and regions that currently lack a fair share housing approach.

This article argues that Florida represents an important indicator of the degree to which the fair share housing movement can become more substantially widespread in the United States. In addition to sharing problems associated with socioeconomic and racial segregation with the rest of the nation, Florida also possesses much of the legal framework necessary to initiate a statewide fair share housing

---

HOUSING CHOICE] ("[Moving to Opportunity for Fair Housing] will provide approximately 2,000 families living in distressed inner-city neighborhoods with rental certificates and vouchers, as well as counseling and other assistance, to aid them in moving to low-poverty areas.").

13. *See* U. S. DEP'T OF HOUS. AND URBAN DEV., Urban Policy No. 1 at 5 (Sept. 1994) [hereinafter URBAN POLICY]. The test cities are Los Angeles, Boston, Chicago, Baltimore, and New York. *See id.*

14. *See id.*

15. DAVID LISTOKIN, FAIR SHARE HOUSING ALLOCATION 1 (1976).

16. For example, participants in the Gautreaux demonstration who moved from the inner city to the suburbs "were more likely to be employed after their move [from the city of Chicago] . . . [and] attributed their success to more job opportunities, less fear for their family's safety, and the influence of positive role models." URBAN POLICY, *supra* note 13, at 4.

program. Because this framework exists, Florida's failure to initiate a fair share program will call the broad scale applicability of fair share housing schemes into question.

Part II of the article explores the need for fair share housing in Florida. Part III examines the current statutory scheme that could provide a basis for fair share housing in Florida. Part IV identifies federal and state fair share housing programs, describes each program, and illustrates how such programs could work in Florida. Part V recommends a fair share housing program for Florida, borrowing from the statutory schemes of other states.

II. THE NEED FOR FAIR SHARE HOUSING IN FLORIDA

Although the rapid population growth of Florida's largest metropolitan areas distinguish these areas from the slower growing metropolitan areas in older parts of the nation, Florida's metropolitan areas reflect the same trends of isolation that have increasingly separated central city populations from economic opportunities in other parts of the nation. Table 1 shows that between 1980 and 1990, the percentage of the metropolitan and central city population working in the central city of Florida's six largest Metropolitan Statistical Areas (MSAs) has declined.[17]

For example, in 1980, 46% of the Miami MSA working population worked in the MSA's central cities (Miami or Hialeah).[18] By 1990, this percentage had dropped to 37%, thereby reflecting a higher percentage of the population working in the MSA's suburban communities.[19] Additionally, in 1980, 67% of Miami and Hialeah city residents worked in one of those two cities, while in 1990 this percentage dropped to 60%.[20] Similar shifts occurred in Orlando, Ft. Lauderdale, Tampa-St. Petersburg, and West Palm Beach.[21] Thus, the shift toward suburban employment during the 1980s showed that fewer residents of Florida's largest central cities could find employment in the inner city.[22]

Just as employment shifted to the suburban areas of Florida's largest metropolitan areas, the concentration of poverty in the state's central cities increased in the 1980s, rising more rapidly than in the

---

17. *See* Appendix, Table 1. The Jacksonville MSA is excluded from this analysis because the City of Jacksonville is coterminous with that MSA's largest county, Duval County, thereby resulting in most of the MSA's population residing in the MSA's central city. This situation is not observed in any of the other Florida MSAs. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.*

suburbs.[23] Table 2 shows that the incidence of poverty increased in four of the five large metropolitan areas. Moreover, the ratio of central city to MSA poverty rates increased in all five metropolitan areas.[24] This suggests that regardless of whether central city poverty rates were rising (as they were in the Miami, Ft. Lauderdale, Tampa, and West Palm Beach MSAs)[25] or were falling (as in the Orlando MSA),[26] that the MSA poverty rate grew at a faster rate than the suburban poverty rate.[27] This growth suggests that the central cities of these five metropolitan areas are experiencing more rapidly increasing concentrations of poverty than their adjacent suburban communities.

In addition to experiencing increased concentrations of poverty than their suburban neighbors, the central cities of Florida's largest metropolitan areas are also experiencing higher concentrations of minority (chiefly African American and Hispanic) populations.[28] Four of the five metropolitan areas display a minority inner-city population percentage that is at least two-thirds higher than the minority percentage of the nearby suburban communities.[29]

Consistent with a finding of high minority concentrations in Florida's central cities, studies of racial segregation indicate a significant separation of whites and blacks in Florida's cities.[30] Using the index of dissimilarity to measure the degree of African American-White segregation in the one hundred largest central cities in the United States, Kasarda found that Miami, St. Petersburg, and Ft. Lauderdale had the eighth, ninth, and seventeenth highest levels of racial segregation in the nation. Tampa and Jacksonville were ranked forty-first and sixty-first.[31]

III. FLORIDA AS A TEST CASE FOR FAIR SHARE HOUSING

Florida is an important test of fair share housing's potential for wider appeal in other states. At this time, Florida does not have any fair share housing requirements. Nevertheless, Florida's housing

---

23. *See* Appendix, Table 2.

24. *See id.*

25. *See id.*

26. *See id.*

27. Between 1980 and 1990, the Orlando city poverty rate fell at a slower rate than the Orlando MSA poverty rate, reflecting the increasing poverty conditions in the Orlando inner city. *See* Appendix, Table 2.

28. *See* Appendix, Table 3.

29. *See id.*

30. *See* John D. Kasarda, *Cities as Places Where People Live and Work: Urban Change and Neighborhood Distress, in* INTERWOVEN DESTINIES: CITIES AND THE NATION 99 (Henry Cisneros ed., 1993).

31. *See id.* at 122-23.

policies, codified in its Growth Management Act,[32] place it in a strong position to move toward a fair share housing approach.

Created in 1985,[33] Florida's Growth Management Act requires all jurisdictions in the state to produce a comprehensive plan.[34] Among the elements required in the plan is a housing element. Jurisdictions are required to prepare a housing element that includes: (1) a provision of housing for all current and anticipated future residents of the jurisdiction; and (2) a provision for adequate sites for future housing, including housing for low income, very low income, and moderate income families, mobile homes, and group home facilities and foster care facilities, with supporting infrastructure and public facilities.[35]

The Growth Management Act, therefore, requires all local jurisdictions in Florida to provide for affordable housing to households that live or are expected to live in a city or county.[36] By requiring local jurisdictions to plan for the housing needs of low income households and the housing needs of potential residents, Florida law lays the groundwork for requiring local jurisdictions to meet their fair share of housing need.

Until 1993, jurisdictions were relatively free to establish their own definition of housing need, thereby resulting in wide variation in housing needs estimates. Jurisdictions could avoid meeting even their current housing needs by defining their housing need to minimize housing deficiencies that the jurisdiction was required to address. Consequently, it has been very difficult to determine whether the state as a whole, as well as regions and communities, were meeting the low income housing needs they were required to identify. The Florida Department of Community Affairs's (DCA) 1991 report on affordable housing identified the absence of an uniform housing need definition as a significant problem and urged that a statewide definition be developed.[37] The DCA also encouraged measurement of the progress of each local government in stimulating the development of affordable housing.[38]

In response to such concerns, the 1993 Florida Legislature amended the Growth Management Act to require state measurement

---

32. FLA. STAT. §§ 163.3161-.3215 (1995).

33. 1985 Fla. Laws ch. 85-55 (codified as amended at FLA. STAT. §§ 163.3161-.3215 (1995)) (officially titled the "Omnibus Growth Management Act of 1985").

34. *See* FLA. STAT. § 163.3184 (1995).

35. *See id.* § 163.3177.

36. *See id.*

37. *See* FLORIDA DEP'T OF COMMUNITY AFF., AFFORDABLE HOUSING IN FLORIDA 15-16 (1991).

38. See *id.* at 16.

of housing needs in each local jurisdiction.[39] This procedure promises to create an independent, objective determination of housing need. Similar housing need determinations in California and New Jersey are critical to defining the fair share housing obligations in each of those states.[40] With state determination of housing need, local jurisdictions are less able to underestimate housing need and thereby avoid responsibility for meeting their fair share of overall housing need. By instituting a uniform determination of local housing need, the 1993 Florida Legislature contributed to the establishment of a foundation upon which a state mandated fair share housing obligation can be built.

Enacted in 1972 by the Florida Legislature,[41] the Development of Regional Impact (DRI) review process[42] creates an additional framework for encouraging fair share housing agreements. The regional planning agency must prepare a report on the regional impact of the development.[43] In their reports, regional planning agencies must conduct a review that will consider whether "the development will favorably or adversely affect the ability of people to find adequate housing reasonably accessible to their places of employment . . . . Adequate housing means housing that is available for occupancy and that is not substandard."[44]

By concentrating on the relationship between new, large-scale developments, many of which generate significant employment opportunities and adequate housing, the DRI statute establishes a procedure by which the affordable housing needs that complement the employment opportunities created by DRI developments can be exposed.[45] Although local jurisdictions have the right under DRI legislation to issue a development order, the regional planning council and the State of Florida each possess the right to appeal the development order to the Florida Land and Water Adjudicatory Commission.[46] Under the DRI legislation, therefore, regional and state planning agencies have the authority to place pressure on local governments and developers to create affordable housing

---

39. 1993 Fla. Laws ch. 93-206 (codified at FLA. STAT. § 163.3177(6)(f)(2) (1995)) ("[T]he state planning agency shall conduct an affordable housing needs estimate for all local jurisdictions on schedule that coordinates the implementation of the needs assessment . . . .").

40. *See* discussion *infra* Part IV.

41. 1972 Fla. Laws ch. 72-317 (codified at FLA. STAT. § 380.06 (1995)).

42. A development of regional impact refers to "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county." FLA. STAT. § 380.06(1) (1995).

43. *See id.* § 380.06(12)(a).

44. *Id.* § 380.06(12)(a)3.

45. *See generally id.* § 380.06 (outlining the DRI process).

46. *See id.* § 380.06(25)(f), (h).

opportunities in situations where employment opportunities are created and insufficient affordable housing is available in the existing stock.

Florida adopted the State Housing Initiatives Program (SHIP)[47] in 1992, in addition to other affordable housing finance incentives and programs.[48] The total SHIP allocation was $26.5 million for the 1994-95 fiscal year and is expected to grow to $80 million in the 1995-96 fiscal year. With this financial backing, Florida should be able to generate significantly more resources for assisting the development of affordable housing.[49] Thus, Florida is in a comparatively strong position to provide the financing needed to employ a fair share housing alternative.

In general, Florida has established the statutory framework for developing a fair share housing policy. The Growth Management Act requires that jurisdictions plan for the housing needs of low income households, and creates a process by which the state will determine local housing need, thereby making it less likely that jurisdictions will be able to shirk their affordable housing responsibilities.[50] The Growth Management Act, therefore, provides the "stick" by which the State of Florida can establish fair share housing objectives for each local jurisdiction.

In turn, the SHIP program, along with other State of Florida housing programs, creates a "carrot" through which local jurisdictions have both the incentive and the means to fulfill their fair share housing obligations.[51] Moreover, in a growth-oriented state such as Florida, where real estate development is fed by emigration and suburban development, the economic prospects for a fair share housing policy are good. Such policies are generally designed to work in growing metropolitan economies. The development of affordable housing can be a part of that growth.

Despite the potential for fair share housing in Florida, fair share housing has not been a focus of the state's housing policy discussions. The absence of fair housing as a significant issue is seen in the

---

47. 1992 Fla. Laws ch. 92-317 (codified at FLA. STAT. §§ 420.907-.9079 (1995)).

48. Other Florida housing programs include the Homeowner Assistance Program (FLA. STAT. § 420.5088 (1995)), State Apartment Incentive Loan (SAIL) program (FLA. STAT. § 420.5087 (1995)), Housing Predevelopment Loan Program (FLA. STAT. § 420.525 (1995)), Florida Small Cities Community Development Block Grant Program (FLA. STAT. §§ 290.0401-.049 (1995)), Community Development Corporation Support and Assistance Program (FLA. STAT. §§ 290.0311-.0395 (1995)), and Community Contribution Tax Incentive Program (FLA. STAT. § 220.183 (1995)).

49. *See* FLORIDA HOUS. FIN. AGENCY, SHIP PROGRAM ALLOCATION (1994) (projecting total SHIP allocation for all Florida counties) [hereinafter SHIP PROGRAM].

50. *See* FLA. STAT. § 163.3177 (1995).

51. *See* SHIP PROGRAM, *supra* note 49.

reports of Florida's Affordable Housing Study Commission (Housing Commission), established by the Florida Legislature in 1986.[52] The Housing Commission was charged by the Florida Legislature to "review, evaluate, and make recommendations regarding existing and proposed housing programs and initiatives."[53] Since 1986, however, the Housing Commission has devoted little attention to fair share housing.[54] In its 1988 report, the Commission drafted recommendations creating an "equitable distribution" system of affordable housing.[55] But no legislative action followed these recommendations. In 1994, a Housing Commission staff report called for consideration of fair share housing as a policy option.[56] The Housing Commission deferred consideration of this and other regulatory reform options and instead made plans to consider them in its 1995 work plan.[57] The 1995 Housing Commission report, however, makes no mention of fair share housing.[58]

Although Florida possesses some key ingredients for creating a fair share housing policy, little has been done to institute fair share housing. The remainder of this article will focus on fair share housing initiatives pursued by the Federal Government and by other states that offer helpful alternatives to the current Florida housing situation. The advantages and disadvantages of these alternatives will be discussed and general recommendations will be made, tailoring these alternatives to Florida's growth management policies.

IV. FAIR SHARE HOUSING PRACTICE OUTSIDE OF FLORIDA

The federal government and several states, including California, New Jersey, Massachusetts, Rhode Island, and Oregon, have implemented fair share housing programs that can serve as a tool for

---

52. 1986 Fla. Laws ch. 86-192 (codified at FLA. STAT. § 420.609 (1995)).

53. *Id.*

54. *See, e.g.*, FLORIDA AFFORDABLE HOUS. STUDY COMM'N, FINAL REPORT OF THE AFFORDABLE HOUS. STUDY COMM'N (Dec. 1987) [hereinafter 1987 REPORT]; FLORIDA AFFORDABLE HOUS. STUDY COMM'N, THE REPORT OF THE AFFORDABLE HOUS. STUDY COMM'N (Dec. 1988) [hereinafter 1988 REPORT]; THE GOVERNOR'S AFFORDABLE HOUS. STUDY COMM'N, FINAL REPORT (Dec. 1992) [hereinafter 1992 REPORT]; FLORIDA AFFORDABLE HOUS. STUDY COMM'N, FINAL REPORT (December 1993) [hereinafter 1993 REPORT]; FLORIDA AFFORDABLE HOUS. STUDY COMM'N, BRINGING THE PIECES TOGETHER: THE AFFORDABLE HOUS. STUDY COMM'N FINAL REPORT (Dec.1994) [hereinafter 1994 REPORT]; FLORIDA AFFORDABLE HOUS. STUDY COMM'N, FINAL REPORT (December 1995) [hereinafter 1995 REPORT]. No reports were published in 1989, 1990, or 1991. *See* Interview with Marcus Hepburn, Planning Manager, Department of Community Affairs, Division of Housing and Community Development (Mar. 15, 1995).

55. *See* AFFORDABLE HOUS. STUDY COMM'N, HOUSING OPPORTUNITIES THROUGH REGULATORY REFORM 16 (1994).

56. *See id.* at 17.

57. *See* 1994 REPORT, *supra* note 54, at 36.

58. *See* 1995 REPORT, *supra* note 54.

Florida in implementing its own fair share housing program. A complete understanding of each program's unique features is necessary to evaluate the elements that would be most effective in Florida.

A. The Federal Government and Fair Share Housing

Fair share housing plans originated in the early 1970s and were generally developed by councils of government or regional planning commissions.[59] By 1975, at least forty jurisdictions, including Jacksonville and Dade County in Florida,[60] had implemented, adopted, proposed, or were considering a fair share plan.

These plans were primarily a response to the opportunity provided by various federal programs and incentives, including the Section 701 planning grant program,[61] which provided financial assistance to regional planning agencies. Created in the 1954 Housing Act, the Section 701 planning grant program was amended in 1968[62] to require a housing element to consider regional housing needs.[63] Through a combination of financial incentives and pressure from HUD, a number of regional planning agencies created regional housing allocation plans under the auspices of Section 701.[64]

Further federal incentives for regional fair share plans came in 1969 with the creation of the A-95 review process, which was established pursuant to the Intergovernmental Cooperation Act of 1968.[65] The A-95 review process required that "all applications for federal grants be reviewed by a state, regional, or metropolitan clearinghouse."[66] The review process gave regional planning agencies the potentially significant right to identify any possible problems

---

59. LISTOKIN, *supra* note 15, at 2, 7 (noting that the first fair share effort was promulgated in 1970 and that the 1970s saw "a proliferation of regional planning entities such as councils of government and county planning boards").

60. *See id.* at 2.

61. 40 U.S.C. § 461(a) (1954) (repealed 1981). The 1954 Housing Act authorized Urban Planning Assistance, which is commonly known as the Section 701 program. *See* LISTOKIN, *supra* note 15, at 5.

62. Pub. L. No. 90-448, tit. VI, § 601, 82 Stat. 526 (1968).

63. *See* LISTOKIN, *supra* note 15, at 6. The housing element was implemented to ensure that the "housing needs of both the region and the local communities studied in the [comprehensive plan would] be adequately covered in terms of existing and prospective immigrant population growth." *Id.*

64. *See id.*

65. Intergovernmental Coordination Act of 1968, Pub. L. No. 90-577, tit. I, § 101-110, 82 Stat. 1098-1101 (1968) (codified at 42 U.S.C. § 4201 (1968)) (repealed 1982); *see also* AMERICAN BAR ASS'N ADVISORY COMM'N ON HOUS. AND URB. GROWTH, HOUSING FOR ALL UNDER LAW: NEW DIRECTIONS IN HOUSING, LAND USE, AND PLANNING 36 (Richard P. Fishman ed., 1978) [hereinafter AMERICAN BAR ASS'N].

66. AMERICAN BAR ASS'N, *supra* note 65, at 36-37.

with the grant proposal.[67] The need for cooperation with local governments and the consequential political sensitivity felt by regional planning agencies, however, frequently resulted in perfunctory regional reviews.[68]

Finally, in the Housing and Urban Development Act of 1968,[69] the federal government set out on an ambitious plan to produce twenty-six million new or rehabilitated dwelling units in ten years. Six million units of the twenty-six would be affordable to low and moderate income households.[70] The Act resulted in the production of 655,923 dwelling units between 1968 and 1972.[71] After this increase in dwelling units, the success of fair share plans was more probable because of the increased availability of subsidized units—the fundamental building block of fair share plans.

These federal tools were effectively utilized by the Miami Valley Regional Planning Commission (MVRPC) in the Dayton, Ohio metropolitan area, which in 1970 created the nation's first fair share housing plan.[72] Under the Dayton Plan, the five county region was divided into fifty-three planning units.[73] Equally weighted allocation criteria were used to allocate low and moderate housing units.[74] The criteria included the number of households with income under $10,000, number of total households, assessed valuation per pupil, pupils in excess of normal capacity, and number of acres of suitable vacant land.[75]

While considerable support was generated for approval of the Dayton Plan, implementation was difficult because communities resisted the location of units, and several threatened to leave the MVRPC.[76] This initial resistance was overcome, and by February 1976, more than 8,000 units had been constructed under the fair share plan.[77] This construction level significantly exceeded low and moderate income housing production in prior years.[78]

---

67. *See id.* at 37. The A-95 review process required the review of grant applications in order "to identify any possible interjurisdictional problems or opportunities associated with the proposal." *Id.* at 36-37.

68. *See id.* at 469.

69. Housing and Urban Development Act of 1968, Pub. L. 90-19, § 6(a), 81 Stat. 21 (1968) (codified at 42 U.S.C. § 1441(a) (West 1994)).

70. *See* AMERICAN BAR ASS'N, *supra* note 65, at 436.

71. *See id.*

72. *See* LISTOKIN, *supra* note 15, at 118; *see also* AMERICAN BAR ASS'N, *supra* note 65, at 38, 469.

73. *See* LISTOKIN, *supra* note 15, at 118.

74. *See id.* at 118, 120.

75. *See id.* at 178.

76. *See id.* at 121.

77. *See id.*

78. *See id.* at 125.

According to the MVRPC executive director, Dale Bertsch, fundamental to the Dayton Plan's success was: (1) Section 701 planning funds that paid for the extensive staffwork needed to prepare the plan; (2) the 1968 amendment to Section 701 that required federally funded regional plans to have housing elements; (3) the commitment by HUD to subsidized housing units under the Housing Act of 1968; (4) the cooperation of the Federal Housing Administration (FHA) in insuring homes built under the Dayton Plan; and (5) the availability of A-95 review powers to control the award of federal funds to jurisdictions contingent upon the jurisdictions' cooperation with the Dayton Plan.[79]

After 1973, the ability of the MVRPC and other regional planning councils to affect the allocation of affordable housing in its region was weakened by the Nixon housing moratorium of that year,[80] a shift in leadership at HUD that resulted in less support for fair share housing plans,[81] and the passage of the Housing and Community Development Act of 1974 (1974 Housing Act).[82] In general, the changing housing policies reflected in the second Nixon administration led to the weakening of fair share planning in various regions that had undertaken fair share housing efforts prior to 1973.[83] The 1974 Housing Act converted federal local assistance programs from competitive, categorical grants to block grants in which local governments were given more discretion on how to spend their federal funds.[84] The 1974 Housing Act thereby weakened the ability of regional planning councils to employ their A-95 review powers to obtain compliance with their fair share housing plans. Without strong federal support for fair share housing, suburban jurisdictions were unlikely to embrace the concept.[85]

Passage of the 1974 Housing Act did not result, however, in total abandonment of efforts to encourage suburban jurisdictions to take on the responsibility of affordable housing. The 1974 Housing Act

---

79. *See* NORMAN KRUMHOLZ & PIERRE CLAVEL, REINVENTING CITIES: EQUITY PLANNERS TELL THEIR STORIES 51, 58 (1994).

80. *See* AMERICAN BAR ASS'N, *supra* note 65, at 436, 470 (commenting that progress on affordable housing was halted due to the moratorium of subsidized housing, and that had there not been "a moratorium on federal subsidies in January 1973, it is possible that many of the regional allocation plans would have produced more significant results").

81. George Romney was succeeded at HUD by James Lynn and Carla Hills. *See* KRUMHOLZ & CLAVEL, *supra* note 79, at 59.

82. Housing and Community Development Act of 1974, Pub. L. No. 93-383, tit. I, § 101, 88 Stat. 633 (1974) (codified at 42 U.S.C. § 1439(f)(c)(3) (1994)).

83. *See* AMERICAN BAR ASS'N, *supra* note 65, at 470.

84. *See* MICHAEL DANIELSON, THE POLITICS OF EXCLUSION 277-78 (1976); *see also* KRUMHOLZ & CLAVEL, *supra* note 79, at 59.

85. *See* DANIELSON, *supra* note 84, at 278.

aimed to achieve spatial deconcentration of housing opportunities for low income persons.[86] To further this objective, the 1974 Housing Act required Community Development Block Grant (CDBG) recipients to prepare a Housing Assistance Plan (HAP).[87] Consistent with the purposes of fair share housing, HAPs were to reflect not only a community's current low income housing needs but also the needs of low income households that were *expected to reside* there.[88] Proposals for subsidized housing were required to be consistent with the HAP.[89] The "expected to reside" criterion was hard to implement because the concept proved difficult to operationalize.[90] Jurisdictions placed lower priority on this objective than on the other objectives of the 1974 Housing Act.[91] Under the Reagan and Bush administrations, the entire HAP planning process was debilitated by: (1) elimination of the HAP requirement for small cities in 1981; (2) significant reduction in housing subsidies that took place during this period; and (3) elimination of the HAP requirement for all jurisdictions in 1990.[92]

In an attempt to strengthen the spatial deconcentration objective of the 1974 Housing Act, HUD created the Areawide Housing Opportunity Plan (AHOP) program in 1976, whereby additional Section 8 housing subsidy funds, 701 planning funds, and CDBG funds were provided to regions that established regional allocation plans.[93] By 1980, thirty-four AHOPs had been approved and $105 million had been granted to AHOP-funded regions.[94] About 70% of those funds

---

86. *See* 42 U.S.C. § 5301(c)(6) (1974).

87. *See* AMERICAN BAR ASS'N, *supra* note 65, at 38. In order for a community to receive community development funds, the community was required to assess and provide for low and moderate income housing needs. *See id.* at 24. Thus, the receipt of federal money was linked to the preparation of a Housing Assistance Plan. *See* U. S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF POL'Y DEV. & RES., REGIONAL HOUSING OPPORTUNITIES FOR LOWER INCOME HOUSEHOLDS (1994) [hereinafter HOUSING OPPORTUNITIES].

88. *See* 42 U.S.C. § 5304(a)(4) (1974); *see also* AMERICAN BAR ASS'N, *supra* note 65, at 38.

89. *See* 42 U.S.C. § 1439(a).

90. *See* Kenneth D. Bleakly, Jr., *Expected to Reside: The Response From the Counties, in* METHODS OF HOUSING ANALYSIS: TECHNIQUES AND CASE STUDIES 465 (James A. Hughes ed., 1977) (commenting that the difficulty with the "expected to reside" criteria stemmed from "the attempt at estimation (of the number of lower income households expected to reside in a community) which result[ed] in a great deal of anxiety and frustration among HUD administrators and local program personnel alike").

91. *See* U.S. DEP'T OF HOUS. AND URBAN DEV., COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM (1975).

92. *See* HOUSING OPPORTUNITIES, *supra* note 87, at 97.

93. *See id.* at 216.

94. *See id.* at 219 (totalling the number of AHOP areas from 1976, 1978, and 1980 and totalling the amount of bonus funds granted in those years).

went for additional Section 8 housing subsidy funds.[95] However, in 1981, the Reagan Administration terminated the AHOP program.[96]

With the demise of the AHOP program in 1981, HUD's efforts to promote fair share housing subsided significantly. Since that time, fair share housing initiatives have originated primarily in the states.[97] As noted earlier, since 1991, the federal government has run a five city demonstration program, Moving to Opportunity for Fair Housing, which seeks to promote spatial deconcentration of poor people[98] by using HUD's Section 8 rental assistance programs to enable migration to low poverty neighborhoods.[99] In addition, Section 8 rental assistance subsidies have been used in a small number of instances, including the Chicago-based Gautreaux demonstration, where there have been judicial or administrative findings of racial discrimination practiced by local government housing agencies.[100] In these instances, Section 8 tenant subsidies, along with landlord outreach, tenant screening, housing search counseling, and follow-up services, have been used to help low income and minority households move to better neighborhoods.[101] According to a recent HUD study, these programs have been successful in enabling Section 8 recipients to move to less segregated neighborhoods.[102] Participants in the mobility programs are more likely to be employed and their children are more likely to achieve in school than similarly situated non-participants.[103]

Despite these recent efforts, the federal government is not the major player in fair share housing that it promised to be in the early 1970s when the MVRPC prepared the Dayton Plan.[104] The Moving to Opportunity for Fair Housing program remains a mere demonstration. Additionally, the use of Section 8 rental assistance has been utilized largely as a remedy to anti-discrimination court suits, rather than as a local response to federal housing policy.[105] In contrast, the MVRPC was able to take advantage of Section 701 federal planning

---

95. *See id.*

96. *See id.* at 218.

97. *See* discussion *infra* Part IV. B-F (examining state efforts for affordable housing).

98. *See* PROMOTING HOUSING CHOICE, *supra* note 12, at vii.

99. *See id.*

100. *See id.* at viii (noting that HUD encourages "the use of mobility programs [such as the Gautreaux demonstration] as a partial remedy for settling desegregation-related lawsuits to which it is a party").

101. *See id.* at 1.

102. *See id.*

103. *See id.* at 71-72.

104. *See generally* KRUMHOLZ & CLAVEL, *supra* note 79, at 45 (discussing the development of the Dayton Plan).

105. *See* PROMOTING HOUSING CHOICE, *supra* note 12, at viii.

assistance,[106] A-95 review authority,[107] housing subsidy assistance created under the Housing and Urban Development Act of 1968, and the sympathetic ear of HUD Secretary George Romney.[108] These influences were temporary, leaving fair share housing initiatives up to the states.

B. *California Housing Element Requirements for Fair Share Housing*

In California, as in Florida, state law requires all local governments to adopt a general plan and such plans must include a housing element that is submitted for review and comment to California's Department of Housing and Community Development (HCD).[109] In contrast to Florida, however, California's housing element law requires that local jurisdictions evaluate their share of regional housing need as part of the local housing need estimate. Specifically, California law requires housing element need assessments to include "an analysis of population and employment trends and documentation of projections and quantification of the locality's existing and projected housing needs for all income levels. *These existing and projected needs shall include the locality's share of the regional housing need in accordance with Section 65584.*"[110]

For purposes of determining each jurisdiction's share of housing need, California requires estimation of the number of existing and projected households in each locality broken down into four income categories: very low income (income not exceeding 50% of area median family income), low income (50 to 80% of area median income), moderate income (80 to 120% of area median income), and above moderate income (above 120% of area median income).[111] This means that not only must California local governments estimate total current and projected housing need, but the need must be broken down by income level to allow an estimate of very low income and low income housing need to be obtained.

In addition to requiring jurisdictions to include their share of regional housing need in their estimates of local housing need, California law specifies the criteria that must be used in determining each jurisdiction's fair share of local need. A jurisdiction's share of

---

106. *See* KRUMHOLZ & CLAVEL, *supra* note 79, at 49. Section 701 programs use federal funding to support local urban planning efforts. *See id.* at 58.

107. *See id.*

108. *See id.*

109. *See* CAL. GOVT. CODE §§ 65300, 65585 (West 1996).

110. *Id.* § 65583(a) (emphasis added).

111. *See* CALIFORNIA DEP'T OF HOUS. AND COMMUNITY DEV., *Developing a Regional Housing Needs Plan* 10 (1988) [hereinafter HOUSING NEEDS PLAN].

regional housing need is defined as including "that share of the housing need of persons at all income levels within the area significantly affected by a general plan of the city or county."[112]

California housing law requires that the determination of a community's share of regional housing take into consideration a variety of factors that influence housing demand, including market demand for housing, employment opportunities, commuting patterns, as well as factors that influence housing supply, such as the availability of suitable sites and public facilities.[113] California housing law also requires that the distribution of regional housing need seek to "reduce the concentration of lower income households in cities or counties which already have disproportionately high proportions of lower income households."[114] Consequently, in California, fair share is determined not only by existing and projected demand for housing but also by efforts to shift low income housing to areas with fewer low income households. By shifting the demand, communities which have traditionally had few poor people must take responsibility for housing a greater share of their region's lower income households.

Actual responsibility in California for delineation of a jurisdiction's housing needs is a responsibility shared by state, regional, and local government. Although state housing need is determined by HCD, regional housing need is jointly determined by state and regional governments (in this situation, Councils of Governments (COGs)), with the state government retaining final authority for delineating regional housing need.[115] In turn, local housing need is determined jointly by regional and local governments, using guidelines and data provided by the State and with COGs retaining final authority for determining a jurisdiction's share of regional housing need.[116]

Although HCD must determine whether a jurisdiction's housing element is in compliance with state law,[117] local jurisdictions are not required to bring their housing elements into compliance as long as they explain why they believe the element is within compliance.[118]

---

112. CAL. GOVT. CODE § 65584(a).

113. *See id.*

114. *Id.*

115. *See* CAL. GOVT. CODE § 65584.

116. *See id.*; *see also* HOUSING NEEDS PLAN, *supra* note 111.

117. *See* CAL. GOVT. CODE § 65583.1.

118. *See id.* § 65584(c)(1) (stating that if a local government proposes to revise its definition of its share of regional housing need, the local government must support such proposed revisions with "available data and accepted planning methodology, and . . . [with] adequate documentation").

California law does not directly provide for penalties for noncompliance with the state statute.[119] As a consequence, less than half of California's jurisdictions have housing elements that are in substantial compliance with state law.[120]

Instead of relying on compulsory compliance, enforcement of housing element law is dependent on legal actions taken by affordable housing advocates when an affordable housing project is threatened with denial or unreasonable conditions that would make the project less affordable to low income households. Under California law, if a community has a housing element that is in substantial compliance with the housing law, then that community cannot deny a housing project simply because the project is inconsistent with the community's general plan. In addition, such a community must demonstrate that the project is an unnecessary component to meet the community's overall share of regional low income housing.[121]

In conclusion, California's housing element law differs from Florida's in two key respects. Florida's housing element requirements make no reference to fair share housing, whereas California's housing element requires jurisdictions to define housing need to include a jurisdiction's fair share of regional housing need.[122] At the same time, however, local jurisdictions in California are not required to have housing elements that are in compliance with state HCD recommendations for fair share housing.[123] A key advantage of the Florida housing element law is that communities are required to adopt elements deemed by Florida's DCA as compliant with state law.[124] If Florida's compliance requirements were combined with California's fair share mandate, then the prospect for fair share housing in Florida would be greatly enhanced.

C. New Jersey Fair Housing Law

It is in New Jersey that the fair share housing doctrine has been most eloquently stated and elaborately implemented. The fair share housing doctrine was enunciated by the New Jersey Supreme Court

---

119. *See* CAL. GOVT. CODE § 65585.

120. *See* PROMOTING HOUSING CHOICE, *supra* note 12, at 79.

121. *See* CAL. GOVT. CODE § 65589.5.

122. *Compare id.* § 65583-65585 *with* FLA. STAT. § 163.3184 (1995).

123. Although a local government has the ability to propose revisions for its share of regional housing needs, *see* CAL. GOVT. CODE § 64484(c)(1), HCD must make sure that this determination of regional housing need is consistent with statewide housing needs. *See id.* § 65584(a).

124. *See* FLA. STAT. § 163.3184 (1995).

in the *Mount Laurel* decisions.[125] The doctrine has been implemented in New Jersey's Fair Housing Act which was adopted on July 2, 1985.[126]

In its 1975 *Mount Laurel* decision, the New Jersey Supreme Court found that each municipality in the state has a constitutional obligation to provide a realistic opportunity for a *fair share* of the region's present and future housing needs for low and very low income households.[127] Eight years later, the New Jersey Supreme Court responded to six cases that had been brought concerning the 1975 *Mount Laurel* decision.[128] The court ruled that its earlier decision had been met by "widespread non-compliance."[129]

In response, the court created specific guidelines for active judicial scrutiny of a jurisdiction's compliance with the *Mount Laurel* doctrine and created a system of designated judges to review all *Mount Laurel* cases in a region.[130] These judges were given a variety of powers to enforce municipal cooperation within a particular area of the state.[131] For example, the judges could require that a jurisdiction revise its zoning ordinance to facilitate low income housing[132] and if the jurisdiction did not comply, then the judge could delay all development in that jurisdiction until it complied with the judge's order.[133] Moreover, the New Jersey Supreme Court endorsed

---

125. South Burlington County NAACP v. Mount Laurel, 336 A.2d 713 (N.J. 1975), *cert. denied*, 423 U.S. 808 (1975) (*Mount Laurel I*); South Burlington County NAACP v. Mount Laurel, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*).

126. 1985 N.J. Laws 222 (codified at N.J. STAT. ANN. § 52:27D-301 -329 (West 1996)).

127. *See Mount Laurel I*, 336 A.2d at 727 ("the presumptive obligation arises for each municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including . . . low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries"). Consistent with HUD's definitions, very low income means incomes of 50% or less of area median income and low income means between 50 and 80% of area median income. *See* 42 U.S.C. § 1437a(b)(2) (Supp. 1982). New Jersey elects to refer to the former income category as low income and to the latter category as moderate income. The author has elected to use the HUD nomenclature because it is more generally accepted.

128. *See Mount Laurel II*, 456 A.2d at 410 n.1. The six cases that involved questions arising from *Mount Laurel I* are: Southern Burlington County NAACP v. Mount Laurel, 391 A.2d 935 (N.J. Super. Ct. 1978); Urban League of Essex Co. v. Mahwah, No. L-17112-71 (N.J. Super. Ct. May 8, 1979); Glenview Dev. Co. v. Franklin, 397 A.2d 384 (N.J. Super. Ct. 1978); Caputo v. Chester, No. L-42857-74 (N.J. Super. Ct. Oct. 4, 1978); Round Valley, Inc. v. Clinton, 413 A.2d 356 (N.J. Super. Ct. 1980); Urban League of Greater New Brunswick v. Carteret, 406 A.2d 1322 (N.J. Super. Ct. 1979), *rev'd*, South Burlington County NAACP v. Mount Laurel, 456 A.2d 390 (N.J. 1983).

129. *Mount Laurel II*, 456 A.2d at 410; *see also* Paula A. Franzese, *Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat*, *in* 1989 ZONING AND PLANNING LAW HANDBOOK 379, 382 (Mark S. Dennison ed., 1989).

130. *See Mount Laurel II*, 456 A.2d at 418-19.

131. *See id.* at 439.

132. *See id.* at 451.

133. *See id.* at 455; *see also* Franzese, *supra* note 129, at 383.

the builder's remedy whereby builders of low income housing who successfully challenged zoning ordinances that prevented such housing could get a court order that effectively overruled the local jurisdiction's zoning decision and permitted the housing to be built.[134]

With its 1983 *Mount Laurel II* decision, the New Jersey Supreme Court indicated that the state's courts would take an extremely activist role in seeing that local governments comply with the fair share doctrine articulated in the 1975 *Mount Laurel I* decision.[135] The New Jersey Legislature responded with the 1985 Fair Housing Act, the primary purpose of which is to reassert the responsibility of the legislative and executive branches of government for shaping local housing policy.[136]

In exchange for elimination of the builder's remedy, the 1985 Fair Housing Act created an administrative mechanism for encouraging local governments to assume responsibility for meeting their fair share housing obligations under the *Mount Laurel* doctrine.[137] To administer the fair share requirement, the Fair Housing Act created the Council on Affordable Housing (COAH), which consists of nine members appointed by the Governor with approval of the New Jersey Senate.[138]

Duties of COAH include determination of the state's housing regions, estimation of present and prospective need for very low and low income housing at the state and regional levels, adoption of criteria for municipal determination of local present and prospective fair share of regional housing need, and projection of population and households for the state and its regions.[139]

The 1985 Fair Housing Act establishes guidelines for municipal housing elements that encourage jurisdictions to develop housing policies that will meet each jurisdiction's fair share housing need.[140] Participation in the fair share housing need determination is voluntary. The primary motivation for participation is protection from builder's remedy suits. COAH substantially certifies jurisdictions whose housing elements and fair share plans are consistent with state housing rules and for which achievement of local fair share responsibilities is realistically possible.[141]

---

134. *See Mount Laurel II*, 456 A. 2d at 451-52; *see also* Franzese, *supra* note 129, at 383.
135. *See Mount Laurel II*, 456 A.2d at 390.
136. *See* N.J. STAT. ANN. § 52:27D-302 (West 1996).
137. *See id.* § 52:27D-302(b).
138. *See id.* § 52:27D-305.
139. *See id.* § 52:27D-307.
140. *See* 26 N.J. Reg. 2326-2328 (1994).
141. *See* N.J. STAT. ANN. §§ 52:27D-311, 313.

The 1985 Fair Housing Act also provides that COAH mediate disputes involving an objection to a jurisdiction's fair share plan.[142] Moreover, any exclusionary zoning case filed against a municipality with a COAH certified fair share plan receives a presumption of validity for that community's zoning laws.[143]

Finally, the 1985 Fair Housing Act grants jurisdictions the option of transferring up to one-half of a jurisdiction's fair share to another jurisdiction by agreement.[144] Such agreements require payment schedules through which the donating jurisdiction agrees to make payments that will enable the receiving jurisdiction to rehabilitate or construct housing affordable to very low and low income households.[145]

According to a 1992 evaluation of the 1985 Fair Housing Act, 13,592 low and very low income housing units have been built or rehabilitated under the *Mount Laurel* obligation.[146] About 55% of these units were reserved for very low income households, while the remaining 45% were reserved for low income households.[147] Inclusionary developments account for nearly half of all units produced under the *Mount Laurel* obligation.[148] These developments include a fixed percentage of dwelling units affordable to very low and low income households. Inclusionary developments are the subsidy source that both the New Jersey Supreme Court and the 1985 New Jersey Legislature envisioned as being critical to suburban growth area compliance with the *Mount Laurel* doctrine.[149] Hence, COAH's regulations call for communities to zone vacant land with the assumption that a maximum of 20% of dwelling units will be set aside for occupancy by very low and low income households with a minimum gross density (dwelling units divided by total residential developable land) of at least six units per acre.[150] New Jersey's Balanced Housing trust fund serves as another significant subsidy source. The New Jersey Balanced Housing program was created by

---

142. *See id.* § 52:27D-315.

143. *See id.* § 52:27D-317.

144. *See id.* § 52:27D-312a.

145. *See id.* § 52:27D-312f.

146. *See* BOB FITZPATRICK, NEW JERSEY DEP'T OF COMMUNITY AFFAIRS, THE MATH OF MT. LAUREL 2 (Mar. 1993).

147. *See id.* at 4.

148. *See id.* at 6. Inclusionary development "is a private sector effort to create lower cost housing by subsidizing some units . . . with profits from the market-priced units in the development." *Id.* at 6-7.

149. *See generally* Sean Mehegan, *Avalanche on Mount Laurel: New Jersey's Troubled Affordable Housing System Staggers Under a Recession*, 21 N.J. REP. 44, 49-50 (1992) (discussing the application of inclusionary developments after the *Mt. Laurel* decision).

150. *See* 26 N.J. Reg. 2325 (1995).

the 1985 Fair Housing Act and has assisted in the development of approximately 3,000 dwelling units.[151]

Overall, however, New Jersey's 1985 Fair Housing Act has been only a partial success. The 13,592 housing units produced under the Act fall short of COAH's identified statewide need of approximately 145,000 units.[152] Moreover, only about 25% of the state's municipalities have received substantive certification of their housing elements by COAH.[153]

In the last decade, New Jersey's sluggish economy has explained the shortfall in affordable housing performance.[154] The *Mount Laurel* doctrine was premised on inclusionary zoning as an important device for supplying affordable housing. Because inclusionary zoning involves the setting aside of newly-constructed dwellings for very low and low income households, the state's slowdown in real estate development has resulted in lower levels of affordable housing development.[155] Additionally, New Jersey's Balanced Housing trust fund is supplied from real estate transfer tax revenue. The annual revenues used to fund this program declined from $28 million in 1988 to $11 million in 1991,[156] resulting from the real estate slowdown.

At the same time, the extensive use of inclusionary zoning as a device for generating affordable units demonstrates that such an approach is feasible with the presence of an active residential development market. Residential developers in New Jersey have been able to build market rate developments with a certain percentage of units, typically 20%, set aside for very low and low income households.[157]

New Jersey's dependence on a statewide real estate transfer tax and on inclusionary zoning is akin to Florida's funding situation. Florida has a similar statewide real estate transfer tax funded program, SHIP,[158] but Florida's steady growth in the 1990s has permitted this program to continue to fund affordable housing without significant interruption. Although inclusionary zoning is not widespread in Florida, inclusionary zoning's reliance on real estate

---

151. *See* FITZPATRICK, *supra* note 146, at 8.

152. *See id.* at 11 (commenting that 13,592 units have been built, rehabilitated, or are under construction and identifying the predefined need at 145,707 units).

153. *See id.* at 9-10.

154. *See* Mehegan, *supra* note 149, at 47-48.

155. *See id.*

156. *See id.* at 49.

157. *See id.*

158. *See* FLA. STAT. § 420.907 (1995); *see also* discussion *supra* Part III (describing the SHIP program).

development to generate affordable housing units is compatible with Florida's high pace of residential development. The major difference between Florida and New Jersey, however, is that New Jersey law mandates consideration of fair share housing, whereas Florida law is silent on this issue.[159]

D. Massachusetts Anti-Snob Zoning Act.

In 1969, the Massachusetts Legislature enacted the Massachusetts Anti-Snob Zoning Act (Massachusetts Act),[160] formally known as the Massachusetts Low and Moderate Income Housing Act.[161] The Massachusetts Act represents an attempt to prevent local governments from arbitrarily limiting the development of affordable housing either through outright permit denials or the attachment of conditions that would make the development of affordable housing uneconomic. Rather than requiring complicated fair share housing plans, the Massachusetts approach relies on fairly simple indicators for determining whether a jurisdiction has met its fair share of housing need.

The Massachusetts Act has two key features. First, the Act creates a comprehensive local permitting process for low or moderate income housing where developers of such housing may file one comprehensive local permit application, which will be heard by the local town's zoning board of appeals.[162] The Massachusetts Act defines low or moderate income housing as "any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing . . . ."[163] Second, if the local zoning board of appeals denies the application for low or moderate income housing or the conditions attached to the project's development make it uneconomical to build, then the developer may appeal directly to a state Housing Appeals Committee.[164] The Housing Appeals Committee possesses the power to override the local zoning board of appeals decision.[165]

When reviewing the justifications for the denial of a comprehensive permit application by the local zoning board of appeal, the Housing Appeals Committee must determine whether the permit

---

159. *See id.*
160. 1969 Mass. Acts 712 (codified at MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (West 1994)).
161. MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (West 1994).
162. *See id.* § 21.
163. *See id.* § 20.
164. *See id.* § 22.
165. *See id.* §§ 20-23; *see also* MASS. REGS. CODE tit. 760, §§ 30-31 (West 1994).

denial was "consistent with local needs."[166] The Housing Appeals Committee must also review permit applications that have been approved with conditions to ensure that the conditions are consistent with local needs and do not create "uneconomic" construction or operation conditions.[167]

Thus, consistency with local needs is an important consideration. The zoning board of appeals may demonstrate to the Housing Appeals Committee that its decision to deny or establish conditions for an application's approval for low or moderate income housing is consistent with local needs if any one of the following is true: (1) the number of low and moderate income housing units in the town exceeds 10% of the total dwelling units in the town, as reported in the latest federal decennial census of the town;[168] (2) low and moderate income housing occupies more than 1.5% of a town's land that is zoned for residential, commercial, or industrial use; or (3) the permit application would result in the development of sites constituting more than 0.3% of the town's land (exclusive of publicly owned land) or 10 acres, whichever is greater in any one year.[169]

The Massachusetts Act is similar to the California and New Jersey fair share laws because it allows the state to have a voice in whether a town is meeting its fair share of housing need. In contrast with these states' laws, however, the Massachusetts Act employs a rather simple and perhaps arbitrary measure of a jurisdiction's compliance with fair share of housing needs. In contrast with New Jersey, which employs a very complicated formula for determining a jurisdiction's fair share, the Massachusetts Act asserts that if a town has more than 10% of its housing stock in subsidized housing for low and moderate income households, then the Housing Appeals Committee will not question the town's decision on a comprehensive permit application.[170]

By 1990, twenty-one years after passage of the Massachusetts Act, only twenty-two of the state's 351 cities and towns had reached

---

166. MASS. GEN. LAWS ANN. ch. 40B, § 23 (West 1994).

167. *See id.*

168. *See id.* The Massachusetts Executive Office of Communities and Development annually produces a Subsidized Housing Inventory that is used to determine whether the 10% threshold has been reached. *See id.*

169. *See* MASS. GEN. LAWS ANN. ch. 40B, § 20; *see also* CYNTHIA LACASSE, AN OVERVIEW OF CHAPTER 774: THE ANTI-SNOB ZONING LAW 2 (Mar. 1987) (unpublished report, Massachusetts Institute of Technology, Department of Urban Studies and Planning) (on file with author).

170. *See* MASS. GEN. LAWS ANN. ch. 40B; *see also* Paul Stockman, *Anti-Snob Zoning in Massachusetts*, 78 VA. L. REV. 535, 551-52 (1992).

the 10% level.[171] These twenty-two cities and towns consisted primarily of large cities (Boston, Springfield, Worcester) and larger, older suburbs and towns (Cambridge, Fall River).[172] Hence, regardless of whether the 10% threshold is an accurate measure of a city or town's "true" fair share, it is a reasonable goal for most of the state's towns, including many of its suburban jurisdictions.

In contrast to California's and New Jersey's fair share laws, the Massachusetts Act relies primarily on developers to stimulate the scrutiny of a town's housing policies. If developers make no attempt to develop affordable housing in a town that has little such housing, then the Massachusetts Act provides no recourse. In this sense, the Act is passive in that it waits for developers to challenge a town's decision to deny or place burdensome conditions on a permit application.[173]

However, reliance on developer initiative allows developers to determine when and where it is economical to develop affordable housing.[174] This situation contrasts with California and New Jersey, where many communities rely on inclusionary zoning to induce developers to provide affordable housing.[175]

Massachusetts does attempt to sweeten the pie for affordable housing development by: (1) making state funds available for low and moderate income housing development; and (2) withholding state development funds from jurisdictions that have shown a pattern of discouraging affordable housing development. Massachusetts also employs the Homeownership Opportunity Program (HOP) to stimulate the development of owner-occupied housing and the State Housing Assistance for Rental Production (SHARP) and Tax-Exempt Loans to Encourage Rental Housing (TELLER) programs to stimulate the development of rental housing.[176] The HOP program, in particular, actively encourages developments that serve a mix of

---

171. *See* MASSACHUSETTS EXECUTIVE OFFICE OF COMMUNITIES AND DEV., 1990 SUBSIDIZED HOUSING INVENTORY (Apr. 1990) (compiling the percentage of subsidized housing for all Massachusetts communities).

172. *See id.*

173. *See* Stockman, *supra* note 170, at 565-66 (citing to one critic's comment that the Massachusetts Act is passive because the law is not self-executing—the initiative remains with the developers).

174. *See id.* at 567 (noting that the builder has the option "to include affordable units; presumably, the builder will act only when existing bonuses and subsidies make it profitable to do so").

175. *See supra* notes 154-57 and accompanying text for a discussion of inclusionary zoning in New Jersey. In an inclusionary housing program, construction of low and moderate income suburban housing must be facilitated and opportunities for circumvention and subversion must be minimized; thus, some scholars argue that the effects of inclusionary zoning are the reverse of its intention. *See* Stockman, *supra* note 170, at 566.

176. *See id.* at 554-56.

incomes, thereby making the program, along with its home-ownership emphasis, more conducive to development in suburban settings.[177] These additional programs serve as important complements to the effectiveness of the Massachusetts Act by encouraging development of affordable housing in jurisdictions that might resist such housing.

In the Massachusetts Act's first twenty years, 1969 to 1989, 33,884 units were proposed under the comprehensive permit procedure promulgated by the Act, of which 20,623 units were built by 1989.[178] Nearly one-quarter of all cities and towns in Massachusetts have had projects that applied for a comprehensive permit under the Massachusetts Act. However, by 1988, only twenty-eight of Massachusetts's 351 cities and towns had met the Act's statutory criteria (10% or more of dwelling units or 1.5% or more of land area devoted to affordable housing).[179] Affordable housing in Massachusetts has undeniably improved, evidenced by the mere two communities that complied with statutory criteria at the inception of the Act in 1969.[180] Many of the ninety-five communities that do not contain subsidized units are rural communities with small populations.[181] Housing advocates in Massachusetts believe that without the Massachusetts Act, few affordable housing units in the suburbs would exist.[182]

The Massachusetts Act appears to have positively-affected developments whose permits had conditions attached to their applications or were denied. Between 1969 and 1986, 42% of developments whose comprehensive permits were denied were eventually built and two-thirds of developments whose permits were given conditions were also built.[183] Consequently, while the appeals process under the Massachusetts Act does not guarantee that these units will be built, the appeals procedure under the Massachusetts Act increases the probability that affordable units will be constructed.

In recent years, at least two other states, Connecticut in 1989,[184] and Rhode Island in 1991,[185] have adopted legislation similar to the Massachusetts Act. As for Florida, the Massachusetts Act concept should be considered as an adjunct to current growth management

---

177. *See id.* at 565.

178. *See id.* at 575.

179. *See id.* at 576.

180. *See id.* at 576-77.

181. Only six of 225 cities and towns with populations higher than 5,000 lack any subsidized units. *See id.* at 577.

182. *See id.*

183. *See* LACASSE, *supra* note 169, at 8.

184. *See* 1989 Conn. Acts § 311 (Reg. Sess.).

185. *See* 1991 R.I. Pub. Laws ch. 154, § 1 (codified at R.I. GEN. LAWS § 45-53 (1991)).

and housing legislation. The adoption of the Massachusetts 10% standard would provide an effective device for measuring the degree to which jurisdictions comply with affordable housing objectives laid out in the state's comprehensive plan, individual housing elements and land use plans. Moreover, Florida's increasing funding for affordable housing will serve as an incentive[186] for housing developers who attempt to create affordable housing in jurisdictions with few low income housing opportunities. These funding incentives, when combined with Massachusetts-type zoning laws, would encourage the private sector to develop affordable housing in suburban jurisdictions in Florida.

E. Connecticut Fair Housing Compact Pilot Program

In contrast with the other fair share housing programs discussed in this article, Connecticut's Fair Housing Compact Pilot Program (Connecticut Act), enacted by the Connecticut Legislature in 1988,[187] uses the state's powers to encourage local governments within a region to come together and negotiate a compact that sets forth numeric affordable housing goals for the entire region, as well as for each jurisdiction.[188] Hence, the emphasis is placed on maintaining a home rule tradition, while also trying to get suburban and central city jurisdictions to discuss compliance with regional housing objectives.

The Connecticut Act stipulated that the Pilot Program would be available for two planning regions in the state.[189] Five of the state's regions submitted applications. The Capitol Region Council of Governments, located in Hartford, and the Greater Bridgeport Regional Planning Agency were chosen to participate.[190]

The Connecticut Act made a number of important stipulations that helped influence the development of a regional housing compact. First, the Connecticut Act called for a negotiation to occur between "a mediator, the Commissioner of Housing or his designee, and the officers of the regional planning agency or agencies within the chosen regions, or their designees, and a representative of each municipality within such planning regions, appointed by the chief

---

186. *See* discussion *supra* note 48.

187. 1988 Conn. Acts § 334 (Reg. Sess.).

188. *See id.*

189. *See id.*

190. *See* Lawrence E. Susskind & Susan L. Podziba, *Affordable Housing Mediation: Building Consensus for Regional Agreements in the Hartford and Greater Bridgeport Area* 2 (1990).

executive officer of such municipality."[191] In practice, elected officials represented their municipality in some instances, while other communities were represented by citizens or town planners. This mix resulted in mutual learning in which citizens and politicians learned about housing from planners and planners and citizens learned about practical political considerations from elected officials.[192] The mix also resulted in the elected officials often having the power to negotiate on behalf of their jurisdictions while other representatives had to bring the compact back to their local jurisdiction's government.[193]

Second, the Connecticut Act required that the city and town representatives reach a consensus on housing principles.[194] The consensus requirement protects those parties who feel they are in the minority and therefore helps to assure them that the compact bears their influence.[195]

Third, the Connecticut Act required that an outside consultant be employed to mediate the negotiation among the various governments.[196] The state, as an incentive to participation, agreed to pay $50,000 for the services of the mediator.[197]

Fourth, the Connecticut Act legitimated negotiation by placing the state's authority in support of negotiation.[198] Moreover, local officials were concerned that if the Pilot Program did not produce an agreement, the state might adopt a more heavy-handed role in fair share housing.[199]

Fifth, whereas the Connecticut Act envisioned that the compact would not be adopted unless each municipality in a region approved it,[200] the Connecticut Legislature later voted to require only that 65% of local governments sign off on the compact for their region.[201] In the Hartford region, twenty-five of twenty-nine jurisdictions approved the compact, while in Bridgeport four of six communities

---

191. CONN. GEN. STAT. ANN. § 8-386 (West 1996). This negotiation was implemented as part of a Regional Fair Housing pilot program. *See id.*

192. *See* Susskind & Podziba, *supra* note 190, at 13.

193. *See id.* at 10 (commenting that the compact could not become binding until formally ratified by all 29 communities' local governing bodies; thus, some local governing bodies were forced to seek the vote of a town meeting and other local governing bodies had to gain approval by their city council).

194. *See* CONN. GEN. STAT. ANN. § 8-386 (West 1996).

195. *See id.*

196. *See id.*

197. *See id.*

198. *See* Michael Wheeler, *Regional Consensus on Affordable Housing: Yes in My Backyard?*, 12 J. PLAN. EDUC. & RES. 139, 142 (1993).

199. *See id.*

200. *See id.*

201. *See* CONN. GEN. STAT. ANN. § 8-386 (West 1996).

approved the compact.[202] The requirement for unanimity or near-unanimity qualified more communities for housing aid and helped to assure various jurisdictions that they would not be forced into a compact with which they did not agree.

Sixth, besides the municipal representatives and the mediator, the only other participants named in the Connecticut Act were representatives of the state's Office of Policy and Management, the state's Commission of Housing, officers of the particular regional planning agency, and the chief executive officer of each of the region's municipalities.[203] Based on the legislation, representatives of various interest groups, such as housing advocates and the Chamber of Commerce, were not permitted direct representation but were permitted the opportunity to observe the negotiation sessions and to speak at a public forum.[204]

Finally, as an added incentive, the Connecticut Act created a housing fund that set aside infrastructure funds for communities signing an adopted compact.[205]

In the Hartford area, the representatives of the twenty-nine communities in that region met during the first six months of 1989 to develop a regional fair share housing policy.[206] Initially, attention was focused on organization and procedure.[207] With an emphasis on consensus-building, the representatives developed rules for interacting with the press, agreeing that representatives could speak with the press as long as they did not repeat the opinions of others.[208] Early agreement on the press rules and other rules was important because it enabled consensus-building while permitting representatives to agree on a variety of noncontroversial issues.

The most controversial issue was the fair share allocation of responsibility for affordable housing. The Hartford representative helped ease the tension between that city and its suburbs when she stated that if each community took care of its own residents in need of affordable housing that "Hartford's burden would be eased."[209]

---

202. *See* Wheeler, *supra* note 198, at 143.

203. *See id.* at 141-42.

204. *See id.* at 144.

205. *See* CONN. GEN. STAT. ANN. § 8-387.

206. *See* Susskind & Podziba, *supra* note 190, at 7 (explaining that negotiation sessions began in January of 1989 and were held every two weeks for six months).

207. *See id.* at 8. The participants formulated an agenda of concerns. The agenda included finding a definition for affordable housing, developing a formula for determining targets, discussing land use and environmental constraints, and discovering ways to fund the new initiatives. The agenda served as a "focal point for future meetings and discussions." *Id.*

208. *See id.* at 7.

209. *Id.*

Nevertheless, much discussion took place concerning the rules that would be used to determine fair share allocation. In the end, participants agreed that each municipality, except Hartford, would commit to using its "best effort" to satisfy *one-fourth* of its local shortfall in affordable housing for 1990-1995.[210] Because Hartford already had much subsidized housing, the city was only expected to meet 12.5% of its affordable housing shortfall.[211]

Data published on the Capitol Region Compact shows that 4,055 new housing opportunities were created between July 1, 1989 and March 31, 1994.[212] Eighty-six percent of these opportunities are located in Hartford's suburbs.[213] Nearly three-fourths of the region's opportunities were made available to very low and low income households.[214]

These numbers aside, probably the most significant aspect of the Connecticut Act is that it stimulated municipalities in two metropolitan regions to reach voluntary agreements on fair share allocations of affordable housing. The Program demonstrates that central cities and suburbs with seemingly competing interests can come together to negotiate a fair share housing agreement under the proper circumstances.

A program similar to Connecticut's program could be implemented in Florida. In Florida, the regional planning councils are established as institutional vehicles for regional planning. The state's Growth Management Conflict Resolution Consortium at Florida State University has the skills and credibility to play the mediator's role in working out a fair share compact. Moreover, the emphasis on a negotiated allocation voluntarily agreed by jurisdictions throughout a metropolitan area fits Florida's home rule traditions.

F. Oregon Land Conservation and Development Act and the Metropolitan Housing Rule

Although Oregon planning legislation has not adopted the fair share concept per se, a special rule for the metropolitan Portland area utilizes a form of fair share housing in which all jurisdictions must zone residential land at minimum densities designed to facilitate the development of affordable housing throughout that metropolitan area.

---

210. *See id.*

211. *See id.*

212. *See* CAPITOL REGION COUNCIL OF GOVERNMENTS, CAPITOL REGION FAIR HOUSING COMPACT ON AFFORDABLE HOUSING: ANNUAL PROGRESS REPORT 3 (Oct. 1994).

213. *See id.* at 4.

214. *See id.*

Implementation of the minimum zoning concept originated in Oregon's 1973 Land Conservation and Development Act (Oregon Act).[215] The Oregon Act was an attempt to control both statewide growth while also providing the housing needed for the Oregon population. Goals 10 and 14 speak directly to the issues of housing development and growth management. Goal 10 aims "to provide for the housing needs of citizens in the state." To achieve this purpose, the Oregon Act authorizes the following: "Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density."[216]

Goal 14's purpose is "to provide for an orderly and efficient transition from rural to urban land use."[217] It accomplishes this purpose by establishing urban growth boundaries. Inside the boundary, urban development is permitted, yet outside the boundary, rural lands are preserved.

The potential conflicts between Goals 10 and 14 were exemplified by two interest groups, 1000 Friends of Oregon, an advocate of rural land preservation, and the Home Builders Association of Metropolitan Portland, which wanted to make certain that a suitable supply of land was available for the construction of new housing. The two interest groups found that in Portland, the region was "meeting its general urbanization [density] objectives under Goal 14, but, in the long term, several jurisdictions will likely fail to meet the more demanding housing targets under Goal 10."[218]

In order to resolve the conflict between Goals 10 and 14, Oregon's Land Conservation and Development Commission (LCDC), the state's land planning agency, adopted the Oregon Metropolitan Housing Rule (Oregon Housing Rule) in 1981[219] that called for several measures designed to meet the objectives of these two goals, as well as those objectives of the two interest groups. The rule requires communities within the Portland metropolitan area to allow development at *minimum* densities of six, eight, or ten units per net

---

215. 1973 Or. Laws 80 (codified at OR. REV. STAT. ch. 197 (1995)).

216. LAND CONSERVATION AND DEV. COMM'N, OREGON'S STATEWIDE PLANNING GOALS 10 (1990) [hereinafter PLANNING GOALS].

217. *Id.* at 12.

218. 1000 FRIENDS OF OREGON & THE HOME BUILDERS ASS'N OF METRO. PORTLAND, EXECUTIVE SUMMARY, MANAGING GROWTH TO PROMOTE AFFORDABLE HOUSING: REVISITING OREGON'S GOAL 10 12 (1991) [hereinafter 1000 FRIENDS OF OREGON].

219. *See* OR. ADMIN. R. 660-07-000 (1991).

buildable acre[220] with the six and eight unit per acre goals established for suburban areas and the ten unit per acre goal established for more urbanized communities such as Portland, Beaverton, and Lake Oswego.[221] In addition, the rule requires jurisdictions, other than small developed cities, to zone land so that one-half of all newly constructed residences are attached single family housing or multi-family housing.[222]

The Oregon Housing Rule assumes that higher density development is critical to the development of affordable housing and that regional minimum density standards are necessary to get local jurisdictions to zone at densities that are amenable to the development of affordable housing. The Oregon Housing Rule is consistent with Anthony Downs's conclusion that low density zoning is a crucial regulatory barrier to the development of affordable housing.[223]

In 1991, 1000 Friends of Oregon and the Home Builders Association of Metropolitan Portland sponsored an evaluation of the Oregon Housing Rule.[224] In general, the study shows that the Oregon Housing Rule has been successful in obtaining higher residential density than would have otherwise been expected. Focusing on the period between 1985 and 1989, the evaluation found that 54% of all new residential housing in a sample area of the Metropolitan Portland region was obtained for single-family and multi-family dwellings.[225] However, the percentage of multi-family permits varied greatly from jurisdiction to jurisdiction, with some jurisdictions reporting as few as 15% multi-family permits and others reporting over 70% multi-family permits.[226] In several jurisdictions, such as unincorporated Clackamas County (lying just southeast of Portland) and Washington County (just west of Portland), the number of multi-family permits was much higher than would have been permitted or expected under the pre-Oregon Housing Rule zoning designations.[227] Consequently, not only did the Portland

---

220. *See id.* (defined as the land area designated for residences exclusive of land set aside for public rights of way, public open spaces, and areas restricted from development, as well as areas that are not buildable for reasons such as periodic flooding or severe slope).

221. *See* OR. ADMIN. R. 660-07-045.

222. *See id.* at 660-07-030 (defining attached housing where each dwelling unit is not located on a separate lot; hence, townhouses are considered to be multifamily).

223. *See* Anthony Downs, *The Advisory Commission on Regulatory Barriers to Affordable Housing: Its Behavior and Accomplishments*, 2 HOUS. POL'Y DEBATE 1095, 1109 (1991).

224. *See* 1000 FRIENDS OF OREGON, *supra* note 218.

225. *See id.* at 10; *see also* HOUSING OPPORTUNITIES, *supra* note 87, at 83 (noting further that prior to the Housing Rule, affordable housing "represented only 30% of the region's planned 20-year housing supply").

226. *See* 1000 FRIENDS OF OREGON, *supra* note 218, at 27.

227. *See id.* at 26.

metropolitan area meet its goal for multi-family housing, but without the Oregon Housing Rule, much less multi-family housing would have been constructed in the metropolitan area.

In general, the evaluation also found that jurisdictions were successful in meeting their six-eight-ten density objectives, with greatest success occurring at the two higher densities. A density shortfall occurred at the six unit per net acre density level with the six unit per net acre jurisdiction included in the study having an average net density of above three units per net acre.[228]

Nevertheless, the Portland metropolitan area's performance in permitting single family homes at higher densities improved over what was the case prior to the period of the Oregon Housing Rule. Whereas two-thirds of single family dwellings under pre-Housing Rule Plans were built on lots averaging 13,000 square feet, the average single family lot during the 1985-1989 evaluation period was smaller than 9,000 square feet.[229] Overall, therefore, while actual performance could have been better than it was, the evaluation concluded that the Oregon Housing Rule had a significant impact on increasing the incidence of higher density housing and multi-family housing in the Portland metropolitan area.

Given that both Oregon and Florida have adopted statewide mandated planning laws, with requirements for housing elements, Florida could easily adopt a proposal similar to the Oregon Housing Rule. Florida's Growth Management Act requires that housing elements in Florida jurisdictions develop "standards, plans, and principles to be followed in . . . the provision of adequate sites for future housing, including housing for low-income, very-low-income, and moderate-income families."[230] This language suggests that the Florida DCA already has the authority to develop a minimum density rule. The Oregon Housing Rule, based on Oregon Goal 10, is written with similar language.[231] This similar language provides a basis for DCA to follow Oregon's Land Conservation and Development Commission and to promulgate a minimum density rule.

V. RECOMMENDATIONS FOR FLORIDA

There is a need for a fair share housing program in Florida. The state's metropolitan areas are racially and economically segregated,

---

228. *See id.* at 9.

229. *See id; see also* HOUSING OPPORTUNITIES, *supra* note 87, at 83 (commenting that "the average (minimum) lot size allowed by local zoning dropped from 13,000 square feet in 1978 (pre-Housing Rule) to 8,300 square feet in 1982 (post implementation)").

230. FLA. STAT. § 163.3177(6)(f)(1)(d) (1995).

231. *See* PLANNING GOALS, *supra* note 216, at 10.

resulting in fewer opportunities for many lower income, primarily African American residents to have access to good schools and good jobs. At the same time, despite the advances in growth management and housing legislation, Florida has done little to actually use housing legislation to promote economic opportunity through the geographic mobility that is enabled by fair share housing. Without state legislation initiating affordable housing change, significant movement to fair share housing at the local level is unlikely. As other jurisdictions demonstrate, fair share housing is most likely to be adopted where higher levels of government, either federal or state, direct or entice local jurisdictions to plan for their fair share of regional housing need.[232] The State of Florida should look to the development of the fair share housing concept to complement its current growth management legislation. In examining fair share alternatives, at least five feasible alternatives exist. The advantages and disadvantages inherent in these alternatives must be analyzed, exposing the best possible approach for initiating fair share housing in Florida.

A. Alternative One: Adopt the California/New Jersey Fair Share Approach in which Emphasis is Placed on State-Directed Determination of Each Jurisdiction's Fair Share Housing Need

The chief advantage of Alternative One is that it builds upon the growth management legislation that Florida already has in place. However, adoption of this alternative would probably require an amendment to the housing element section of the Florida Growth Management Act[233] to provide a jurisdiction's fair share of regional housing need. Such an amendment would also entail development of a formula or procedure for calculating fair share. Although it is unclear how difficult the passage of such an amendment would be, the concept of fair share would undoubtedly spark concern among suburban jurisdictions that are fearful of having to absorb residents of the central city. Moreover, since the California/New Jersey approach to fair share housing relies quite extensively on inclusionary zoning,[234] the development community would probably react negatively to this approach.

---

232. *See* discussion *supra* Part IV (describing affordable housing efforts in other states).

233. FLA. STAT. § 163.3177 (1995).

234. For a discussion of California's approach to fair share housing, see discussion *supra* Part IV.B. For a discussion of New Jersey's approach to fair share housing, see discussion *supra* Part IV.C.

B. Alternative Two: Adopt the Massachusetts Fair Share Approach in which an Arbitrary Fair Share Goal is Established for Each Jurisdiction and the State Retains Preemptive Powers Over Local Jurisdictions for the Purpose of Granting Development Permits for Affordable Housing

Because the Massachusetts Act only takes effect after a developer proposes an affordable development, this approach permits developers to build affordable housing where they think is best. By combining various housing subsidy programs, the Massachusetts Act uses a "carrot" approach to attract developers to plan for affordable housing.[235]

A second advantage lies in the rather simple approach taken in Massachusetts for determining fair share need. Rather than spending time and energy developing an empirically based, but complex, measure of fair share need, Massachusetts elects to allocate the same fair share goal to all jurisdictions, requiring each jurisdiction to have at least 10% of all dwellings in subsidized housing. Not only is time and effort saved with such a measure, but it becomes more difficult for jurisdictions to manipulate statistical figures to make it appear that they have less need or have met their housing need.

The passive nature of the Massachusetts Act is its primary drawback. The Massachusetts Act relies on the developer to provide affordable housing. Where such efforts do not exist or are significantly less than housing need requires, the approach lacks the ability to more actively address housing issues. In response to this problem, the application of significant housing subsidies as "carrots" would not only encourage developers to build affordable housing but provide opportunities for such housing in suburban communities.

C. Alternative Three. Adopt the Connecticut Fair Share Approach in which Jurisdictions are Encouraged to Negotiate Fair Share Housing Allocations Among Themselves

This approach has several advantages. First, the Connecticut approach is voluntary, so jurisdictions cannot complain that the program is forced upon them. The voluntary approach applies not only to program participation but also to acceptance of any fair share allocation that comes from a regional decision-making process. Additionally, the Connecticut approach's negotiation process[236] has the

---

235. *See* discussion *supra* Part IV.D. In contrast, the California/New Jersey approach relies more on a "stick" approach through those states' utilization of inclusionary zoning as the primary tool by which jurisdictions meet their fair share requirements. *See* discussion *supra* Parts IV.B-C.

236. *See* discussion *supra* Part IV.E.

potential to produce a multi-jurisdictional consensus that supports the overall responsibility for affordable housing development.

Despite these advantages, the Connecticut approach's emphasis on voluntary negotiations fails to provide the type of comprehensive statewide coverage found in California or New Jersey.[237]

D. Alternative Four: Adopt the Oregon Fair Share Approach in which the State Sets Minimum Density Standards that Minimizes Large-Lot Zoning so that Housing Can Be Made More Affordable

The chief advantage of Oregon's approach to fair share housing is that it addresses a key determinant of housing affordability: density.[238] The minimum density standards developed for the Portland metropolitan area are simple and straightforward. The Florida Growth Management Act requirement that housing elements develop "standards, plans, and principles to be followed in . . . the provision of adequate sites for future housing, including housing for low-income, very-low-income, and moderate-income families . . . ."[239] appears to provide the statutory foundation for a DCA rule requiring minimum densities.

The chief disadvantage of this alternative is that increasing density, by itself, does not guarantee the development of affordable housing. With the SHIP program in Florida,[240] however, there is the opportunity to combine minimum density requirements with financial subsidies for affordable housing.

E. Alternative Five: Combining Alternatives

Given the disadvantages associated with each of the first four alternatives, an alternative or set of alternatives that reflects a combination of approaches is preferable. At a minimum, consideration should be given to the following recommendations, gleaned from the first four alternatives.

1. Recommendation One

Based on the Florida Growth Management Act requirement that jurisdictions develop criteria for the provision of adequate sites for various income levels,[241] the Florida DCA should develop minimum density standards for planning regions throughout the state. Such

---

237. *See* discussion *supra* Part IV.B-C.
238. *See* discussion *supra* Part IV.F.
239. FLA. STAT. § 163.3177(6)(f) (1995).
240. *See* discussion *supra* Part III (discussing Florida's SHIP program).
241. *See* FLA. STAT. § 163.3177(6)(f) (1995).

action would set standards that would better guarantee that adequate sites would be available for all income levels in the population. Although the standards would not guarantee that affordable housing would be developed in these jurisdictions, a minimum density floor could be established that would enable the development of affordable housing in a variety of jurisdictions.

2. Recommendation Two

The State of Florida, through the Florida Growth Management Conflict Resolution Consortium, should adopt the Connecticut model which offers regions the opportunity to negotiate fair share housing compacts.[242] The Connecticut model should be implemented as a pilot program, and based on the results of the pilot program, the concept could eventually be expanded to all regions in the state. This alternative seems desirable because it introduces the fair share concept to Florida, but does so in a way that attempts to produce consensus rather than conflict.

3. Recommendation Three

The State of Florida should use its housing subsidy programs, chiefly the SHIP and SAIL programs, to encourage developers to build housing in suburban jurisdictions. In conjunction with these incentives, Florida should provide for a comprehensive permit process that allows state preemption of local permitting, as is found in the Massachusetts model.[243] Given the availability of housing subsidies in Florida, the state can use incentives to encourage developers to produce affordable housing in suburban jurisdictions. At the same time, the state should be prepared to overrule local jurisdictions that stand in the way of affordable housing development.

4. Recommendation Four

Under the DRI review process, regional planning councils and the State of Florida have the right to ensure that the review of large-scale developments falling under the umbrella of the DRI process by considering whether "the development will favorably or adversely affect the ability of people to find adequate housing reasonably accessible to their places of employment."[244] Given that large-scale new developments are often located in suburban jurisdictions and

242. *See* discussion *supra* Part IV.E.
243. *See* discussion *supra* Part IV.D.
244. FLA. STAT. § 380.06(12)(a)(3).

that such developments, including shopping centers, often generate low-paying employment, the DRI statute can be used to argue that such developments create housing needs in suburban jurisdictions which require mitigation through the development of affordable housing. Although the DRI statute is not a fair share housing statute *per se*, its linkage of employment and housing opportunities can and should be used to achieve fair share housing-type results.

5. Recommendation Five

If the above recommendations inadequately stimulate the adoption of fair share housing plans and practices, the State of Florida should amend the Growth Management Act to require measurement of housing need that considers the jurisdiction's fair share of regional housing need. To be effective, the State would probably have to develop specific estimates of each jurisdiction's fair share, just as is done in California and New Jersey.

VI. CONCLUSION

Florida is an important test case for fair share housing. The state has the need for a more equitable distribution of poor people and minorities. Its growth management legislation, which features state-mandated planning, provides the legal framework for developing the type of state-led effort that is necessary for an effective fair share housing policy. If the state does not develop a fair share housing policy, it will not be because of a lack of need or opportunity.

Table 1. Place of Employment by Place of Residence in Five Florida Metropolitan Statistical Areas (MSAs)

	Miami MSA		Orlando MSA		Ft. Lauderdale MSA		Tampa-St. Pete MSA		West Palm Beach MSA	
	1980	1990	1980	1990	1980	1990	1980	1990	1980	1990
Number of MSA Residents Working in MSA	611,109	844,722	266,108	538,132	309,985	471,595	533,714	855,293	192,067	343,100
Number of MSA Residents Working in City	284,423	313,117	107,563	200,775	106,315	138,484	180,927	266,441	50,559	70,915
Percent of MSA Residents Working in City	46.5%	37.1%	40.4%	37.3%	34.3%	29.4%	33.9%	30.1%	26.3%	20.7%

	Miami City		Orlando City		Ft. Lauderdale City		Tampa-St. Pete City		West Palm Beach City	
	1980	1990	1980	1990	1980	1990	1980	1990	1980	1990
Number of City Residents Working in MSA	130,888	143,196	48,328	88,887	57,222	64,522	101,138	128,648	25,059	32,105
Number of City Residents Working in City	87,652	86,136	30,579	56,482	38,980	40,729	84,369	101,741	13,711	16,029
Percent of City Residents Working in City	67.0%	60.2%	63.3%	63.5%	68.1%	63.1%	83.4%	79.1%	54.7%	49.9%

Sources: 1980 and 1990 U.S. Census

Table 2. Percent of Families in Poverty by Location

	Miami MSA		Orlando MSA		Ft. Lauderdale MSA		Tampa-St. Pete MSA		West Palm Beach MSA	
	1980	1990	1980	1990	1980	1990	1980	1990	1980	1990
Percent of Central City Families in Poverty	19.9%	25.7%	14.2%	12.2%	9.7%	13.1%	14.8%	15.0%	11.2%	12.7%
Percent of MSA Families in Poverty	11.9%	14.2%	9.2%	7.1%	6.3%	7.1%	8.3%	7.8%	6.7%	6.2%
Ratio of Central City/MSA Poverty Rates	1.67	1.81	1.54	1.72	1.54	1.85	1.78	1.92	1.67	2.05

Sources: 1980 and 1990 U.S. Census

Table 3. Percent of Population That is Minority by Location

	Miami MSA		Orlando MSA		Ft. Lauderdale MSA		Tampa-St. Pete MSA		West Palm Beach MSA	
	1980	1990	1980	1990	1980	1990	1980	1990	1980	1990
Percent of Central City Population That is Minority	35.0%	34.2%	22.2%	30.4%	31.6%	31.4%	26.0%	29.0%	29.5%	36.7%
Percent of MSA Population That is Minority	22.8%	26.9%	12.2%	18.2%	14.9%	17.2%	10.6%	11.6%	15.4%	15.1%
Ratio of Central City/MSA Minority Population Rates	1.54	1.27	1.82	1.67	2.12	1.83	2.45	2.50	1.92	2.43

Sources: 1980 and 1990 U.S. Census