

NOTES

THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1992: AFFORDABLE HOUSING INITIATIVES MAY HAVE FOUND A HOME

*John M. Kerekes**

I. Introduction

An affordable housing and community development law, the Housing and Community Development Act of 1992 (1992 Act)¹ was a progressive amendment² to the Cranston-Gonzalez National Affordable Housing Act of 1990 (NAHA).³ The 1992 Act was a vehicle that allowed Congress to make adjustments and administrative corrections to Title II, Subtitle A: HOME Investment

* B.Arch., School of Architecture, New Jersey Institute of Technology (*cum laude*); M.C.P., School of Architecture and Urban Planning, Massachusetts Institute of Technology; J.D., Seton Hall University School of Law, anticipated 1996.

¹ Pub. L. No. 102-550, 106 Stat. 3672 (1992) (amending scattered sections of the U.S.C.) [hereinafter 1992 Act].

² See Susan Kellam, *Reauthorization Conference Yields Delicate Compromise*, 50 CONG. Q. 3057, 3057-58 (Oct. 3, 1992) [hereinafter Kellam, *Reauthorization Conference*]. The major concept of the HOME program was the program's requirement that federal funds will be used to leverage local government and private funds. *Id.* at 3057. When the HOME program was debated by both houses, an agreement was struck whereby the public debt of municipalities and states would be reduced from the 50% share, as stated in a staff recommendation, to a 25% share. *Id.* at 3057-58. Furthermore, it was stated that "[m]uch of the conference give-and-take occurred over fine tuning of the two programs created by the 1990 housing bill and geared toward putting more affordable housing on the market[.]" *Id.* at 3057. See also Susan Kellam, *This Time, the Center Holds For Policy Bill Supporters*, 50 CONG. Q. 2717, 2717 (Sept. 12, 1992) [hereinafter Kellam, *Policy Bill Supporters*]. The new legislation was considered to be important in its attempt to add new programs to deliver more affordable housing and fix flaws in current programs, although the housing policy created by the 1990 omnibus housing bill would not shift dramatically from its original intentions. *Id.*; Susan Kellam, *Inner City Needs Spur Push For Housing Compromise*, 50 CONG. Q. 1803, 1803 (June 20, 1992) [hereinafter Kellam, *Inner City*]. Congressman Henry B. Gonzalez (D-Tex.) House Banking, Finance, Housing and Urban Affairs Chairman stated that "we can't afford to continue to turn our backs" to "the rising needs of the nation's distressed cities." *Id.*

³ Pub. L. No. 101-625, 104 Stat. 4079 (1990) (codified as amended in scattered sections of the U.S.C.) [hereinafter NAHA].

Partnerships Program (HOME).⁴ The 1992 Act enabled the HOME program to supply much-needed affordable housing to distressed urban centers and other needy areas.⁵

The HOME program,⁶ which was brought to life by the NAHA,⁷ is at the very center of the federal government's involvement in this country's affordable housing⁸ crisis. The HOME program is not intended to be a categorical housing program,⁹ nor an

⁴ *Id.* tit. II: HOME Investment Partnerships Program, 42 U.S.C. § 3535(d), §§ 12701-12839 (1990) (amended 1992).

⁵ See generally Jeffrey L. Katz, *Rooms for Improvement: Can Cisneros Fix HUD?*, 51 CONG. Q. 915, 915 (Apr. 10, 1993) (discussing affordable housing programs that are operated by local government, which are stocked with 1.4 million units and service 3.4 million tenants, with an additional one million names on a waiting list to receive some type of housing assistance); Kellam, *Policy Bill Supporters*, *supra* note 2, at 2717 (explaining some of the critical issues that needed to be amended to allow the HOME program to supply affordable housing to areas with housing needs); Kellam, *Inner City*, *supra* note 2, at 1803 (discussing the compromises both the House and the Senate struck to amend the NAHA and instill flexibility to a complex program).

⁶ See OFFICE COMMUNITY PLAN. & DEV., U.S. DEP'T HOUSING AND URBAN DEV., THE HOME PROGRAM HOME INVESTMENT PARTNERSHIPS - PROGRAM GUIDE (1993) [hereinafter HOME PROGRAM GUIDE]. The program guide specifically states that "HOME affirms the Federal government's commitment to provide decent, safe and affordable housing to all Americans, and to alleviate the problems of excessive rent burdens, homelessness and deteriorating housing stock in the nation." *Id.* at 3.

The HOME program affords states and local governments the authority to "design and tailor" strategies to address affordable housing needs and specific housing conditions, while the federal government provides the funding and guidelines for program implementation. *Id.* The HOME program is based upon a two-tier goal: one, to increase the supply and availability of affordable housing in the short-term; and two, to establish and strengthen capacity of public/private partnerships between local government and housing developers in the long-term. *Id.* The two-tier goal structure assures that immediate and long-range housing needs for low- and very low-income residents will be achieved. *Id.*

⁷ NAHA §§ 201-89, 42 U.S.C. §§ 12701 - 12839 (1990).

⁸ See NAHA § 215, 42 U.S.C. § 12745 (1990) (qualifying affordable housing for purposes of the HOME program). Generally, however, affordable housing defines housing that either rents or sells at 25% to 30% of a low or moderate family's income. S. Mark White, *The National Affordable Housing Act and Comprehensive Planning: An Overview and Analysis*, 1992 INST. ON PLAN. ZONING & EMINENT DOMAIN 4-1. The classification of low- or moderate-income families may be adjusted by each jurisdiction for different programs. *Id.* at 4-2 to 4-3 n.1. The definition generally refers to low-income families who earn between 50% and 80% of the median income for that area, while the moderate-income families earn 80% to 120% of that area's median income. *Id.* The HOME program recognizes those families who earn less than 80% of the area median income as low-income families, whereas those families who earn less than 50% are defined as very low-income. NAHA § 104(9)-(10), 42 U.S.C. § 12704 (1990).

⁹ HOME PROGRAM GUIDE, *supra* note 6, at 3. For example, new construction of public housing is a categorical housing program because it requires a project specific

unworkable and overly regulated program. Rather, it is an attempt at forming partnerships between the federal government and local communities.¹⁰ This program signaled the beginning of the federal government's divestiture from sponsoring subsidized housing.¹¹

Although the HOME program is seen as the cornerstone of the NAHA,¹² the use of program funds has been curtailed due to the harsh guidelines and administrative complexities.¹³ As a result of the intricate and exhaustive requirements of the program,¹⁴ the commitment and expenditure of HOME funds has been an arduous task.¹⁵ In an effort to relieve these constraints, Congress

housing activity. *Id.* States and local governments, therefore, are afforded flexibility in designing specific housing goals to meet its individual housing needs. *Id.*

¹⁰ See generally Claudia Brodie, Note, *Federal Housing Funds in the Hands of Local Communities: The Cranston-Gonzalez National Affordable Housing Act*, 10 ST. LOUIS U. PUB. L. REV. 547 (1991) (analyzing the NAHA as a long and overdue answer to motivate and promote the development of affordable housing for very low- and low-income families).

The guide outlines the federal government's strategy "to encourage states and local governments to use HOME funds most efficiently, the most cost-effective housing activities (tenant-based assistance, acquisition and low-cost rehabilitation) require the smallest state and local matching contribution for Federal funds." HOME PROGRAM GUIDE, *supra* note 6, at 3. The program intended to merge federal resources, which would fund mortgages and construction costs, with the flexibility of the local governments. Brad German, *Major Housing Bill Finally Takes Shape*, BUILDER, Nov. 1988, at 40.

¹¹ White, *supra* note 8, at 4-4 to -5. As a result of decreasing levels of federal subsidies, local and state governments have developed creative initiatives to replace federal subsidized housing. *Id.* As a direct response to that action, the NAHA and the HOME program were created to further these goals. *Id.* The HOME program stimulates local involvement in affordable housing by providing assistance to local communities with innovative loan programs, housing trust funds, community land trusts and local nonprofit housing development groups, all of which produce and preserve affordable housing. *Id.*

¹² Katz, *supra* note 5, at 915-16. The HOME program "is supposed to function like a block grant for housing. States and localities decide how they want to use the money for [very] low- and [low]-income housing needs." *Id.*

¹³ *Id.* at 918. Many community development officials have been "stymied" from committing and expending their HOME funds because of the outright complexity of the program. *Id.*

¹⁴ See NAHA § 216, 42 U.S.C. § 12746 (1990) (delineating the requirements to which a local or state government or consortia must comply with to be designated a participating jurisdiction).

¹⁵ Due to the complex regulations "[o]nly 4 percent of the \$2.50 billion allocated for the HOME program has been spent." Katz, *supra* note 5, at 918. Furthermore, the Secretary of Housing and Urban Development (HUD), Henry Cisneros "has promised to encourage further use of the funds by simplifying rules, allowing localities

passed the 1992 Act as a vehicle to fine-tune some of the programs created by the bipartisan NAHA.¹⁶

This note will examine the Congress' response to relax the administrative and programmatic burdens imposed upon the HOME Program through its enactment of the 1992 Act. Part II, which follows the introduction, surveys prior legislation enacted to provide persons with decent and affordable housing. Part III provides an overview of the immediate need for safe and decent affordable housing, with an analysis of the shortage of quality affordable housing and the goals of the HOME Program's attempts to decrease that shortage. Part IV chronicles the legislative history of the 1992 Act. Part V analyzes the effects of the current changes. Part VI describes the attorney's role in the development of affordable housing. Part VII is a conclusion that analyzes the effects made by the 1992 Act on the HOME program.

wider flexibility, improving public information about the program and providing more technical assistance. He also said the current administration may propose additional legislation to make the HOME program easier to use." *Id.* See also OFFICE OF AFFORDABLE HOUS. PROGRAMS, U.S. DEP'T OF HOUS. AND URBAN DEV., ANNUAL REPORT TO CONGRESS ON COMMUNITY PLANNING & DEVELOPMENT OF AFFORDABLE HOUSING PROGRAMS 2-15 (1993) [hereinafter ANNUAL REPORT] (reporting the statutorily-mandated information on the HOME program to Congress). Fiscal year 1992 was the first funding year for the HOME Program, and the participating jurisdictions reported little commitment of its HOME funds to designated projects. *Id.* Rather than "obligating and executing funding contracts" with potential developers, the participating jurisdiction's time was expended to design its programs and to taking other actions to implement the program. *Id.* As of September 30, 1992, only 36 participating jurisdictions out of a total of 435 had committed funds (\$7.1 million of the allocated \$1.46 million) to specific projects, with only \$2.8 million expended. *Id.*

¹⁶ *Inside Congress, Issue: Housing Reauthorization*, 50 CONG. Q. 3483, 3843 (Oct. 31, 1992). Lawmakers saw the opportunity to "streamline housing programs." *Id.* See also Susan Kellam, *Reauthorization Now Down To Fine Points of Negotiation*, 50 CONG. Q. 2944, 2944 (Sept. 26, 1992) (outlining outstanding issues regarding the housing bill to correct the NAHA); Susan Kellam, *Bipartisan Support in House Propels New Housing Bill*, 50 CONG. Q. 2358, 2358 (Aug. 8, 1992) [hereinafter Kellam, *Bipartisan Support*] (discussing the compromises struck to move the bill forward and to show the Bush Administration that a bipartisan sponsored bill will introduce the corrective measures of the NAHA); Susan Kellam, *Policy Fixes Move Forward But Use Up Precious Time*, 50 CONG. Q. 2288, 2288 (Aug. 1, 1992) [hereinafter Kellam, *Policy Fixes*] (discussing the opposing philosophies of the House and Senate on a fine tuning amendment bill to the NAHA); Susan Kellam, *Reauthorization Bill Wrangling Reinforces Partisan Wall*, 50 CONG. Q. 1452, 1452 (May 23, 1992) [hereinafter Kellam, *Bill Wrangling*] (commenting on the political tug-of-war over the reauthorization bill because of urban unrest as witnessed in the L.A. riots).

II. *Pre-National Affordable Housing Act Legislation*

A. *The National Housing Act of 1934 and the United States Housing Act of 1937*

The National Housing Act of 1934 (NHA) marked the beginning of the federal government's substantial involvement with housing in this country.¹⁷ The NHA was not merely a quantitative approach to housing; it was a qualitative approach that focused on housing standards and conditions.¹⁸ Instead of the federal government focusing its use of federal funds to create a massive number of units to house families or individuals, the NHA's intent was to improve and upgrade existing units. The NHA concentrated on the improvement of living conditions and raising the standard of housing quality within the units.

Under the NHA, the improvement of housing standards and conditions was achieved by housing renovation and modernization.¹⁹ Additionally, the NHA provided for mutual mortgage insurance,²⁰ the creation of national mortgage associations,²¹ the creation of insurance for savings and loan accounts²² and amended various sections of the Federal Home Loan Bank Act.²³

¹⁷ Pub. L. No. 73-479, ch. 847, 48 Stat. 1246 (1934) (codified as amended in scattered sections of 12 and 42 U.S.C.) [hereinafter NHA].

¹⁸ *Id.* The preamble to P.L. 479 states that the intent of the NHA was "[to] encourage improvement in housing standards and conditions, to provide a system of mutual mortgage insurance, and for other purposes." *Id.*

¹⁹ See *supra* note 16 (explaining in various periodicals the governments program of housing renovation and modernization). Title I of the NHA created the Federal Housing Administration, which also empowered a Federal Housing Administrator to carry out the purposes of the NHA and to delegate functions to other officers and/or employees. NHA tit. I, § 1. The title introduced the practice of the federal government insuring financial institutions, and it also authorized the lending of monies to financial institutions. *Id.* §§ 3-4.

²⁰ NHA tit. II, §§ 201-09 (creating mutual mortgage insurance and defining the authority given to the insurance of mortgages, the payment of the insurance, the classification of mortgages and reinsurance funds and insuring first mortgages for low-cost housing, providing taxation provisions and statistical and economic surveys).

²¹ NHA tit. III, §§ 301-08 (creating national mortgage associations to purchase and sell first mortgages, borrow and invest funds, manage acquired properties and act as a depository of public monies).

²² NHA tit. IV, §§ 401-07 (creating the federal savings and loan insurance corporation to insure savings accounts, sell premiums and payments on insurance and to terminate those accounts).

²³ NHA tit. V, §§ 501-12 (amending various sections of the Federal Home Loan Bank Act, Pub. L. No. 72-304, ch. 522, 47 Stat. 725 (1932) (codified as amended in scattered sections of the U.S.C.)).

Four years after passage of the NHA, the federal government recognized that the NHA did not fulfill the housing needs of all Americans.²⁴ The federal government, therefore, enacted the United States Housing Act of 1937 (USHA).²⁵ The USHA addressed the housing needs of low-income families²⁶ and further invested the responsibility of housing program administration for low-income housing²⁷ in the local public housing agencies.²⁸

The main thrust of the USHA was the provision of decent and safe housing for low-income families.²⁹ The development³⁰ of low-income housing³¹ was generated by the housing needs of post-De-

²⁴ See, e.g., Lawrence Geller, Note, *Expiring Use Restrictions: Their Impact and Enforceability*, 24 NEW ENG. L. REV. 155, 157 (1989). The NHA of 1934 not only provided assistance to families of the lowest income, but it had been expanded to assist those low-income tenants in public housing. *Id.* For the program to assist families who are at 80% of the median income for that area, Congress enacted the USHA, which authorized housing development programs. *Id.*

²⁵ 42 U.S.C. §§ 1401-36 (1937) (replaced by 42 U.S.C. §§ 1437-40 (1979)) [hereinafter USHA].

²⁶ USHA § 3 provides in relevant part:

The term "low-income families" means those families whose incomes do not exceed 80 per centum of the median income for the area, as determined by the Secretary with adjustments for smaller and larger families, except that the Secretary may establish income ceilings higher or lower than 80 per centum of the median for the area on the basis of the Secretary's findings that such variations are necessary because of prevailing levels of construction costs or unusually high or low family incomes.

USHA § 3(b)(2), 42 U.S.C. § 1437(a) (amended 1979).

²⁷ Section 3(b)(1), in part, provides that "[t]he term 'low-income housing' means decent, safe and sanitary dwellings assisted under this act." USHA § 3(b)(1), 42 U.S.C. § 1437(a) (amended 1979)

²⁸ Section 3(b)(6) provides that "[t]he term 'public housing agency' means any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of low-income housing. The term includes any Indian housing authority." USHA § 6, 42 U.S.C. § 1437(a) (amended 1979).

²⁹ The USHA's policy was "[t]o remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of lower income [and] . . . to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." USHA § 2, 42 U.S.C. § 1437 (amended 1979).

³⁰ Section 3(c)(1) provides, in relevant part, that "[t]he term 'development' means any and all undertakings necessary for planning, land acquisition, demolition, construction, or equipment, in connection, with low-income housing projects." USHA § 3(c)(1), 42 U.S.C. § 1437(a) (amended 1979).

³¹ See *supra* note 27 (delineating the term "low-income housing" as originally stipulated by the USHA).

pression era families.³² Many families coming out of the Depression required decent housing; however, these families were virtually unemployed or employed on a salary that would barely provide for a family of three, let alone six individuals. Families moved to more economically viable regions of the country where the job prospects were better. These areas tended to be the larger, urban, industrial cities. With the influx of displaced rural workers, the cities grew, and as a consequence of this population growth, the housing stock needed to expand, to keep families from experiencing overcrowded housing environments.

Since the 1930s, federal assistance had been limited to debt service on government owned and operated public housing.³³ As a result, the government had established a considerable amount of housing across the country, especially within the overpopulated inner-cities.³⁴

B. *The Housing and Community Development Act of 1974*

After the NHA and the USHA were signed into law, several subsequent amendments were enacted that further developed the role of the U.S. government's involvement in affordable housing.³⁵

³² The Great Depression of the 1930s had a significant impact on working-class families in rental units. Katz, *supra* note 5, at 915.

³³ Paul Nyham, *A Housing Glossary*, 51 CONG. Q. 918, 918 (Apr. 10, 1993). Public housing, as created by the USHA in 1937, was the federal and local government's joint venture into the production of affordable housing. *Id.* The affordable housing was for "low-income families, the elderly and the physically and mentally disabled." *Id.* The construction of affordable housing was financed by the federal government, while local governments managed the housing using federally-sponsored subsidies. *Id.*

³⁴ *Id.* Nationwide, the federal government has 13,200 public housing developments, which are administered by 3200 public housing authorities. *Id.*

³⁵ See, e.g., Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (1949) (amended 1974) (codified as amended in scattered sections of the U.S.C.) (tit. I: Urban Renewal Projects); Housing Act of 1954, Pub. L. No. 83-560, 68 Stat. 590, 31 U.S.C. § 59 (1954) (tit. VII, § 701: Comprehensive Planning Assistance); Housing Act of 1959, Pub. L. No. 86-372, 73 Stat. 654 (1959) (codified in scattered sections of the U.S.C.) (tit. II, § 202: Senior Citizen Housing); Housing Act of 1964, Pub. L. No. 88-560, 78 Stat. 769 (1964) (codified in scattered sections of 12 and 42 U.S.C.) (tit. III, § 312: Rehabilitation Loans & Title VIII: pt. 1: Federal-State Training Programs); Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451 (1965) (codified in scattered sections of the U.S.C.) (tit. I: Rent Supplements; tit. VII, §§ 702, 703); Civil Rights Act of 1968, Pub. L. No. 90-448, 82 Stat. 73. (1968) (codified as amended in various sections of the U.S.C.) (tit. I, IV, VIII, XI, XIV); Housing and Community Development Act of 1969, Pub. L. No. 91-152, 83 Stat. 379 (1969) (codified as

Findings showed that communities throughout the country were suffering from overpopulation of lower-income persons in urban centers, but insufficient forms of investments, both public and private, were provided to these troubled areas.³⁶ Furthermore, the enrichment of the nation lay within the communities.³⁷ As a result of these findings, housing and community development legislation was drafted³⁸ to provide safe and economically stable communities.³⁹

In 1974, the Housing and Community Development Act (HCDA 1974)⁴⁰ was enacted, with the main thrust of the law embedded in Title I - Community Development Block Grants (CDBG).⁴¹ Under Title I, the new community development pro-

amended in scattered sections of 12 and 42 U.S.C.); Housing and Urban Development Act of 1970, Pub. L. No. 91-609, 84 Stat. 1770 (1970) (codified in scattered sections of the U.S.C.); Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633, 42 U.S.C. §§ 5301-20 (1974) (amended in 1987) (tit. I: Community Development Block Grants; tit. II: Assisted Housing; tit. III: Mortgage Credit Assistance: §§ 306, 307; tit. VI, VIII).

³⁶ See H.R. CONF. REP. NO. 1279, 93d Cong., 2d Sess. 1, 123 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4273, 4449 [hereinafter H.R. CONF. REP. NO. 1279].

³⁷ *Id.* at 123, *reprinted in* 1974 U.S.C.C.A.N. 4449. The Senate bill stated that "the Nation's welfare depends on establishing and maintaining viable urban communities." *Id.* Urban communities, for the most part, are the center of the smaller concentrations of people within the city. For the city to be viable as a whole, each of its parts must be assisted individually on a smaller scale.

³⁸ S. REP. NO. 693, 93d Cong., 2d Sess. 1, 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4273, 4273 [hereinafter S. REP. NO. 693]. The Senate Committee on Banking, Housing and Urban Affairs stated that "the main thrust of the proposed legislation is to consolidate and simplify existing programs, it contains authority for the development of several new programs, the most important of which is a new and far-reaching block grant community development program." *Id.*

³⁹ H.R. CONF. REP. NO. 1279, *supra* note 36, at 123, *reprinted in* 1974 U.S.C.C.A.N. 4449. The Senate's findings further provided that the primary objective of the law should develop viable urban communities by facilitating the creation of suitable living environments and encouraging economic opportunities, for low and moderate income persons; and the objective should also address the elimination of slums and blight and those conditions that are "detrimental to health, safety and welfare." *Id.* The Senate findings also provided that the primary objective focus on the "conservation and expansion of housing and housing opportunities, increased public services, improved use of land, increased neighborhood diversity, and preservation of property with special values." *Id.*

⁴⁰ 42 U.S.C. §§ 5301-20 (1974) (amended 1987) [hereinafter HCDA 1974].

⁴¹ See 42 U.S.C. §§ 5301-17, § 1453; 12 U.S.C. § 1701u. (1974) (amended 1987). The CDBG program promotes community development by channeling federal aid directly to local governments. UNITED STATES DEP'T HOUS. AND URBAN DEV., 1993 PROGRAMS OF HUD 7 [hereinafter 1993 PROGRAMS OF HUD]. CDBG funds are provided to entitled communities on a formula basis, which must "benefit low- and mod-

gram was consolidated with existing programs.⁴² Funds for the resulting unified program were directed toward "units of general local government."⁴³ Before the funds were granted to a unit of local government, the local government would prepare a plan that would delineate specific needs and budget requirements to achieve the community development goals.⁴⁴ The HCDA 1974, however, placed some restrictions on new housing construction with an option to focus on a more cost-effective method of affordable hous-

erate-income persons, or aid in the prevention or elimination of slums and blight; or address other community development needs that present a serious and immediate threat to the health and welfare of the community." *Id.* As per the statute, at least 70% of the entitlement funds must be expended on low- and moderate-income individuals for eligible activities, such as acquisition, rehabilitation, improvements to public facilities, public services, removal of architectural barriers and economic development. *Id.*

The CDBG program is described as the "workhorse of federal assistance" to the entitlement communities. Neal R. Pierce, *Has Common Sense Arrived at HUD?*, 25 NAT'L J. 643, 643 (Mar. 13, 1993). Congress finances the program with approximately \$4 billion annually. *Id.* The CDBG program is the last "flexible pool of federal money" that entitlements may use on eligible activities, ranging from revitalizing commercial areas to funding local community development corporations. *Id.*

⁴² See S. REP. NO. 693, *supra* note 38, at 6, *reprinted in* 1974 U.S.C.C.A.N. 4278. The community development program consolidation impacted the urban renewal program (authorized by the Housing Act of 1949 and amended by the Housing Act of 1954), the Model Cities Program (authorized by the Housing Act of 1966) and other various community development programs in 1954, 1955, 1961 and 1965. *Id.* at 1-2, *reprinted in* 1974 U.S.C.C.A.N. 4273-74.

The most prominent element was the new block grant program that provided local units of government with federal funds. *Id.* at 2, *reprinted in* 1974 U.S.C.C.A.N. 4274. The concept of giving federal assistance in the form of block grants is possible by "consolidating and simplifying ten categorical urban development grant programs and replacing them with a single, more comprehensive, flexible and soundly financed community development block grant program." *Id.* To ensure that the federal assistance is used, the block grant method is primarily promulgated to eliminate slums and blighted areas and to rehabilitate the nation's cities so that they may become more livable, attractive and viable places to dwell. *Id.*

⁴³ See 42 U.S.C. § 5302 (1974) (amended 1987). A unit of local government is generally defined as "any city, county, town, township, parish, village, or other general purpose political subdivision of a State"; any of the Pacific islands under U.S. laws; any combination of the above two; the District of Columbia; any Trust Territory; and any American Indian tribe or nation, including Eskimos or Aleuts in the U.S. *Id.*

⁴⁴ See S. REP. NO. 693, *supra* note 38, at 2, *reprinted in* 1974 U.S.C.C.A.N. 4274. To ensure that federal assistance is used to the maximum extent feasible, four specific requirements must be met: a four-year community plan that addresses housing needs; slum and blight prevention and the improvement of community services; a budget narrative; and a certification with respect to statutory compliance, citizen participation and housing goals and a one-year performance report. *Id.*

ing production, i.e., housing rehabilitation.⁴⁵

The federal government's role in providing affordable housing has evolved from the initial targeting of individual homes to creating viable communities.⁴⁶ Most recently, the government has stepped away from being the sole provider of affordable housing units and has imbued in the local communities some of that responsibility.⁴⁷ This trend will gain further strength by new legisla-

⁴⁵ The CDBG funds may be expended to rehabilitate privately- or publicly-owned residential units that are a segment of the local unit of government's housing stock. 24 C.F.R. § 570.202 (1991). Housing rehabilitation is best achieved by the grantee providing direct loans and grants to individual property owners. *Id.* § 570.202(b). Other forms of assistance to rehabilitate affordable housing are found in loan guarantees, subsidies to debt service, contractor bonding and the payment of costs incurred by housing-related insurance premiums. *Id.*

The emphasis on rehabilitation is further evidenced by the near-total restriction of new housing construction projects. *Id.* § 570.204. New housing construction is limited to certain eligible subrecipients, neighborhood-based nonprofit organizations (§ 301(d) Small Business Investment Companies and Local Development Corporations). *Id.* § 570.204(c)(1)-(3).

⁴⁶ NHA tit. I. The NHA sought to improve the standards and conditions of the nation's housing stock through renovation and modernization. *Id.* Not specifically targeted to provide direct assistance to individual homeowners, the NHA created institutions where individual homeowners could apply for rehabilitation funds or other financial institutions would be supported or insured by the federal government. *Id.*

The HCDA 1974, under Title I, however, focuses clearly on the community. 42 U.S.C. § 5301 (1987). The law expressly states that the provision of decent and suitable housing conditions for low- and moderate-income individuals is to be attained by developing viable communities. *Id.* The law further provides for the conservation and expansion of the housing stock, the expansion and improvement of community services, the revitalization of deteriorating or deteriorated neighborhoods and the restoration and preservation of special value properties. *Id.*

⁴⁷ See 42 U.S.C. § 5301 (1974). The HCDA 1974 provides for eligible activities aimed at reducing costs and facilitating private developments. *Id.* Congress recognized that affordable housing was more viable when the cost to the private developer was lowered. *Id.* This could be achieved by reducing land cost and improving sites, which would ultimately lower sale prices for single-family residences and monthly expenses of rental units. *Id.* The following activities are CDBG eligible: acquisition and clearance of sites, site improvements and payment of development soft costs. 24 C.F.R. § 570.201(a)-(g) (1991). Private development of affordable housing is stimulated and the associated costs are reduced when the local government undertakes public improvements at the development site. *Id.* § 570.201. CDBG funds may be expended by constructing or reconstructing utilities, parks, neighborhood facilities and recreation centers, improving streets, developing or revising local codes, ordinances and regulations and streamlining permit procedures. *Id.* §§ 570.201(c), 202(b)(6), 205(a)(4)(v).

Furthermore, a local unit of government increases its housing stock by acquiring, converting and rehabilitating existing non-residential structures into housing. 42 U.S.C. § 5301 (1974). Housing may become more affordable when the local unit of

tion passed in the 1990s which would establish a partnership between the federal and local governments to provide affordable housing to eligible recipients.⁴⁸

C. Cranston-Gonzalez National Affordable Housing Act of 1990

After an exhaustive three-year review of the nation's housing needs, Congress developed a new policy that would enable more American families to obtain housing.⁴⁹ The new policy was a direct result of a clear finding that the existing policy was not adequately addressing the country's housing needs.⁵⁰ In particular, the new policy was based upon the conclusion that the lack of affordable

government undertakes these activities, whereby those units are sold or leased at reduced prices to low- and moderate-income individuals. *Id.*

⁴⁸ See Neal R. Pierce, *At HUD, The Byword Is 'Partnership'*, 25 NAT'L J. 828, 828 (Apr. 3, 1993). HUD Secretary Henry G. Cisneros stated that the most effective position the federal government can hold is that of a "facilitator, expeditor [and/or] catalyst." *Id.* Additionally, the federal government must assist communities with their affordable housing commitments, or at a minimum, allow them the flexibility to produce the housing units alone. *Id.* As a consequence of reduced federal assistance, Cisneros feels that the partnership concept is an integral element that will allow HUD to accomplish its mission and communities to meet their own housing goals. *Id.*

Designed primarily as a block grant program for rehabilitating housing and neighborhoods, the HOME program's main focus is to foster and solidify public/private cooperation. Rochelle L. Stanfield, *Building Two-Way Streets in the Cities*, 25 NAT'L J. 593, 593 (Mar. 6, 1993). The public sector (cities and community development corporations) and the private sector (local banks and businesses) are the central actors, who come together to initiate and structure affordable housing developments. *Id.*

⁴⁹ S. REP. NO. 316, 101st Cong., 2d Sess. 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763 [hereinafter S. REP. NO. 316]. The three-year review effort included a wide range of suggestions from state and local housing officials, private developers, non-profit housing organizations, housing experts, researchers, tenant groups and other groups and individuals associated with providing housing. *Id.*, *reprinted in* 1990 U.S.C.C.A.N. 5764. It was evident from the beginning that Congress sought to draft legislation that would include insight and recommendations from this vast spectrum of individuals. *Id.* at 2-3, *reprinted in* 1990 U.S.C.C.A.N. 5764-66.

⁵⁰ *Id.* at 1-2, *reprinted in* 1990 U.S.C.C.A.N. 5764-65. Since 1980, federal assistance for affordable housing was ravaged by major budget cuts, program and policy neglect and mismanagement, and several cases of actual fraud and abuse. *Id.* Scandal had also severely tarnished HUD's effective control of the housing crisis. Therefore, new and "sweeping" legislation was needed to correct the neglect and abuse of the past decade. *Id.* The Senate Banking, Housing and Urban Affairs Committee bill focused on the findings and recommendations from the "building block" papers, the MIT Housing Policy Project, the Rouse/Maxwell Task Force, oral testimony and other written comments." *Id.* at 3, *reprinted in* 1990 U.S.C.C.A.N. 5765-66. See also Brodie, *supra* note 10 (commenting on the creation of the NAHA as a response to the nationwide shortage of affordable housing).

housing was the most significant housing need.⁵¹

As a means to respond to this need, President George Bush signed the NAHA on November 28, 1990.⁵² The NAHA was an enactment of S. 566,⁵³ which was passed in June 1990,⁵⁴ and included significant provisions from H.R. 1180,⁵⁵ passed in August 1990.⁵⁶ The NAHA established the allocation of block grants for the provision of affordable housing.⁵⁷ These block grant funds were specially allocated to fulfill the national housing goal.⁵⁸

⁵¹ See White, *supra* note 8, at 4-2 to 4-3. Many complex factors were ascribed to the lack of affordable housing, but none have impacted this undersupply as much as "static growth in real income, labor and construction costs, interest costs, urban growth patterns, and regulatory constraints." *Id.*

⁵² Statement By President George Bush Upon Signing S. 566, 26 WEEKLY COMP. PRES. DOC. 1930 (Dec. 30, 1990), reprinted in 1990 U.S.C.C.A.N. 6231-1 to 6231-4.

⁵³ S. 566, 101st Cong., 2d Sess. (1990) [hereinafter S. 566].

⁵⁴ *Id.*

⁵⁵ H.R. 1180, 101st Cong., 1st Sess. (1990).

⁵⁶ *Id.*

⁵⁷ Brodie, *supra* note 10. HOME funds are distributed to local units of government, as are funds allocated to entitlements under the CDBG program. *Id.* The provision for a block grant methodology decentralizes the federal government's role in providing the affordable housing. *Id.* The latter occurred as a direct response to scandals involving HUD officials. *Id.* See also Barry G. Jacobs, *Landmark Legislation Offers Housing Solutions*, NAT'L REAL EST. INVESTOR, Jan. 1991, at 30 (discussing the creation of new "block grant-type" funding program for the HOME program).

⁵⁸ NAHA § 101, 42 U.S.C. § 12701 (1990). The NAHA states that "every American family [should] be able to afford a decent home in a suitable environment." *Id.* Section 102 provides:

The objective of the national housing policy shall be to reaffirm the long-established national commitment to decent, safe and sanitary housing for every American by strengthening a nationwide partnership of public and private institutions able

- (1) to ensure that every resident of the United States has access to decent shelter or assistance in avoiding homelessness;
- (2) to increase the Nation's supply of decent housing that is affordable to low-income and moderate income families and accessible to job opportunities;
- (3) to improve housing opportunities for all residents of the United States, particularly members of disadvantage minorities, on a nondiscriminatory basis;
- (4) to help make neighborhoods safe and livable;
- (5) to expand opportunities for homeownership;
- (6) to provide every American community with a reliable, readily available supply of mortgage finance at the lowest possible interest rates; and
- (7) to encourage tenant empowerment and reduce generational poverty in federally assisted and public housing by improving the means by which self-sufficiency may be achieved.

The NAHA created new housing programs,⁵⁹ with the most promising being the HOME Investment Partnerships Program.⁶⁰ The HOME program is Congress' solution for creating public and private partnerships⁶¹ to provide affordable housing to very low- and low-income families.⁶² The new partnerships are envisioned as a nationwide system generating direct involvement in the development of housing by the local communities.⁶³ This is due partly to

NAHA § 102, 42 U.S.C. § 12702 (1990). See also Brodie, *supra* note 10, at 548-49 (discussing the HOME program's objective to implement programs to support the national housing policy).

⁵⁹ See NAHA tit. II; National Homeownership Trust Act, *id.* tit. III (establishing financial assistance to first-time homebuyers); Homeownership and Opportunity Through HOPE Act, *id.* tit. IV (providing federal assistance to low-income public housing residents to gain self-reliance with homeownership opportunities); Housing for Persons with Special Needs, *id.* tit. VIII (providing supportive housing opportunities for the elderly, handicapped, homeless and persons with AIDS). While the NAHA created new housing programs, it also eliminated a number of existing subsidy programs. Jacobs, *supra* note 57, at 30. The terminated programs include the Rental Rehabilitation Grant and Housing Development Grant programs, the Section 312 Rehabilitation Loan program and the Section 8 Moderate Rehabilitation program. *Id.*

⁶⁰ See NAHA §§ 201-89, 42 U.S.C. §§ 12721 - 12839 (1990).

⁶¹ S. REP. No. 316, *supra* note 49, at 19, reprinted in 1990 U.S.C.C.A.N. 5781. By creating HOME, HUD would be able to provide states, local governments and the private sector with a "one-stop shop" to assist in their achievement of their housing goals. *Id.* Strong partnerships would be formed because HUD would develop and refine (with the help and input of nonprofits and private developers) the most effective affordable housing model programs. *Id.* By forming a close working relationship with the nonprofit organizations, the local governments would be able to "stimulate innovation" and address the greatest needs more effectively in their own communities. *Id.* See also Brodie, *supra* note 10, at 548 (expressing that the intent of the HOME program is to encourage and nurture public and private partnership to develop affordable housing).

⁶² David Heinly, *First-Time Buyers Make Endangered Species List*, PROF. BUILDER, Oct. 1989, at 43. Karney Hodge, president of the National Council of State Housing Agencies, reported to the Senate Housing Subcommittee "that until Congress agrees on something better, such state and local public and private efforts will be needed to fill a niche in the market that would otherwise go unserved." *Id.* Private/public partnerships, including many states, had developed strategies to design and construct affordable housing, rather than simply providing the financing for these affordable housing projects. *Id.*

⁶³ S. REP. No. 316, *supra* note 49, at 12-13, reprinted in 1990 U.S.C.C.A.N. 5774-75. The law brings together the federal government and the local communities by creating investment partnerships. *Id.* Historically, fixed federal housing assistance programs are not resilient enough to adapt to changing or differing local conditions and circumstances. *Id.* at 13, reprinted in 1990 U.S.C.C.A.N. 5775. The intent of the law is to build "responsive housing institutions rather than to define a fixed natural program." *Id.* at 12, reprinted in 1990 U.S.C.C.A.N. 5774. Institutions are readily available to adapt to changing public purposes by gaining new skills, building capacity, devising creative solutions and avoiding or overcoming obstacles. *Id.* at 13, reprinted in 1990

the fact that the local governments are better equipped to assess and evaluate the needs of their localities.⁶⁴ Furthermore, the NAHA's general goals are more easily obtainable by allowing direct local involvement because local governments can better tailor their affordable housing policy to meet not only local goals, but national goals as well.⁶⁵

The HOME program provides eligible states and local municipal governments with allocated funds from HUD by formula.⁶⁶

U.S.C.C.A.N. 5775. Congress recognized that the needs of communities are different and unique, and that certain programs designed for one locality may not work as well in another locality, or may even have the potential to fail because the needs of communities are different and unique. *Id.* at 12, *reprinted in* 1990 U.S.C.C.A.N. 5774. *See also* Brodie, *supra* note 10, at 548 (explaining how local governments are better equipped to analyze and assess the local housing needs and design strategy to fulfill those needs).

⁶⁴ Long-term success in delivering affordable housing units are possible when the developers, in consultation with the local government, tailor projects to local housing needs. S. REP. NO. 316, *supra* note 49, at 13, *reprinted in* 1990 U.S.C.C.A.N. 5775. The local governments have a direct relationship with their housing needs and each is a master of its local conditions by implementing and designing different strategies to ameliorate housing deficiencies. *Id.*

⁶⁵ NAHA § 103, 42 U.S.C. § 12703 (1990). Section 103 provided that the purposes of the act are

- (1) to help families not owning a home to save for a down payment for the purchase of a home;
- (2) to retain wherever feasible as housing affordable to low-income families those dwelling units produced for such purpose with Federal assistance;
- (3) to extend and strengthen partnerships among all levels of government and the private sector, including for-profit and nonprofit organizations, in the production and operation of housing affordable to low-income and moderate income families;
- (4) to expand and improve Federal rental assistance for very low-income families; and
- (5) to increase the supply of supportive housing, which combines structural features and services needed to enable persons with special needs to live with dignity and independence.

Id.

⁶⁶ NAHA § 217, 42 U.S.C. § 12747 (1990). One percent of all HOME funds are reserved for Indian tribes, while 40% of the remaining funds are reserved for units of general local government and 60% for states. 1993 PROGRAMS OF HUD, *supra* note 41, at 13. Formula allocations greater than \$750,000 establish eligibility for local governments to receive HOME funds; where those that receive an allocation less than \$750,000, but at least \$500,000, must make up the difference up to \$750,000 with non-federal funds. *Id.* at 13-14. *See also* HOME PROGRAM GUIDE, *supra* note 6, at 6 (explaining the criteria by which states and local governments receive funding allocations).

Due to the investment partnership nature of the program,⁶⁷ the eligible states and local governments must match the amount of HOME funds with non-federal resources.⁶⁸ Eligible HOME-funded activities⁶⁹ to provide affordable rental and homeownership housing include: acquisition,⁷⁰ rehabilitation,⁷¹ new construction of housing,⁷² and tenant-based rental assist-

⁶⁷ NAHA § 221, 42 U.S.C. § 12751 (1990). One of the NAHA's general purposes is "[t]o extend and strengthen partnerships among all levels of government and the private sector, including for-profit and nonprofit organizations, in the production and operation of affordable housing." HOME PROGRAM GUIDE, *supra* note 6, at 3.

⁶⁸ NAHA § 220, 42 U.S.C. § 12750 (1990). The local units of government must directly contribute other non-federal funds to the affordable housing development project. HOME PROGRAM GUIDE, *supra* note 6, at 11. The match requirement will vary by the type of activity, such as for every four dollars of HOME funds used in a rehabilitation the match is one dollar (4:1). *Id.* at 12. The match requirements for rental assistance, acquisition, substantial rehabilitation (over \$25,000 per unit) and new construction is 4:1, 4:1, 3:1 and 2:1, respectively. *Id.* Match requirements must come from eligible sources, such as cash; the value of foregone interest, taxes, fees or charges; appraised value of land or real property; investments in on- or off-site improvements; and up to 7% of each year's allocation expended on administration. *Id.* See also 1993 PROGRAMS OF HUD, *supra* note 41, at 13 (discussing the match requirements for the HOME program).

⁶⁹ NAHA § 212, 42 U.S.C. § 12742 (1990). See also 1993 PROGRAMS OF HUD, *supra* note 41, at 13 (discussing the HOME program's eligible activities); HOME PROGRAM GUIDE, *supra* note 6, at 7-10 (delineating the various types of eligible HOME activities that a participating jurisdiction may undertake); 24 C.F.R. § 92.205(a) (1993) (listing the HOME-eligible activities).

⁷⁰ NAHA § 212(a)(1), 42 U.S.C. § 12742 (1990). While the NAHA does not expressly define the term acquisition, under the HOME program acquisition is generally referred to as the acquiring of improved or unimproved real property. 24 C.F.R. § 92.206(b) (1993). Furthermore, the regulations provide that any funds used for acquiring real property must be undertaken when the acquired land is associated with an eligible HOME project. *Id.* § 92.205(a)(2) (1993).

⁷¹ NAHA § 212(a)(2), 42 U.S.C. § 12742 (1990). The HOME program expressly defines rehabilitation in one standard, substantial rehabilitation, where the average project cost to the residential property exceeds \$25,000 per dwelling unit. 24 C.F.R. § 92.2 (1993). However, moderate rehabilitation is taken to be rehabilitation of residential property where the average cost per dwelling unit is less than or equal to \$25,000. *Id.* § 92.205(a)(1). Rehabilitation, both rental and homeownership occupied units, is seen as a cost-effective strategy for local governments to meet its housing needs. HOME PROGRAM GUIDE, *supra* note 6, at 8. In fact, a preference for rehabilitation is delineated by the statute. NAHA § 212(2), 42 U.S.C. § 12742 (1990).

⁷² NAHA § 212(a)(3), 42 U.S.C. § 12742 (1990). The term new construction is generally defined as any project that is newly built, or newly built housing that receives its first certificate of occupancy one-year prior to the participating jurisdiction's commitment of HOME funds, 24 C.F.R. § 92.205(a)(3); or any physical construction beyond the existing structure that may add one or more units. *Id.* § 92.205(a)(4) (1993). See also HOME PROGRAM GUIDE, *supra* note 6, at 8-10 (discussing new construction as an eligible HOME-funded activity if the following criteria are met: need

ance.⁷³ The eligible states and local governments may provide the affordable housing assistance, for HOME-eligible costs⁷⁴ in many forms,⁷⁵ including loans, advances, equity investments, interest subsidies and other forms of investment that HUD approves.

HOME program funds are exclusively intended to benefit low-⁷⁶ and very low-income families.⁷⁷ The rental housing provisions require that 90% of the HOME funds go to families whose incomes are at or below 60% of the area median income, and the remaining 10% to families at or below 10% of the area median

for new construction; furthering a neighborhood revitalization effort; and providing special need housing).

⁷³ NAHA § 212(a)(4), 42 U.S.C. § 12742 (1990). Tenant-based rental assistance is generally defined as rental assistance, which subsidizes the tenants contribution for the contracted rent, that a tenant may retain subsequent to moving to another unit that was not the original unit. 24 C.F.R. § 92.2 (1993). The rental assistance may also include security deposits to the landlord for a rental unit. *Id.* See also HOME PROGRAM GUIDE, *supra* note 6, at 7-8 (explaining how tenant-based rental assistance may be used when the participating jurisdiction certifies the activity is an essential element to the Comprehensive Housing Affordability Strategy (CHAS) and local housing and market conditions evidence such conditions and the assistance is available to persons on a public housing authorities § 8 waiting list).

⁷⁴ See, e.g., 24 C.F.R. § 92.206 (1993) (listing the HOME-eligible costs: development hard costs, acquisition costs, relocation costs, costs related to tenant-based rental assistance, administrative and planning costs, and Community Housing Development Organization operating expenses); *id.* § 92.214 (listing the prohibitive activities that may not be funded by HOME funds).

⁷⁵ NAHA § 212(b), 42 U.S.C. § 12742 (1990); 24 C.F.R. § 92.205(b) (1993).

⁷⁶ NAHA § 104(10), 42 U.S.C. § 12704 (1990). Section 104 defines low-income families as those

families whose annual incomes do not exceed 80 percent of the median income for the area, as determined by HUD with adjustments for smaller and larger families, except that HUD may establish income ceilings higher or lower than 80 percent of the median for the area on the basis of HUD findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low family incomes.

Id.

⁷⁷ NAHA § 104(9), 42 U.S.C. § 12704 (1990). Section 104(9) defines very low-income families as those families

whose annual incomes do not exceed 50 percent of the median income for the area, as determined by HUD with adjustments for smaller and larger families, except that HUD may establish income ceilings higher or lower than 50 percent of the median for the area on the basis of HUD findings that such variations are necessary because of prevailing levels of construction costs or fair market rents, or unusually high or low family incomes.

Id.

homeownership assistance, the NAHA requires at a minimum that the families be at or below 80% of the area median income.⁷⁹

Before a state or local government⁸⁰ may be awarded HOME funds, it must prepare and submit a Comprehensive Housing Affordability Strategy (CHAS).⁸¹ The CHAS is a new planning document⁸² that the states or local governments will use as a tool to assess their specific housing needs and to develop strategies to fulfill those needs.⁸³ The CHAS is not intended to be an exercise in fact finding or data aggregation, but an effective vehicle to target specific housing deficiencies within the participating jurisdiction's

⁷⁹ NAHA §§ 214(2), 215(b), 42 U.S.C. §§ 12744, 12745 (1990).

⁸⁰ See *supra* note 43 (definition for local or state governments).

⁸¹ 42 U.S.C. §§ 12701-708, 3535(d) (1990); see also 24 C.F.R. §§ 91.1-99 (1993) (delineating the regulations for the CHAS).

See NAHA § 105(a), 42 U.S.C. § 12705 (1990). This section expressly stipulates that a participating jurisdiction must submit a housing strategy (five-year) and annual updates, which HUD must approve. Title I of the NAHA mandates that the participating jurisdiction's CHAS submission must be approved by HUD as a requirement prior to application for direct assistance for specific HUD programs. UNITED STATES DEP'T HOUS. & URBAN DEV., INSTRUCTIONS FOR DEVELOPING AND COMPLETING A FIVE-YEAR COMPREHENSIVE AFFORDABILITY STRATEGY 3 (1992) [hereinafter CHAS INSTRUCTIONS]. Other programs may require the participating jurisdiction to include a "certification of consistency" with the approved CHAS. *Id.*

⁸² See NAHA § 105(b), 42 U.S.C. § 12705 (1990) (discussing the required contents of the new planning document). The CHAS is intended to motivate and challenge participating jurisdictions to develop comprehensive and long-term strategies to fulfill affordable housing goals, rather than be a prerequisite document for federal assistance or a HUD monitoring tool. CHAS INSTRUCTIONS, *supra* note 81, at 4. The CHAS is a comprehensive planning document that addresses the participating jurisdiction's affordable and supportive housing needs. *Id.* at 3. Citizen and community participation is encouraged throughout the entire CHAS development process. *Id.* This innovative approach affords the people of the community to directly assess and impact upon the participating jurisdiction's housing needs. *Id.* Once goals are identified, the community would establish strategic priorities and develop a plan to fulfill its needs. *Id.* at 3-4. The CHAS is seen as a housing investment management tool that steers the participating jurisdiction to those established priorities where the most assistance is required. *Id.*

⁸³ See NAHA § 105(b), 42 U.S.C. § 12705 (1990) (detailing specific requirements of housing and population needs within the participating jurisdictions that must be addressed by the CHAS). As required by the NAHA, the CHAS instructs "each local jurisdiction to describe its housing needs and market conditions, set out a five-year strategy that establishes priorities for meeting those needs, identify resources anticipated to be available for the provision of affordable and supportive housing, and establish a one-year investment plan that outlines the intended uses of resources." CHAS INSTRUCTIONS, *supra* note 81, at 3-4. The introduction of the CHAS makes modifications to two separate programs: for the CDBG program, the CHAS replaces the Housing Assistance Plan (HAP) and for the McKinney Homeless Assistance Programs, the CHAS replaces the Comprehensive Homeless Assistance Plan (CHAP). *Id.*

locale.⁸⁴ With the completed CHAS, the government entity must then prepare a HOME program description that will describe how the HOME funds will be used to provide affordable housing within the community.⁸⁵

The HOME program also provides funds to Community Housing Development Organizations (CHDOs)⁸⁶ for the facilitation of affordable rental or homeownership housing.⁸⁷ Lastly, the HOME program provides competitive funds to Indian tribes.⁸⁸ The funds to the Indian tribes may be used to provide affordable rental or homeownership housing through acquisition, rehabilitation, new

⁸⁴ See NAHA § 105(b), 42 U.S.C. § 12705 (1990) (discussing the CHAS content requirements that will address conditions intimate with the local participating jurisdiction). The focus of the CHAS is based upon data analysis and strategy development, not data collection and presentation. CHAS INSTRUCTIONS, *supra* note 81, at 3. Data evidencing housing needs and conditions are elements that are analyzed and assessed to enable the participating jurisdiction to draft a CHAS that is responsive and effective to its particular housing needs. *Id.*

⁸⁵ See 24 C.F.R. § 92.61 (1993) (explaining the submission requirements, contents and certifications which must be included in a participating jurisdiction's HOME program description). The participating jurisdiction must submit a program description to HUD for approval before any HOME funds may be released. CHAS INSTRUCTIONS, *supra* note 81, at 3. The program description must contain the following items:

For local governments, the estimated use of HOME and matching funds for each eligible activity; [f]or States, a description of how it plans to use and distribute HOME funds; [t]he amount of HOME funds that will be reserved for [Community Housing Development Organizations] and a description of how the participating jurisdiction will work with the [Community Housing Development Organizations]; [c]ertifications regarding compliance with other statutory requirements and Federal laws; and [c]ertification of compliance with its CHAS.

Id. at 6.

⁸⁶ 24 C.F.R. § 92.2 (1993). Generally, a Community Housing Development Organization (CHDO) is a private nonprofit organization: with (1) IRS § 501(c) tax-exempt status; (2) has one-third of its governing board members as residents of a low-income neighborhood; (3) is not an instrumentality of a public body; and (4) that evidences capacity of similarly completed projects and have at least one year of experience serving the community within the particular participating jurisdiction. *Id.*

⁸⁷ NAHA § 231, 42 U.S.C. § 12771 (1990). Local governments are required to reserve at a minimum 15% of its HOME allocation for CHDOs. 1993 PROGRAMS OF HUD, *supra* note 41, at 13. The CHDOs may use the funds to own, develop or sponsor affordable housing projects. *Id.* See HOME PROGRAM GUIDE, *supra* note 6, at 13 (discussing the role of CHDO within the community to produce or sponsor affordable housing developments).

⁸⁸ NAHA § 217(a)(2), 42 U.S.C. § 12747 (1990). Generally, the term Indian tribe is defined as "any Indian tribe, band, group, or nation," which includes "Alaskan Indians, Aleuts and Eskimos and any Alaskan Native Village of the United States." 24 C.F.R. § 92.2 (1993).

construction of housing and tenant-based rental assistance.⁸⁹

III. *The Decline in Affordable Housing*

The supply and quality of the nation's affordable housing stock continued to spiral downward.⁹⁰ Many dreadful inner-city

⁸⁹ See *supra* note 69 (describing the eligible HOME-funded activities for Indian Tribes).

⁹⁰ See German, *supra* note 10, at 36. Two panels, the National Housing Task Force (chaired by Maryland developer James Rouse and Fannie Mae Chairman David Maxwell) and the National Low-Income Housing Preservation Commission (chaired by former Rep. Henry Reuss (D-Wis.) and former HUD Secretary Carla Hills), concluded that the nation was suffering from a severe housing crisis. *Id.* The two panels found that between 1980 and 1987, the homeownership rate decreased from 65.6% to 63.8%, that many renters were paying more than 50% of their income to rent and that approximately 400,000 low-income units would be gentrified (converted to high-cost housing). *Id.* A study by the Chicago Title and Trust Company reported that housing costs would increase 10.5% (an average national net increase) and borrowing costs would increase 5.5%. Heinly, *supra* note 62, at 43. The Chicago Title and Trust Co. study offered no relief or hope in the near future. *Id.*

In 1985, 4.3% (nearly two million families whose income exceeded 80% of the median income) of the population lived in substandard housing. MICHAEL A. STEGMAN, *MORE HOUSING, MORE FAIRLY* 8 (1991). Statistics revealed that in 1987, approximately 1,096,000 substandard units were located in central cities and 1,396,000 substandard units were in a combination of suburban communities and non-metropolitan areas. *Id.* Furthermore, two-thirds of those families lived below the poverty level with a quarter of those people housed in substandard units. *Id.*

As operating costs, abandonment and gentrification increased, the shortage of existing affordable housing rental units for low- and moderate-income families had also increased. MARGERY A. TURNER & VERONICA M. REED, *HOUSING AMERICA* 2 (1990). For poor renter households, those units that rented for less than \$300, decreased from "over 10 million [units] in 1974 to 8.5 million in 1985." *Id.* at 30-31.

Particularly, very low-income households amount to three times greater than the amount of available units that rented for less than \$300. *Id.* at 31. Some affordable housing units were in such drastic disrepair that they were uninhabitable, and therefore, they were removed from the housing stock inventory. *Id.* at 32. A recent study by the National Housing Preservation Task Force predicted that by 1995, 1.2 to 1.5 million assisted housing units would be lost, and by the year 2000 the total will reach 1.8 million units. *Id.* at 32.

Statistics have shown that between 1978 and 1985, the number of poor families (those at or below 50% of the median income for that area) increased 25% from 10.5 million to 13.3 million. LARRY YATES, *LOW INCOME HOUSING IN AMERICA* 7 (1990). Another significant statistic reveals that between 1970 and 1985, the number of units that rented for less than \$250 a unit fell from 9.7 million to 7.9 million units. *Id.*

Further compounding the declining supply of affordable housing units was the "destruction and conversion of [these] units." ARLENE ZAREMBKA, *THE URBAN HOUSING CRISIS* 3 (1990). Between 1973 and 1979, it was reported that 885,430 units out of 973,000 rental units, which rented for less than \$200 a month, were demolished or abandoned. *Id.* From 1970 to 1980, "[one] million single room occupancy units were converted to condominiums or destroyed[.]" *Id.* Half a million low-income housing

tales stemmed from the lack of safe and decent affordable housing, both for rental housing and homeownership.⁹¹ Issues of poverty, discrimination, neglected inner-city youth and affordable housing were tabled for many years by both federal and local governments.⁹² The 1992 riots in Los Angeles opened many eyes to the stifling accounts of human misery and despicable housing conditions.⁹³

The low-income rental housing market had been in sharp decline since the 1970s due to the rapid increase in the population of poor families⁹⁴ and a decrease in the low-rent housing

units were removed from the available affordable housing stock register annually, because of abandonment, conversion, demolition or privatization of federally subsidized housing projects. *Id.*

The loss of affordable housing units was not the only problem faced by these households; the quality of the remaining housing was far from standard. *Id.* It was reported in 1985 that 7.4 million low-income units had severe or moderate quality problems and that 5.3 million of this total was located within the central cities or suburbs. *Id.* at 4. See also S. REP. NO. 332, 102d Cong., 2d Sess., 4-8 (1992) (reporting on the nation's affordable housing crisis) [hereinafter S. REP. NO. 332]; N. Linda Goldstein & Diane E. Dorius, *The Challenge of Affordable Housing*, PROBS. & PROP., Mar.-Apr. 1992, at 47 (discussing the drastic housing conditions for low- and moderate-income individuals and families).

⁹¹ S. REP. NO. 332, *supra* note 90, at 2. At a kickoff hearing on the housing reauthorization bill sponsored by the Subcommittee on March 6, 1992, James Rouse, Chairman of the Enterprise Foundation, eloquently espoused the brutal conditions in which millions of American people live. *Id.* Rouse vividly described the dilapidated housing in the run-down neighborhoods and the hopelessness of any bright future etched on the faces of the residents of these neighborhoods. *Id.*

⁹² *Id.* at 3. Based on the testimony gathered from extensive hearings across the country, it became evident to the Subcommittee that "affordable housing for all Americans is an integral part of the solution to the nation's urban crisis" and that the issues should not be tabled by government. *Id.* Furthermore, Rouse stated that "housing inherently adds value to the public investment[,] and more than just job creation, housing fulfills a social purpose. *Id.* at 4. Workers and their families who have a safe and decent housing have a stable living environment. *Id.*

⁹³ S. REP. NO. 332, *supra* note 90, at 4. The Senate Report stated that "the Los Angeles riots provided an added impetus for the passage of housing reauthorization legislation," and that "[t]he committee believes that the events in Los Angeles have brought us to a crossroads in the nation's response to the urban crisis." *Id.* See, e.g., Kellam, *Policy Fixes*, *supra* note 16, at 2288 (explaining the significance of the riots in motivating Congress to respond to the urban housing problem); Kellam, *Inner City*, *supra* note 2, at 1803 (explaining how the riots in L.A. highlighted the lack of affordable housing in the urban centers).

⁹⁴ S. REP. NO. 332, *supra* note 90, at 5. The Senate Report 332 stated that "the number of low income renters is growing. In 1974, 9 million households had incomes that fell below official poverty thresholds. By 1989, 12.3% (11.5 million) of the nation's households lived in poverty. Between 1974 and 1989, the number of poverty-

stock.⁹⁵ Furthermore, there was an increase in the income gap between those who were defined as the "rich" and the "poor."⁹⁶ Consequently, the disparity between the supply and demand⁹⁷ for affordable housing forced rents to increase,⁹⁸ added high rent burdens,⁹⁹ caused severe overcrowding and evictions¹⁰⁰ and subsequently increased the number of homeless persons and families.¹⁰¹

level households . . . jumped 42% to 8.8 million." *Id.* These poor households were housed in rental units, which represented an increase of 62% since 1974. *Id.*

⁹⁵ *Id.* at 4-5. From 1974 and 1989, the supply of rental housing for families that earn \$10,000 or less decreased by 2.6 million. *Id.* at 4. Affordable housing stock is lost because "rent payments of \$250 are insufficient to cover the basic costs of maintaining and operating housing. The failure to break even leads owners to disinvest, which causes units to deteriorate, and which eventually results in units being lost from the housing stock." *Id.* at 5. See Heinly, *supra* note 62, at 43 (explaining the recent over-building of the rental sector and the loss of investor tax incentives); Jacobs, *supra* note 57, at 30 (discussing the loss of affordable housing stock through the termination of low-income restrictions when a owner pays off the mortgage to convert those units to market rental or condominiums).

⁹⁶ S. REP. NO. 332, *supra* note 90, at 5.

⁹⁷ *Id.* The disparity between the supply and demand for affordable housing is attributable to

[t]he shortfall between affordable housing units (renting for less than \$250) and the number of needy low income families was 4.1 million units in 1989. The number of affordable housing units (renting for \$250 or less) fell steadily from over 8.6 million in 1974 to only 6.0 million in 1989. Of the 2.6 million units vacant in 1989, only one third (987,000) would have rented at levels affordable to poor renters.

Id.

⁹⁸ *Id.* The lack of affordable housing causes a higher contribution of a family's income to pay for rent. *Id.* The Senate Report stated that "[i]n 1989, two-thirds of all poor renter households remained outside the housing assistance network and, 77% of these unassisted poor households paid more than 50% of their income for housing[.]" and "[t]he cost of renting a one-bedroom unit is beyond the reach of at least one-third of renter households in every single state." *Id.*

⁹⁹ *Id.* Renter households that incur high rent burdens, those which are defined as " 'worst-case,' such as families that pay 50% or more of the family income for rent, live in substandard housing, or both, are increasing." *Id.* Worst-case very-low income households number 5.1 million, contrasting the number of worst-case households, 2.5 million, in 1974. *Id.*

¹⁰⁰ *Id.* As a consequence of high rents, large families will rent in smaller units. *Id.* However, many families are unable to move to smaller/cheaper units due to numerous reasons, and therefore, many face eviction. *Id.* See also Heinly, *supra* note 62, at 43 (arguing the deep concern over the federal deficit that is barring Congress from appropriating money to federal subsidies and new assistance programs).

¹⁰¹ S. REP. NO. 332, *supra* note 90, at 5. As a consequence of the declining supply of affordable housing, the number of homeless persons and families has risen. *Id.* A report by the National Alliance to End Homelessness "estimates that as many as 736,000 persons may be homeless on a given night and between 1.3 million and two

Similarly, the homeowner market declined as steadily as the rental housing sector.¹⁰² Within the homeowner segment of the market, the number of first-time homebuyers under the age of twenty-five declined the most.¹⁰³ Contrary to the effects of reduced purchase prices and low interest rates,¹⁰⁴ homeownership continued to be a burdensome endeavor because of increasing housing costs that out-paced increases to income.¹⁰⁵

Due to the widening gap between income and housing costs, the poorer families who sought homeownership experienced the heaviest burden.¹⁰⁶ Thus, these families were found to be more

million persons may experience homelessness at some point during the year." *Id.* at 5-6.

¹⁰² *Id.* at 6. The 1980s also showed a significant decrease in homeownership from 65.6% in 1980 to 64.1% in 1990. *Id.* It was reported that "[t]his was the first time the homeownership rate had dropped since the beginning of World War II. While the percentage of decline may appear small, it means that nearly 2 million fewer families own homes today." *Id.* See also David Heinly, *Affordable Housing: Has Government Reneged?*, PROF. BUILDER, Oct. 1989, at 38 (evidencing that a 1.7% drop in homeownership was an indicator that the purchases of homes had declined; homes across the U.S. are, for the most part, still owner-occupied).

¹⁰³ S. REP. NO. 332, *supra* note 90, at 6. The Report delineated that "in households under the age of 25, the homeownership rate fell from 21.3% to 15.3% and in households aged 30-34, the homeownership rate fell from 61.1% to 51.5%. In black households, the homeownership rate fell from 43.8% to 42.4%." *Id.* See also Heinly, *supra* note 102, at 38 (evidencing support that the high cost of purchasing a home for potential, young homebuyers is caused by insufficient resources to afford a downpayment and insufficient income to qualify for a mortgage).

¹⁰⁴ S. REP. NO. 332, *supra* note 90, at 6. In the two decades prior to 1990, the average purchase price for a home increased 21% as compared to the average income of a first-time homebuyer, which decreased 7%. *Id.* It is estimated that only 17% of the renters in the nation currently have the financial resources to post a down payment and qualify for a mortgage. *Id.* See also Heinly, *supra* note 62, at 43 (discussing how traditional resources for first-time homebuyers, such as tax-free mortgage revenue bonds, federal mortgage insurance, secondary-market mortgages, low-income housing tax credits and mortgage interest deductions, have been scaled back, making first-time homebuying more difficult).

¹⁰⁵ S. REP. NO. 332, *supra* note 90, at 6. The purchase price of housing had increased at a rate greater than that of a person's income across the nation. *Id.* It was reported that "[f]rom 1974 to 1990, real house prices soared 127.4% in Los Angeles while real incomes rose only 5.3%. In Boston, house prices jumped 81.1% while incomes edged up only 3.2%." *Id.*

¹⁰⁶ *Id.* Potential homeowners experienced housing cost burdens, especially poor families who attempted to move up the housing ladder from rental housing. *Id.* The Senate Report stated that

[n]early one-third of all homeowners - 31 percent - paid at least 70 percent of their incomes for housing in 1985. Nearly half paid at least 50 percent of their incomes on housing, while 73 percent paid at least 30 percent of their income on housing. Poor homeowners faced high costs for housing

prone to poverty and substandard living conditions and were forced back into rental housing.¹⁰⁷

The economic recession,¹⁰⁸ compounded by ten years of federal idleness,¹⁰⁹ amplified the problems of the housing crisis.¹¹⁰ Federal assistance was nearly nonexistent; it was merely redirected from assisting new families to preserving existing housing stock.¹¹¹ The federal government recognized the need for decent and affordable housing for very low- and low-income families and set into motion a device which would reverse the declining quality of hous-

expenses other than just their mortgage payments. The typical poor homeowner household paid 35 percent of its income for fuels, other utilities, real estate and insurance.

Id. at 6-7; see also Goldstein & Dorius, *supra* note 90, at 48 (discussing the severe cost burdens faced by low-income families seeking adequate housing).

¹⁰⁷ S. REP. NO. 332, *supra* note 90, at 7. The effects of high housing costs have significantly impacted poor families, as many had fallen into poverty, were housed in substandard conditions and an increasing number of former homeowners had entered rental housing. *Id.* Poor households increased from 10.5 million to 13.3 million from 1978 until 1985. *Id.* Poor homeowners, numbering 1.3 million, pay 70% of their income towards housing, while 2.9 million have paid in excess of 50% of their income towards housing. *Id.* It was reported that "18.7% of poor homeowners failed to meet the minimum standards for structurally sound units." *Id.*

¹⁰⁸ *Id.* at 8. The recession that this country experienced, during the mid-eighties, had a strong impact upon the affordable housing crisis. *Id.* As revenues collected by states dwindled, funding for social services was significantly slashed. *Id.* These cut-backs terminated many programs that provided general assistance and homeless emergency housing. *Id.*

¹⁰⁹ *Id.* at 7. New federal housing assistance was significantly reduced in the 1980s. *Id.* The Senate Report stated "[i]n 1980, \$26.7 billion (in budget authority) was appropriated for low-income housing assistance. If these funding levels had been maintained during the past decade, \$44.4 billion would have been provided in 1991. Yet, in that year, only \$8.5 billion was appropriated, a cut of 82% in real terms." *Id.* See, e.g., Heinly, *supra* note 62, at 43 (explaining the need for creative methods to finance affordable housing projects because the gap between home sale prices and family incomes has widened); Heinly, *supra* note 102, at 38 (describing how deep cuts in federal aid includes the elimination of numerous housing programs and the creation of localized financing packages by local governments); Goldstein & Dorius, *supra* note 90, at 48 (stating that the federal government neglected housing issues and aid for nearly 10 years).

¹¹⁰ S. REP. NO. 332, *supra* note 90, at 7. Families receiving federal assistance for housing declined sharply in the 1980s, from 350,000 families receiving assistance in 1977 to 68,700 in 1990. *Id.*

¹¹¹ *Id.* at 7. New families did not receive assistance due to the federal government's current policy of applying federal assistance to the maintenance of existing inventory. *Id.* Between fiscal years 1980 and 1992, the annual appropriation for existing inventory maintenance rose from less than 20% to almost 80%, respectively. *Id.* (citing S. REP. NO. 107, 102d Cong., 1st Sess. 37-78 (1991)).

ing in the U.S.¹¹²

IV. *Legislative History of the Housing and Community Development Act of 1992*

In July 1992, Congress assertively put the Bush Administration on notice that it was packaging a major bipartisan bill.¹¹³ Among its various components,¹¹⁴ this bill was intended to add new programs to the NAHA and relieve implementation restrictions on the HOME program.¹¹⁵

H.R. 5334, introduced and referred to the House Banking, Finance and Urban Affairs Committee (HBFUAC) on June 5,

¹¹² German, *supra* note 10, at 36. The Rouse-Maxwell National Housing Task Force and the National Low-Income Housing Preservation Commission introduced clear evidence that the U.S. was in the midst of "its worst housing crisis in decades." *Id.* Support for housing by the federal government declined as a consequence of budget cuts, policy mismanagement and criminal abuses. S. REP. NO. 316, *supra* note 49, at 1-2, *reprinted in* 1990 U.S.C.C.A.N. 5764-65. Congress, therefore, enacted the NAHA, setting forth a new national housing policy that would provide affordable housing to very low- and low-income families. *Id.* at 1, *reprinted in* 1990 U.S.C.C.A.N. 5764. The NAHA was extolled by many as the most meaningful initiative for housing in this country since the 1949 National Housing Act. German, *supra* note 10, at 36.

However, the NAHA, along with the HOME program, was strapped by a complex set of regulations which made the program nearly impossible to implement expeditiously. Katz, *supra* note 5, at 918. In order to assist the stumbling HOME program, Congress prepared a bill, recommended by the Rouse/Maxwell Task Force, which would reauthorize and revise the HOME program (and other federal programs) and would allow local governments to facilitate the expansion of their affordable housing stock. S. REP. NO. 316, *supra* note 49, at 9, *reprinted in* 1990 U.S.C.C.A.N. 5771.

¹¹³ Kellam, *Inner City*, *supra* note 2, at 1803. Senator Alfonse M. D'Amato (R-N.Y.) said, "We want a housing bill this year." *Id.* On May 20, 1992, the House Banking Subcommittee on Housing and Community Development approved a housing reauthorization bill by a 22-13 vote. 138 CONG. REC. D607 (daily ed. May 20, 1992). *See also* Kellam, *Bill Wrangling*, *supra* note 16, at 1452 (tallying the votes of the subcommittee).

¹¹⁴ Kellam, *Inner City*, *supra* note 2, at 1803-04. *See also* Kellam, *Policy Fixes*, *supra* note 16, at 2288 (discussing the bill proposals of the House and the Senate and explaining the differences between the two); Kellam, *Bill Wrangling*, *supra* note 16, at 1453 (explaining some of the key amendments that the House Banking Subcommittee approved).

¹¹⁵ Kellam, *Policy Fixes*, *supra* note 16, at 2288. Both the House and the Senate had agreed that the Democratic-sponsored HOME program contained program design flaws and suffered from a lack of funds to properly implement the program. *Id.* The head of the National Community Development Association, Reggie Todd, said that "municipalities are having trouble implementing HOME because of confusion over federal regulations - especially in the area of funding." *Id.*

1992,¹¹⁶ was approved by the HBFUAC on June 16, 1992.¹¹⁷ The major components of the House version of the bill included HOME matching funds, HOME construction restrictions, Federal Housing Authority changes, the Youth Build job training program and mixed public housing for the elderly and disabled.¹¹⁸

As evidenced by its commitment two years earlier to work with the Bush Administration and develop a bipartisan bill, the Senate drafted its own version of the bill on June 18, 1992.¹¹⁹ Following

¹¹⁶ 138 CONG. REC. H4334 (daily ed. June 5, 1992). The version introduced by the House was stated by House Banking Committee Chairman Henry B. Gonzalez (D-Tex.) to be a "modest response to the rising needs of the nation's distressed cities. Nonetheless, we can't afford to continue to turn our backs." *Inner City*, *supra* note 2, at 1803.

¹¹⁷ 138 CONG. REC. D731 (daily ed. June 16, 1992).

¹¹⁸ See Kellam, *Inner City*, *supra* note 2, at 1804. The original HOME matching funds requirements ranged from 25% to 50% for the various housing activities. *Id.* The committee bill implemented a flat match of 10% for all HOME eligible activities and provided match liability waivers to financially distressed participating jurisdictions. *Id.*

The NAHA gave a preference to the rehabilitation of substandard housing using HOME funds, while the committee bill entirely eliminated the new construction restriction. *Id.* The bill allowed participating jurisdictions to undertake these activities, without being mired down in the technical requirements. *Id.*

The 1990 omnibus bill mandated that buyers absorb closing and annual insurance fees when buying a home, while the committee bill removed the requirement and allowed homebuyers to finance a percentage of these costs from the FHA loan. *Id.*

The House version included a new subtitle to the HOPE program (HOPE offered public housing tenants the opportunity to purchase the public housing units). The new subtitle empowered chapters with federal construction jobs to employ disadvantaged youths to expand the work force, and thereby, supply additional affordable housing through new construction. *Id.*

Another new provision that the committee bill presented allowed owners of elderly housing an option to maintain the preference to rent to elderly tenants, or to allow disabled non-elderly tenants to occupy those units that were once strictly elderly units. *Id.*

The House was not united when it approved H.R. 5334 by voice vote. *Id.* Furthermore, it resoundingly rejected almost all of Kemp's new ideas and slashed the Bush Administration's funding level requests by more than half. *Id.* at 1803.

¹¹⁹ *Id.* The Senate version of the reauthorization bill appeared to vacillate with the House version in nearly all of the major components. *Id.* The Senate bill also provided for a flat match for HOME matching funds; however, its requirement called for a 25% match, instead of the House's 10% match. *Id.* at 1804. The Senate also concurred with the House that participating jurisdictions in financially distressed localities may apply for waivers. *Id.*

With respect to new construction, the only provision the Senate furthered was to allow new construction to be eligible in rural areas. *Id.* Furthermore, the Senate version also established a Youthbuild program in conjunction with the HOPE pro-

an unlikely path that nearly failed to materialize, the Senate Banking, Finance, Housing and Urban Affairs Committee (SBFHUAC) unanimously approved the bill by voice vote.¹²⁰ This version of the bill was critical of the Administration's intent to eliminate the federal government's practice of completely subsidizing affordable housing.¹²¹ On June 23, 1992, the Senate introduced S. 3031 and it was reported without amendments on July 23, 1992.¹²²

Nevertheless, beginning on July 30, 1992, the HBFUAC released a report containing many amendments to the House bill.¹²³ On August 5, 1992, the House bill appeared stalled, due to two failed attempts to adopt the amendments.¹²⁴ However, a third attempt finally improved the prospects of a new and ambitious hous-

gram. *Id.* However, the Senate version applied funding priorities to local chapters that had established existing partnerships with federal programs or those chapters that were funded by state project or rehabilitation funds. *Id.*

The Senate bill included provisions that the House version did not include. The Senate drafted provisions for the removal of lead-based paint in housing, thereby preventing the poisoning of children in private, public and assisted housing. *Id.* However, the Senate bill did not make any alterations to the FHA reforms in the NAHA, which required first-time homebuyers to pay for closing costs and annual insurance fees. *Id.* The Senate also temporarily tabled the issue of mixing elderly residents in public housing with disabled non-elderly residents until compromise provisions were agreed upon. *Id.*

The single issue that appeared to be in complete conflict between the two bills was Kemp's "Choice in Management" Initiative. *Id.* The "Choice in Management" Initiative was Kemp's and the Administration's early attempt at allowing public housing tenants a choice in the ownership and management of their public housing units. *Id.* The House Subcommittee rejected the initiative and entirely omitted it from the committee bill. *Id.* The Senate subcommittee, however, compromised on Kemp's initiative and funded it as a demonstration program over the next two years at 15 public housing units across the nation. *Id.*

¹²⁰ See Kellam, *Inner City*, *supra* note 2, at 1803. The bill appeared doomed not to reach the floor because on the eve of the vote, 96 amendments to the bill were drafted. *Id.* However, many members worked around the clock to draft a compromise that the committee approved, and in the end, the markup lasted less than two hours. *Id.*

¹²¹ See *supra* note 108 (discussing the dwindling of federal funds).

¹²² S. REP. NO. 332, *supra* note 90, at 1. The Committee reported favorably to "reauthorize, revise and extend federal housing and community development programs." *Id.*

¹²³ H.R. REP. NO. 760, 102d Cong., 2d Sess. 101-13 (1992), *reprinted in* 1992 U.S.C.A.N. 3281, 3381-93 [hereinafter H.R. REP. NO. 760]. The critical amendments to the House bill, which was passed in lieu of the Senate's bill, included administrative costs, the CHDO definition, resale restrictions, qualification of affordable rental housing, tenant-based rental assistance, homeless activities, development of land banks, manufactured housing and the CHAS. *Id.*

¹²⁴ 138 CONG. REC. H7387, H7472-73 (daily ed. Aug. 5, 1992). The House rejected

ing policy that seemed more likely when the House finally adopted the amendments to H.R. 5334.¹²⁵ Six days later, the bill was placed on the Senate calendar.¹²⁶

With the summer recess looming and all the negotiating and deal-making apparently completed, the Senate awaited S. 3031.¹²⁷ The bill soon hit the Senate floor, and as quickly as it appeared, it left the floor unpassed, because it was put in limbo by an unidentified Republican.¹²⁸ Senate Majority Leader Mitchell desperately attempted to force passage of the Senate bill by emphasizing the Administration's support for it.¹²⁹ Many senators were dismayed by this action and were apprehensive as to what course the bill would follow when the Senate returned in September.¹³⁰ The events of August 12 seemed to negate any efforts by HUD Secretary Jack Kemp to ensure that the Senate bill would pass by informing the SBFHUAC that its version would be recommended to the President.¹³¹

the amendments to the bill by a vote of 268 to 153. *Id.* at H7493. This was followed by another defeat on the same day with the vote 147 for, 277 against. *Id.* at H7493-94.

¹²⁵ The House passed the bill by a vote of 369 to 54. *Id.* at H7494. *See also* Kellam, *Bipartisan Support*, *supra* note 16, at 2358 (voting 369 to 54, the House overwhelmingly showed its approval of the bill).

¹²⁶ *See* Kellam, *Bipartisan Support*, *supra* note 16, at 2358.

¹²⁷ *Id.* Bill sponsors Roukema, Frank and Gonzalez were relieved that the bill had a strong bipartisan backing, because S. 3031 emerged from a "sharply divided" subcommittee conference that voted along party lines to approve the bill. *Id.*

¹²⁸ Susan Kellam, *Lone Republican Short Circuits Housing Bills in Senate*, 50 CONG. Q. 2451, 2451 (Aug. 15, 1992). Speculation as to why the bill was "derailed" at the last moment rebounded throughout the Senate, with one possibility being the intense dislike for the HUD Secretary, Jack Kemp. *Id.* By stalling the bill, Kemp was precluded from flaunting his public housing initiative at the Republican convention. *Id.*

¹²⁹ The Bush Administration supported the Senate version of the reauthorization bill, because, as it did two years previously, the Senate created the NAHA in conjunction with the Administration's recommendations, Kellam, *Inner City*, *supra* note 2, at 1803, and "[the Senate] version of the [new] bill . . . [did] not attempt to alter FHA rules and it [did] advance the HOPE concept of getting the federal government out of the business of subsidized housing." *Issue: Housing Reauthorization*, 50 CONG. Q. 2626, 2626 (Sept. 5, 1992).

¹³⁰ Kellam, *supra* note 128, at 2451. Alan Cranston (D-Cal.), chairman of the Senate Banking Subcommittee on Housing and Urban Affairs, and other members of the Senate, especially Christopher Bond (R-Mo.), were frustrated by the bill's course of action. *Id.* Senate Majority Leader Mitchell feared that the delay would encourage unwanted amendments, especially on unrelated issues. *Id.* This scenario appeared to mimic a bill that was stalled on July 4 and subsequently trudged through four days of additional debate. *Id.*

¹³¹ *Id.* The Senate bill provided Kemp with programs that would achieve the administration's (and his) intention of removing from the federal government the onus

To have the bill passed within the remaining time of the 102nd congressional session, the Senate requested a conference so that the House Bill would contain elements of the Senate bill.¹³² H.R. 5334 was passed on September 10, 1992,¹³³ in lieu of S. 3031, after it was amended to contain the Senate's modifications.¹³⁴ The conferees reached an agreement on October 2, 1992,¹³⁵ and filed a House Report.¹³⁶ The report, dated October 5, 1992, documented the bill's modifications and the Committee's comments.¹³⁷

On that same day, the House agreed to the Conference report.¹³⁸ The Senate cleared the bill by voice vote on October 10, 1992.¹³⁹ After tense negotiations and politicking, President Bush

of providing subsidized housing and more choice to public housing residents with respect to housing management and ownership. *Id.* On August 7, 1992, Kemp sent a letter to the Chairman of the Senate Banking Committee, Donald Riegle, Jr. (D-Mich.), and the ranking minority member, Jake Garn (R-Utah), stipulating that the Senate crafted a bill which "I can recommend [to] the president [to] sign." *Id.*

¹³² See Kellam, *Policy Bill Supporters*, *supra* note 2, at 2717. Unlike the events in August, the Republicans did not derail the bill again. *Id.* They agreed, however, that the "differences could be worked out in conference." *Id.*

¹³³ 138 CONG. REC. S13,259 (daily ed. Sept. 10, 1992).

¹³⁴ *Id.* The bill contained the Senate modifications with respect to the tiered match requirements, *see supra* note 119; new construction restrictions, *id.*; the HOPE program and other administration proposals, *id.*; the removal of lead-based paints, *id.*; and the mixing of elderly and non-elderly disabled in public housing. *Id.* See generally Susan Kellam, *Conferees Plan to Compromise*, 50 CONG. Q. 2821, 2821 (Sept. 19, 1992) (stating that both the House and Senate were more interested in supplying relief to poor urban cities and communities than "partisan bickering" over the reauthorization bill).

¹³⁵ See Kellam, *Reauthorization Conference*, *supra* note 2, at 3057. An agreement was reached, with strong Republican backing in the Senate, after three days of negotiation. *Id.*

¹³⁶ H.R. CONF. REP. NO. 1017, 102d Cong., 2d Sess., 445 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3483; *see also* 138 CONG. REC. H11,476 (daily ed. Oct. 5, 1992) (filing of the House report).

¹³⁷ Susan Kellam, *Fine Points of the Housing Bill*, 50 CONG. Q. 3166, 3166 (Oct. 10, 1992). The bill was modified in the following key areas: authorization levels, the HOME program, HOPE Youthbuild, lead-based paint reduction, mixed housing for the elderly, FHA loan limits and preservation of federally-assisted housing and homelessness assistance. *Id.*

For comments, see H.R. REP. NO. 760, *supra* note 123, at 476-83, 497-501, *reprinted in* 1992 U.S.C.C.A.N. 3469-76, 3479-82 (stating additional views on the bill by Richard Bake and Stephen Neal, the minority view - Chalmers Wylie et. al., Jack Kemp, Marge Roukema and Frank Riggs). *See also* 138 CONG. REC. H11,942 (Oct. 5, 1992) (submitting the conference report on H.R. 5334 to amend laws with respect to housing and community development).

¹³⁸ 138 CONG. REC. H11,942 (daily ed. Oct. 5, 1992).

¹³⁹ 138 CONG. REC. H11,476 (daily ed. Oct. 28, 1992).

signed the bill into law on October 28, 1992, as the Housing and Community Development Act of 1992.¹⁴⁰

V. Major Changes to the NAHA by the Housing and Community Development Act of 1992 to Create Greater Flexibility for Program and Project Implementation

The 1992 Act contained various amendments to Title II of the NAHA that would relieve many of its inflexible and burdensome requirements.¹⁴¹ Changes resulting from the 1992 Act appear to have made the HOME program more workable in terms of providing affordable housing to very low- and low-income citizens.¹⁴²

Program thresholds for jurisdictions were adjusted to correspond to fluctuating congressional appropriations.¹⁴³ Due to the varying appropriation amounts, the 1992 Act changed the participation and alternate participation amounts when the HOME program appropriations fall below \$1.5 million.¹⁴⁴ Congress also created new thresholds for when a participating jurisdiction's

¹⁴⁰ Susan Kellam, *Hill Bulwarks Renewal Bill But Will Bush Sign It?*, 50 CONG. Q. 3165, 3165 (Oct. 10, 1992). H.R. 5334 was approved in dramatic fashion by the 102nd Congress before the conclusion of the session. *Id.* However, many Congresspersons were skeptical whether President Bush would sign the bill. *Id.* After Kemp's failed attempt at pushing his initiatives into the bill, the HUD Secretary wrote a letter to Richard G. Darman, White House Budget Director, requesting that the President veto the bill. *Id.* Many Congresspersons on the Hill felt that Kemp's attempt would fail. *Id.* Chalmers P. Wylie (R-Ohio), ranking member of the House Banking Committee and former House colleague of President Bush, wrote the President to lobby for Bush's approval. *Id.* Wylie stated that "Kemp would have been well-advised to tell Bush to sign it." *Id.* However, when Congress adjourned, Wylie had not received a reply to his letter to President Bush, although the Representative from Ohio was very optimistic. *Id.*

President Bush signed the bill into law on October 28, 1992. Statement by President George Bush Upon Signing of H.R. 5334, 28 WEEKLY COMP. PRES. DOC. 2186 (Nov. 2, 1992), reprinted in 1992 U.S.C.C.A.N. 3485, 3485-86.

¹⁴¹ See *supra* note 16.

¹⁴² See *supra* note 5.

¹⁴³ 1992 Act § 202(a), 42 U.S.C. § 12746 (1992) (amending NAHA § 216, 42 U.S.C. § 12746 (1990)).

¹⁴⁴ 42 U.S.C. § 12746 (1990). The NAHA originally stipulated that a participating jurisdiction, through formula distribution, must receive \$750,000 to become a HOME-designated participating jurisdiction, or receive at least \$500,000 by formula and "make up the difference" to \$750,000. *Id.* The 1992 Act amends these thresholds providing that in years when Congress appropriates less than \$1.5 billion for the HOME programs, the participating jurisdiction must receive by formula at least \$335,000 and meet the threshold of \$500,000. 42 U.S.C. § 12746 (1990); see also *id.* § 92.102 (1993) (describing the particular threshold amounts); *id.* § 92.103(b) (1993)

designation as a HOME participant may be revoked.¹⁴⁵

Section 203 of the 1992 Act eliminated the restrictions on new construction,¹⁴⁶ including rental production set-asides, new construction lists and special justifications for new construction under neighborhood revitalization and special needs housing.¹⁴⁷ The site and neighborhood standards, which were required by the NAHA, remain in effect.¹⁴⁸ Additionally, the NAHA provided for a thirty-six month commitment deadline for rental housing production; however, with the new law, the commitment deadline has been reduced to twenty-four months.¹⁴⁹

Section 204 addresses the use of HOME funds as security deposits for very low- and low-income families for rental dwelling units.¹⁵⁰ The new law affords each participating jurisdiction the right to use its HOME funds for security deposits, even if the families are not receiving any other HOME assistance, such as tenant-based rental assistance.¹⁵¹

(explaining the process for a participating jurisdiction to notify HUD of its intent to participate in the HOME program).

¹⁴⁵ 1992 Act § 202(b), 42 U.S.C. § 12747(b) (1992) (amending NAHA § 217(b), 42 U.S.C. § 12747(b) (1990)). The 1992 Act creates new thresholds by which a participating jurisdiction's HOME designation may be revoked. 24 C.F.R. § 92.107(b) (1993). If a participating jurisdiction's allocation for three consecutive years falls below \$500,000, for two consecutive years below \$410,000 and for any one year below \$335,000, it will lose its participating jurisdiction designation and will not receive HOME funds. *Id.* This three-tiered provision will only be applicable when the congressional appropriation for HOME funds falls below \$1.5 billion. *Id.*

¹⁴⁶ 1992 Act § 203(a)-(c), 42 U.S.C. § 12742(a), 12747(b)(1), 12748(g) (1992) (amending NAHA §§ 212(a), 217(b)(1), 218(g), 42 U.S.C. §§ 12742(a), 12747(b)(1), 12748(g) (1990)).

¹⁴⁷ 24 C.F.R. §§ 92.52, 92.102(b)(2), 92.500(d)(2) (1990). The elimination of the restrictions to new construction, *id.* § 92.51, establishing a list of participating jurisdictions that may use funds for new construction and rental housing production set-asides, *id.* § 92.208, HUD authorized new construction and *id.* § 92.209 - New construction: Neighborhood revitalization are being removed and reserved. The amendment removed all references to rental production set-asides or new construction found in *id.* §§ 92.52, 92.102(b)(2), 92.500(d)(2) (1993).

¹⁴⁸ 24 C.F.R. § 92.202 (1990).

¹⁴⁹ 24 C.F.R. § 92.500(d)(1)-(2) (1993). The funds for any type of new construction have been decreased to 24 months from the last day of the month in which HUD notifies the participating jurisdiction of HUD's execution of a HOME grant agreement. *Id.*

¹⁵⁰ 1992 Act § 204(a)-(b), 42 U.S.C. §§ 12742(a)(3), 12742(a)(3)(A) (1992) (amending NAHA §§ 212(a)(3), 212(a)(3)(A), 42 U.S.C. §§ 12742(a)(3), 12742(a)(3)(A) (1990)).

¹⁵¹ 24 C.F.R. § 92.210(b) (1993). The 1992 Act prompted HUD to create a new section in the regulations that allows participating jurisdictions to define the term

Section 205 expands the definition of affordable housing to include permanent housing for disabled homeless persons, transitional housing and single-room occupancy (SRO) housing.¹⁵²

Section 206 amends the per unit cost limitations of the NAHA.¹⁵³ The new law provides that in the case of multifamily housing, which includes the actual cost of new construction, reconstruction or rehabilitation, the Secretary may increase the per unit cost amounts by as much as 140% depending on the actual construction costs and national averages of such costs.¹⁵⁴

Regarded as one of the most important amendments to the NAHA, section 207 provides for administrative costs as an eligible use of the HOME funds investment.¹⁵⁵ The administrative costs of implementing and maintaining a HOME program are allowable, but capped at 10% of the participating jurisdiction's allocation, re-

"security deposit"; however, the amount of the security deposit may not be greater than two months of the tenant's rent. *Id.* A further stipulation included that only tenants may apply for assistance and not the unit's owner. *Id.* Furthermore, the tenant lease provisions of § 92.253(a)-(b) are still applicable because the HOME funded security deposits are a form of tenant-based assistance. *Id.* The regulations also delineates that the definition of tenant-based rental assistance will include security deposits at § 92.2, eligible activities at § 92.205(a)(1), eligible costs at § 92.206(e) and as an element of tenant-based rental assistance at § 92.211. *Id.*

¹⁵² 1992 Act § 205, 42 U.S.C. § 12742(a)(1) (1992) (amending NAHA § 212(a)(1), 42 U.S.C. § 12742(a)(1) (1990)). Transitional housing is defined as housing that is designed to shelter individuals or families and provides appropriate support services. 24 C.F.R. § 92.2 (1993). The purpose of transitional housing affords an individual or family adequate preparation to move from dependent living conditions to independent living conditions during a prescribed period of time. *Id.*

Those emergency shelters that are designed to temporarily house persons who are in need of immediate housing are not eligible for HOME funds because they are not considered housing of a permanent or transitional nature. *Id.* The definition at § 92.2 is amended to clarify the definition of housing with respect to emergency shelters. *Id.*

¹⁵³ 1992 Act § 206, 42 U.S.C. § 12742(e)(1) (1992) (amending NAHA § 212(d)(1), 42 U.S.C. § 12742(d)(1) (1990)).

¹⁵⁴ OFFICE COMMUNITY PLAN & DEV., U.S. DEP'T HOUS. AND URBAN DEV., HUD MEMO (Nov. 9, 1992) (on file with the *Seton Hall Legislative Journal*) [hereinafter HUD MEMO]. The new law stipulates that the per unit subsidy limits shall not be less than the limits set by § 221(d)(3)(ii) of the NHA. *Id.* In high cost areas, the law specifies that the limits may be adjusted up to 140% of an amount equal to the area's construction costs that exceed the national average construction costs. *Id.* Additionally, projects that use Federal Low-Income Housing Tax Credits can no longer reduce the § 221(d)(3) per unit subsidy limits by the amount of the tax credit subsidy. *Id.*

¹⁵⁵ 1992 Act § 207(a)-(b), 42 U.S.C. §§ 12742(a)(1), 12742, 12750 (1992) (amending NAHA §§ 212(a)(1), 212, 220, 42 U.S.C. §§ 12742(a)(1), 12742, 12750 (1990)).

ardless of the time of expenditure.¹⁵⁶ The new law also provides for the elimination of match credit for administrative costs,¹⁵⁷ and allows operating expenses for CHDO's, up to 5% of the participating jurisdiction's HOME allocation.¹⁵⁸

The 1992 Act made changes to the provisions regarding the qualifications of rental housing as affordable housing.¹⁵⁹ As stated in the NAHA, affordable rental housing units must not have rents greater than the lesser of fair market rents or a rent that does not exceed 30% of the adjusted income of a family at 65% of median income for the area, with adjustments for smaller and larger families.¹⁶⁰ The 1992 Act eliminates the adjustment for family size provision and replaces it with an adjustments for the number of

¹⁵⁶ 24 C.F.R. § 92.206(f) (1993). The new law allows a participating jurisdiction to allocate a maximum of 10% of its HOME funds to pay for administrative and planning costs, incurred on or after October 28, 1992. *Id.* These administrative costs include the salaries of staff persons who administer and manage the participating jurisdiction's HOME program. *Id.* Additionally, participating jurisdictions are afforded the capability of using 10% of any return on investment, *see* 24 C.F.R. § 92.503 (1990), of HOME funds to pay for administrative and planning costs. *Id.*

¹⁵⁷ 24 C.F.R. § 92.220(a)(5) (1993). The NAHA mandated that the participating jurisdiction could receive a 7% match credit for administrative costs that would be paid by state, local or CDBG funds, however, the 1992 Act has eliminated this provision. *Id.* With respect to match requirements and credits, the regulations are amended to renumber § 92.218(c)-(d) and to create a new section § 92.218(c) that clarifies that administrative, CHDO operating and CHDO capacity building expenses need not be matched. *Id.*

¹⁵⁸ 24 C.F.R. § 92.2 (1993). The new law defines operating expenses as "any reasonable and necessary costs for the operation of a [CHDO]." *Id.* Operating expenses include salaries, wages and other employee compensation and benefits, equipment, materials, supplies and other items. *Id.* The intent of this change is to distinguish operating expenses from project costs. *Id.* The operating expenses incurred by a CHDO cannot be used to pay administrative costs when the CHDO is performing as a participating jurisdiction's subrecipient or contractor. *Id.* However, the CHDO may only use 10% to pay for these costs. *Id.*

A new section is added to the regulations that encourages CHDOs to undertake HOME-funded activities. *See* 24 C.F.R. § 92.300(e) (1993). The section states that a CHDO must enter into a written agreement with a participating jurisdiction for administration funds if the CHDO does not receive set-aside funds or receives operating expenses § 92.206(g). *Id.* The agreement must stipulate that the CHDO will receive set-up funds within 24 months after receiving operating expenses. *Id.* Another new section provides that a CHDO is limited to operating expenses that does not exceed the greater of 50% or \$50,000 of the CHDO's total fiscal year operating budget, independent of the CHDO's receipt of other federal funding. *Id.* § 92.300(f).

¹⁵⁹ 1992 Act § 208(a), 42 U.S.C. § 12745(a) (1992) (amending NAHA § 215(a), 42 U.S.C. § 12745(a) (1990)).

¹⁶⁰ NAHA § 215(a), 42 U.S.C. § 12745 (1990).

bedrooms in a unit.¹⁶¹ Additionally section 208 provides for new provisions with respect to tenants in HOME-assisted housing whose incomes have increased and no longer qualify as low-income,¹⁶² and an exception to the termination rule for those rental housing units that must remain affordable.¹⁶³

While section 208 dealt exclusively with rental housing units, section 209 amends those provision that deal with the homeownership of affordable housing.¹⁶⁴ As a means to keep single-family homes that were assisted with HOME funds affordable to low-income families, the NAHA required the participating jurisdictions to include resale restrictions on subsequent purchases of these housing units.¹⁶⁵ In lieu of providing additional HOME assistance to a subsequent first-time homebuyer, the new law provides the

¹⁶¹ *Id.* The NAHA provided the maximum rent payment for a family as a specific percentage of the median income for the area with adjustments for small and larger families. *Id.* The new adjustment is based upon the number of bedrooms. 42 U.S.C. § 12745(a)(1) (1992). HUD amended this section to conform to the Department's standard that rent amounts are calculated according to bedroom size. HUD MEMO, *supra* note 154, at 3.

¹⁶² HUD MEMO, *supra* note 154, at 3. When a tenant occupies a HOME-assisted unit and the tenant's income increases above the low-income limit, the tenant shall not be displaced, but "shall pay as rent the lesser of 30% of the family's adjusted monthly income, as recertified annually, or 'the amount payable by the tenant under State or local law.'" *Id.* The new law makes a provision for units developed with Low-Income Housing Tax Credits and under rent control, whereby the tenant's rent will not be adjusted to 30% of the family's income when the family income exceeds 80% of the median income for the area. *Id.*

¹⁶³ 1992 Act § 208(b), 42 U.S.C. § 12745(a)(1)(E) (1992) (amending NAHA § 215(a)(1)(E), 42 U.S.C. § 12745(a)(1)(E) (1990)). The qualification for affordable housing and income targeting states that rental housing shall remain affordable, except

upon foreclosure by a lender (or upon other transfer in lieu of foreclosure) if such action (i) recognizes any contractual or legal rights of public agencies, nonprofit sponsors, or others to take actions that would avoid termination of low-income affordability in the case of foreclosure in lieu of foreclosure, and (ii) is not for the purpose of avoiding low-income affordability restrictions

Id.

¹⁶⁴ 1992 Act § 209, 42 U.S.C. § 12745(b) (1992) (amending NAHA § 215(b), 42 U.S.C. § 12745(b) (1990)).

¹⁶⁵ 42 U.S.C. § 12745(b) (1992). The NAHA intended to lessen the decrease in the available stock of affordable housing by including resale provisions on subsequent purchases of HOME-assisted housing. *Id.* When the NAHA was initially drafted, the SBHUA Committee was aware that the supply of affordable housing was threatened by two important factors: (1) the potential to convert affordable housing into market-rate housing "through mortgage prepayments and other methods of terminating low-income affordability restrictions" and (2) considerable deterioration and default as a

participating jurisdictions with the flexibility of recapturing the HOME investment provided the recaptured funds are utilized to assist other first-time homebuyers.¹⁶⁶

Other controversial issues that the 1992 Act was intended to amend was the matching requirements of section 210.¹⁶⁷ This section appears to be the most important of the new law. The match requirement was seen as the largest of the program implementation hurdles to overcome.¹⁶⁸ The match requirement in the

result of insufficient federal subsidies and program income. S. REP. NO. 316, *supra* note 49, at 18, *reprinted in* 1990 U.S.C.C.A.N. 5780.

The NAHA's resale restrictions made subsequent purchases available only to other qualified low-income homebuyers and at a price consistent with established guidelines as determined by a participating jurisdiction. NAHA § 215(b)(4). Such guidelines provide that the initial owner could realize a fair return on investment, including improvements, and the participating jurisdiction must ensure that the home will remain affordable to other potential low-income homebuyers.

¹⁶⁶ 24 C.F.R. § 92.254(a)(4)(i)-(ii) (1993). The new law affords the participating jurisdiction an option with respect to subsequent purchases of HOME-assisted units. *Id.* It enables the participating jurisdiction to recapture the HOME funds that were invested in an initial home purchase and reinvest those funds into another first-time homebuyer purchase when the initial home is sold to a non-eligible homebuyer. *Id.* In an earlier interim rule, dated December 22, 1992, HUD required "the participating jurisdiction to recapture the entire net proceeds when [the net proceeds] are insufficient to repay the full HOME subsidy, thus allowing the homeowner zero investment recovery." *Id.* This was amended to allow the homeowner to recover the amount of investment (i.e., downpayments, principal payments and other capital improvements), or at least, a percentage of the investment. *Id.* This option allows reasonable investment recovery in steady or depreciating markets, where the recapturing of the entire amount of HOME funds is not possible. 58 Fed. Reg. 34,135 (1993).

Another option allows the participating jurisdiction to pro rate the owner's return on investment when the net proceeds are less than the initial HOME investment. 24 C.F.R. § 92.254(a)(4)(ii) (1993). The recaptured amount of HOME funds may be used for a portion that is the equivalent of the time remaining in the homeowner's affordability period. *Id.*

¹⁶⁷ Kellam, *Inner City*, *supra* note 2, at 1803. The Bush Administration's major concern with respect to the 1992 Act was the requirement that the localities financially match, at a prescribed ratio for the specific activity, local funds with HOME funds. *Id.* As both Houses proposed two drastically different match requirement proposals, Secretary Kemp corresponded with the chairmen of both committees emphasizing the administration's criticism of the two divergent views. *Id.* Originally, the NAHA prescribed a three-tier system that would require the localities to match the HOME funds. Kellam, *Policy Fixes*, *supra* note 16, at 2288. The newly created three-tier system was fiscally problematic for the new participating jurisdictions, and therefore, the appropriators waived the requirements for the 1992 fiscal year. *Id.* The House proposed a flat match of 10%, while the Senate drafted the bill to create a flat 25% match, both of which differed from the administration's philosophy that the match should remain as the NAHA originally stipulated. *Id.*

¹⁶⁸ Kellam, *Policy Bill Supporters*, *supra* note 2, at 2717. The match formula intended

NAHA demands that the participating jurisdictions in their partnership capacity must contribute monies from non-federal sources for the various types of eligible HOME activities.¹⁶⁹ Many participating jurisdictions suffer from low revenues and little state or private aid;¹⁷⁰ therefore, they undertake those activities, which may not be entirely suitable for their needs, but afford a low match requirement.¹⁷¹

Section 210 of the new law prescribes a new tiered match requirement. Moderate and substantial rehabilitation and tenant-based rental assistance would require a 25% match, while any new construction activity would require a 30% match.¹⁷² The 1992 Act

to put federal funds into those areas designated as requiring affordable housing. *Id.* The HOME program's funds will be extended to provide more units, if the localities also contribute to the development. *Id.* Both the Administration and Congress concur that a new match formula may, however, be the lone solution to successful implementation of the HOME program's partnership concept. Susan Kellam, *Around the Block*, 50 CONG. Q. 2945, 2945 (Sept. 26, 1992). Without a new formula, the participating jurisdictions would once again be totally dependent on the federal government to supply additional affordable housing. *Id.* Furthermore, the participating jurisdictions' "dwindling resources" for housing would be re-budgeted to non-housing activities. *Id.*

Barry Zigas, president of the National Low-Income Housing Coalition, stated the following: "For housing advocates, the bottom line is how much money is going into housing," and "[t]he match in the HOME program serves an important purpose . . . it was meant to augment the federal money." *Id.* Jim Park, member of the National Community Development Association, an organization of community housing program administrators, has argued that a large match would inhibit participation in the program. *Id.* He also stated that the choices need to be weighed intelligently, because although the match formula can work as a catalyst, it may also function as an obstacle if the requirement is excessive. *Id.*

¹⁶⁹ NAHA § 220, 42 U.S.C. § 12750 (1990); *see also id.* § 221, 42 U.S.C. § 12751 (1990) (describing NAHA's provision for private-public partnerships).

¹⁷⁰ *See supra* note 108 (explaining that the recession had decreased the amount of federal and private assistance available for affordable housing); *supra* note 109 (describing that federal assistance to affordable housing developments was cut significantly during the 1980s).

¹⁷¹ NAHA § 220, 42 U.S.C. § 12750 (1990). The NAHA's three-tiered match requirement provided that participating jurisdictions match 50% of the HOME funds when new construction is undertaken. *Id.* If the participating jurisdiction proposes to rehabilitate units for very low- or low-income persons, the match formula requires the participating jurisdiction to pay 20% for moderate rehabilitation, 33% for substantial rehabilitation and 50% for new construction. *Id.* This system "would encourage local governments to do low-cost [moderate] rehabilitation projects before attempting new construction[.]" regardless of the participating jurisdictions' need for another specific activity. Kellam, *Policy Fixes*, *supra* note 16, at 2288.

¹⁷² 1992 Act § 210(a), 42 U.S.C. § 12750(a) (1992) (amending NAHA § 220(a), 42 U.S.C. § 12750(a) (1990)). The match requirements will commence when a partici-

also amends the NAHA with respect to eligible forms of contribution by allowing proceeds from bond financing, donated materials and labor and other reasonable forms to be included as an eligible match.¹⁷³ Another significant amendment is the inclusion of the reduction of match requirements for those participating jurisdictions that are determined to be in fiscal distress¹⁷⁴ and those declared disaster areas.¹⁷⁵

pating jurisdiction draws down HOME funds on or after October 1, 1992, the first day of the 1993 federal fiscal year. 24 C.F.R. § 92.218(a) (1993).

¹⁷³ 1992 Act § 210(b), 42 U.S.C. § 12750(c) (1992) (amending NAHA § 220(c), 42 U.S.C. § 12750(c) (1990)). The value of site preparation, construction materials and donated or voluntary labor (in conjunction with an eligible HOME activity, such as site preparation and construction or rehabilitation of affordable housing), is included as an eligible match. 24 C.F.R. § 92.220(a)(5) (1993). Donated or voluntary labor will be valued at a single rate and will be reviewed and adjusted annually. *Id.* Donated materials will be credited as an eligible match form at the time of its use for a HOME-assisted project and any donated or voluntary labor will be credited when the work is performed on the eligible HOME-assisted project. 24 C.F.R. § 92.221(a)(6) (1993). Contributions to match requirements may also be satisfied with bond proceeds earmarked for affordable housing activities. 58 Fed. Reg. 34,133 (1993).

¹⁷⁴ 1992 Act § 210(c), 42 U.S.C. § 12750 (1992) (amending NAHA § 220, 42 U.S.C. § 12750 (1990)). A participating jurisdiction or state may qualify for the match reduction due to fiscal distress, with limitations. 24 C.F.R. § 92.222 (1993). The participating jurisdictions are entitled to a 50% reduction if they are determined to be in fiscal distress, and a 100% reduction for severe fiscal distress. *Id.* § 92.222(a)(1) (1993). The statute delineates two distress criterion, one based upon the participating jurisdiction's poverty rate, the other upon the per capita income of the participating jurisdiction, according to Bureau of Census data for the calendar year immediately preceding the participating jurisdiction's fiscal year. *Id.* § 92.222(a)(1)(i)-(ii) (1993). If a participating jurisdiction satisfies either of the criterion, it is determined to be fiscally distressed; if it satisfies both of the criteria, it is considered to be severely fiscally distressed. *Id.* The statute does not prescribe a formula for states; however, procedures will be designed, and § 92.222(a)(2) is reserved for this purpose. 58 Fed. Reg. 34,132 (1993).

For a participating jurisdiction to meet the first criterion, it must be evidenced by Census data that its percentage of families in poverty is 125% or more of the nation's average. 24 C.F.R. § 92.222(a)(1)(i)-(ii) (1993). To satisfy the second criterion, its per capita income must be less than 75% of the nation's average. *Id.* The Census data will be updated every two years, and HUD will determine which participating jurisdictions qualify for either of the distress categories on an annual basis. The participating jurisdictions are, therefore, not required to submit a certification of distress. *Id.*

¹⁷⁵ 24 C.F.R. § 92.222(b) (1993). For participating jurisdictions not suffering fiscal or severe fiscal distress, a match reduction may be implemented if the participating jurisdiction is located in an area that is declared a major disaster pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act. *Id.* If a participating jurisdiction is located in such an area, the match may be reduced up to 100%. *Id.* This provision was initiated due to several disasters that occurred in 1992; therefore,

Section 211 provides assistance for insular areas, by repealing the amendments made by the Insular Areas Act.¹⁷⁶

As part of Congress's attempt to provide affordable housing through partnerships with local for-profit and nonprofit developers, the NAHA established the creation of CHDOs.¹⁷⁷ The CHDOs play a significant part in the production of affordable housing.¹⁷⁸ Because they are community based, the CHDO has a better capacity to assess the locality's housing needs and to take action to satisfy that particular need.¹⁷⁹ As a consequence of this observation, Congress required that a minimum of 15% of a participating jurisdiction's HOME allocation be reserved for CHDOs, thereby assuring that the CHDOs would always have some HOME funds with which to provide housing.¹⁸⁰

Section 212 extends the time period, from eighteen months to twenty-four months, in which the participating jurisdictions must reserve HOME funds for CHDOs.¹⁸¹ Under the new law, an exception is provided for those participating jurisdictions that cannot identify capable CHDOs within a twenty-four month period. Participating jurisdictions that cannot identify capable CHDO's within

HUD extended the match for the 1993 and 1994 fiscal years. 58 Fed. Reg. 34,133 (1993). Those participating jurisdictions seeking a reduction must submit a copy of the disaster declaration to the local HUD field office to be considered. *Id.*

¹⁷⁶ 1992 Act § 211, 42 U.S.C. § 12704 (1992) (amending NAHA § 104, 42 U.S.C. § 12704 (1990)); see *Insular Areas Act*, Pub. L. No. 102-230, 105 Stat. 1720 (1992). The revocation of the amendment to the Insular Areas Act restores the definition of a "unit of general local government" to include the following: the Federal States of Micronesia and Palau, the Marshall Islands, or a general purpose political subdivision thereof. HUD MEMO, *supra* note 154, at 4-5. This provision includes the above areas in other HOME-eligible insular areas. *Id.* See generally 24 C.F.R. §§ 92.60-66 (1993) (describing the program as it pertains strictly to insular areas).

¹⁷⁷ See *supra* note 86 (generally defining CHDOs).

¹⁷⁸ Brodie, *supra* note 10, at 556. The CHDO's 15% set-aside is intended to act as a "bargaining tool" to stimulate private involvement in supplying affordable housing. *Id.* With the enactment of the NAHA, the nonprofit sector now has the resources necessary to leverage private funds for development within the community. *Id.* at 557. Traditionally, private-sector entities did not involve themselves in communities where no public money was staked in a project. *Id.* at 556-57.

¹⁷⁹ *Id.* at 557. Local nonprofit organizations "are essential to the assessment of housing needs in each jurisdiction's housing strategy." *Id.*

¹⁸⁰ NAHA § 231, 42 U.S.C. § 12771 (1990).

¹⁸¹ 1992 Act § 212(a), 42 U.S.C. § 12771 (1992) (amending NAHA § 231, 42 U.S.C. § 12771 (1990)). Congress amended this section to have the time period within which participating jurisdictions reserve CHDO funds correspond with the time period at 24 C.F.R. § 92.500(d)(2) (1990), which mandates the time within which CHDO funds must be committed to HOME-eligible activities. § 92.300(a) (1993).

twenty-four months may obligate money, from the CHDO set-aside, to pay for capacity building.¹⁸² Additionally, the amount of HOME funds that a CHDO may acquire in any fiscal year may not be greater than 50% of the CHDOs operating funds, or \$50,000, whichever is the greater amount.¹⁸³

The 1992 Act provides for other statutory changes that have no direct effect on the participating jurisdictions use of HOME funds, whereby four new sections offer technical assistance, research and model program funds for capacity building and program development.¹⁸⁴ Section 213 provides funds for technical assistance to support community land trusts (CLTs) and those groups establishing CLTs, and to organizations involved in the support of women in the housing construction industry.¹⁸⁵ Section 214 creates an additional priority for capacity building with respect

¹⁸² 1992 Act § 212(b), 42 U.S.C. § 12771(a) (1992) (amending NAHA § 231(a), 42 U.S.C. § 12771(a) (1990)). The 1992 Act provides that a participating jurisdiction, during the first 24 months of its participation in the HOME program, may expend HOME funds to identify eligible CHDOs and allocate funds for capacity building. 24 C.F.R. § 92.300(b) (1993). The 1992 Act provides that a maximum of 20% of a participating jurisdiction's 15% CHDO set-aside may be used to identify and support CHDOs. *Id.* However, the amount is limited, so that a participating jurisdiction may not expend more than \$150,000 during a 24 month period. *Id.*

¹⁸³ 1992 Act § 212(c), 42 U.S.C. § 12747(b) (1992) (amending NAHA § 234(b), 42 U.S.C. § 12774(b) (1990)). The amendment in the 1992 Act reflects the limitation that the CHDO may not receive HOME set-aside funds in excess of 50% of its total operating funds. 24 C.F.R. § 92.300(f) (1993).

¹⁸⁴ 42 U.S.C. §§ 12704, 12773, 12783, 17784 (1992).

¹⁸⁵ 1992 Act § 213(a)-(b), 42 U.S.C. § 12773 (1992) (amending NAHA § 238, 42 U.S.C. § 12773) (1990). Section 213(a) of the 1992 Act was created to allow intermediary organizations to support community land trusts (CLT) by providing funds for organizational support, technical assistance, education and training and continuing support. 24 C.F.R. § 302(c)(6) (1993). A CLT is a CHDO when the following conditions are met, generally: if the entity is not sponsored by a for-profit; the entity is established to undertake acquisition, transfer and purchase option activities; corporate membership is open to any member of the area, with an equal distribution of corporate members; and the entity does not have to demonstrate capacity to implement HOME activities or serve the local community. *Id.*

Section 213(b) of the 1992 Act was created to allow intermediary organizations to support businesses, unions and organizations that assist women in homebuilding professions that are involved in the construction and rehabilitation of affordable housing. 24 C.F.R. § 92.302(c)(7) (1993). Funds may be expended on activities that support traditional and non-traditional training and apprenticeship programs, including recruitment programs, support for women at job sites, counseling, education regarding the work environment and business start-ups. *Id.* Furthermore, up to 10% of the HOME funds allocated for technical assistance may be used for the purchase of tools and materials for training purposes. *Id.*

to land bank redevelopments, where HOME funds may be used.¹⁸⁶ Section 215 provides research funds in connection with the HOME program for the delivery of energy-efficient affordable housing.¹⁸⁷ Finally, Section 216 requires HUD to create a model program that addresses cost-saving building technologies and construction techniques.¹⁸⁸

Under Title I of the NAHA, the new law at sections 217, 218 and 219, expands the definitions of three distinct terms and creates a anti-displacement plan for the HOME program. Section 217 amends the definition of CHDOs by deleting the requirement that one low-income member from each county serve on the governing board of a CHDO operating in more than one county.¹⁸⁹ The definition of housing is expanded to include elder cottage housing opportunity (ECHO) units.¹⁹⁰ Section 219 amends the definition of

¹⁸⁶ 1992 Act § 214, 42 U.S.C. § 12782 (1992) (amending NAHA § 242, 42 U.S.C. § 12782 (1990)). The 1992 Act does not provide funds for participating jurisdictions to undertake land banking activities. 24 C.F.R. § 92.400(a)(6) (1993). It does provide, however, for capacity building to facilitate the establishment and efficient operation of programs, which acquire title to vacant and abandoned parcels of real property that will be used in conjunction with HOME-eligible activities. *Id.* When a participating jurisdiction acquires a vacant or abandoned parcel through a land bank-type entity, the construction must begin within 12 months of the commitment of the HOME funds. *Id.*

¹⁸⁷ 1992 Act § 215, 42 U.S.C. § 12784 (1992) (amending NAHA § 244, 42 U.S.C. § 12784 (1990)). Financial support for research that has the objective of improving the efficiency and effective implementation of affordable housing programs is an eligible activity. 24 C.F.R. § 92.400(a)(5) (1993). This new provision supports incentives that expand and maintain the supply of energy-efficient affordable housing, where cost-saving, creative building technology and construction methods are employed. *Id.* Programs that implement cost-effective methods will ultimately allow the HOME program and participating jurisdictions to produce more affordable housing units than those using traditional methods. *Id.*

¹⁸⁸ 1992 Act § 216, 42 U.S.C. § 12810 (1992) (amending NAHA Subtitle D of Title II, 42 U.S.C. § 12801-12809 (1990)) (providing HOME funds to create model programs that implement cost-saving building technologies and construction techniques).

¹⁸⁹ 1992 Act § 217, 42 U.S.C. § 12704(6) (1992) (amending NAHA § 104(6), 42 U.S.C. § 12704(6) (1990)). The new law also provides an exception for those organizations that satisfy the CHDO definition except for the "significant representation" requirement of having community residents on the CHDO's governing board. HUD MEMO, *supra* note 154, at 5. The exception may be used for up to six months after the CHDO receives the HOME funds, or September 30, 1993, whichever ever comes first. *Id.*

¹⁹⁰ 1992 Act § 218, 42 U.S.C. § 12704(8) (1992) (amending NAHA § 104(8), 42 U.S.C. § 12704(8) (1990)). The 1992 Act creates a new housing type that may be eligible as a HOME-funded activity: elder cottage housing opportunity units (ECHO). HUD MEMO, *supra* note 154, at 9. ECHO units are defined as "small, free-standing,

an eligible first-time homebuyer to include owners of manufactured homes.¹⁹¹ The law prescribes that the participating jurisdictions extend the requirements for homeless information,¹⁹² certify to an anti-displacement plan and anti-poverty strategy¹⁹³ and describe the linkage between housing need and housing resource allocation.¹⁹⁴

VI. *The Attorney's Role in the Development of Affordable Housing*

To deliver affordable housing to distressed urban centers, the attorney's role will be to navigate both the nonprofit organiza-

barrier-free, energy-efficient, removable and designed to be installed adjacent to existing one- to four-family dwellings." *Id.* These units are intended to house dependent elder family members on an owner's property, thereby negating the need for the elderly family member to move into the owner's home and the need for high-cost 24-hour care in geriatric health care facilities or hospitals. *Id.*

¹⁹¹ 1992 Act § 219, 42 U.S.C. § 12704(14) (1992) (amending NAHA § 104(14), 42 U.S.C. § 12704(14) (1990)). The new law amends the definition of first-time homebuyer to include those individuals who own or have owned a principal residence during the past three years where the structure was "not permanently affixed to a permanent foundation in accordance with local or other applicable codes and cannot be brought into compliance with such codes for less than the cost of constructing a permanent structure." 24 C.F.R. § 92.2 (1993). The second provision offers wider flexibility to the participating jurisdiction because it carries the scope of the definition beyond owners of manufactured homes and includes those individuals living in housing units that are not up to applicable standards and cannot be cost-effectively rehabilitated. *Id.*

¹⁹² 1992 Act § 220(a), 42 U.S.C. § 12705(b)(2) (1992) (amending NAHA § 105(b)(2), 42 U.S.C. § 12705(b)(2) (1990)). The 1992 Act also created new requirements with respect to the participating jurisdiction's CHAS. Beginning with the 1994 fiscal year CHAS, the participating jurisdictions must provide a greater amount of homeless information so that this segment of the population, who possess perhaps the greatest need, is afforded a better opportunity to be assisted. *Id.*

¹⁹³ 1992 Act § 220(b), 42 U.S.C. § 12705(b) (1992) (amending NAHA § 105(b), 42 U.S.C. 12705(b) (1990)). The certification requires a participating jurisdiction to replace affordable housing that is converted into non-affordable housing or demolished when the project is undertaken with HOME funds. HUD MEMO, *supra* note 154, at 9. The certification for the antipoverty strategy requires that a participating jurisdiction provide relocation assistance to a displaced very low- or low-income individual or family due to a HOME-funded conversion or demolition of an affordable housing unit. *Id.* The certification is the equivalent of the CDBG program certification delineated in section 104(d) of the HCDA 1974. *Id.*

¹⁹⁴ 1992 Act § 220(c), 42 U.S.C. § 12705(b) (1992) (amending NAHA § 105(b), 42 U.S.C. § 12705(b) (1990)). The CHAS was amended to require that the participating jurisdiction describe how it will address the needs of its very low- and low-income and homeless population; state the linkage between the reasons for resource allocation; and describe priorities and identify potential obstacles that may affect the needs of the under-served population. *Id.*

tion¹⁹⁵ and other for-profit developers¹⁹⁶ through the complicated and oft-times tiring red-tape of governmental programs. Practitioners must ready themselves for the challenge when becoming involved in a project to deliver affordable housing.¹⁹⁷ Those attorneys with conventional housing and/or commercial real estate development transaction experience will be taken back by the complex nature of the affordable housing transactions.¹⁹⁸

Typical transactions associated with the delivery of affordable housing initiatives provide for the combination of "multiple financing resources and subsidies" to lower construction costs.¹⁹⁹ Aside from the typical role an attorney plays in the development process, he or she may investigate other roles that directly or indirectly interface with the client and/or the public interest.²⁰⁰ Furthermore,

¹⁹⁵ Goldstein & Dorius, *supra* note 90, at 49. For years, the nonprofit sector was a creative and actively demanding participant in the affordable housing market. *Id.* For the past 10 years, nonprofit community development corporations and neighborhood groups have led the way to many successful and model affordable housing initiatives. *Id.* These initiatives include "the preservation and development of affordable sale and rental housing." *Id.* Many of these groups did not evolve without the aid of certain third-party intermediaries, such as the Enterprise Foundation and the Local Initiatives Support Corporation. *Id.* The national nonprofit intermediaries assist the local organizations by providing technical assistance in the form of loans and grants and helping local nonprofits initiate and negotiate partnerships with local governments and lending institutions. *Id.*

¹⁹⁶ *Id.* While the public claims a larger stake in the development of affordable housing, the private sector also has provided sufficient numbers of units. *Id.* Indirect as it may be, the private sector's role makes available the lending strength of private banks and mortgage insurers to provide homeownership opportunities to those families who have traditionally been denied mortgages. *Id.* Creative new programs in the secondary mortgage market have been established by the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC) for low- and moderate-income homebuyers. *Id.* The FNMA and the General Electric (GE) Mortgage Insurance Company have instituted the Community Home Buyer's Program, which provides flexible underwriting criteria for low- and moderate-income families, provided that they participate in homeowner programs involving home financing and budgeting concerns. *Id.* The FHLMC has undertaken a similar loan program. *Id.*

¹⁹⁷ *Id.* at 50.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* A project may include "state or local tax-exempt bonds, tax credit syndication proceeds, a below-market interest rate [CDBG or HOME] loan, a foundation grant, Section 8 rental subsidy, an energy conservation grant and a construction loan from a local bank that is sensitive to its Community Reinvestment Act (CRA) responsibilities." *Id.*

²⁰⁰ At an American Bar Association Presidential Showcase Program, speakers addressed the various roles the practitioner may play in the delivery of affordable housing projects, including

the practitioner may provide these services on a pro bono basis²⁰¹ or at a reduced fee.²⁰²

VII. Conclusion

The enactment of the 1992 Act improves upon most of the burdensome and complex restrictions that hindered the expeditious implementation of the HOME program. Particular attention was drawn to match requirements, CHDOs, the elimination of new housing construction restrictions, inclusion of administrative costs as an eligible HOME-activity and the provision of funds for technical assistance to capacity building and product development.

The changes to match requirements in the HOME program raised the greatest debate. The House advocated a flat match across the board on all activities at 10%. The flat match afforded no preference to a specific activity; therefore, money-strapped participating jurisdictions did not undertake projects with the lowest match liabilities in order to commit and expend the HOME funds. The Senate offered a flat match proposal at 25%. Their flat match offer negated any preference for a specific activity, but required the local participating jurisdiction to inject more funds into a pro-

joining the board of local nonprofit community development corporations; providing legal services to nonprofit housing organizations; reviewing state and local legislation to ensure effective support for affordable housing efforts; working in the community to ensure that zoning laws and regulations are used to counter "not in my backyard" (NIMBY) problems; become familiar with the requirements of federal, state and local housing subsidy and financing programs and educating clients about these programs; investigating with clients the use of low-income housing tax credits; applying professional skills to development of new creative financing arrangements; assisting lender clients in making mortgage products and services more flexible to address the needs of low- and moderate-income borrowers; and advising lender clients on ways to provide financing that meets CRA requirements.

Id.

²⁰¹ *Id.* The attorney may provide the legal services pro bono, although this decision is based upon a number of factors, including "the financial needs of the client organization or project; the likelihood of success of the enterprise; the availability of resources allocated to legal services and the experience of the lawyers involved in the project." *Id.*

²⁰² *Id.* The practitioner, however, may choose to offer the legal services as part of a reduced fee arrangement. *Id.* Such an arrangement with a nonprofit organization may include "forgiving the total legal fee, providing a reduction of normal fees, establishing a fixed fee, billing for one phase of the project but not for a subsequent phase and recovering fees on a contingency basis." *Id.*

ject. This activity better enhanced private and non-federal housing funds and development assistance.

Further public and private participation was encouraged by affording CHDOs less restriction in their construction and range of activities. The CHDOs provide a more realistic approach to affordable housing delivery at the neighborhood and community level. They are able to assess the specific needs of the area and design strategies to fulfill those needs by developing, sponsoring or owning affordable housing projects. Rather than using a city-wide approach that spreads the resources thin throughout a large urban metropolis, the CHDOs develop affordable housing at a scale small enough that the impact is immediately felt within the community.

Whether developing a project on a large city scale or by neighborhoods, the HOME program, as it was intended, must motivate private sector involvement with affordable housing development. Efforts such as private loans to first-time homebuyers or private financing for the rehabilitation of rental properties appear to be successful. The leveraging aspect of the program secures many below market-rate private financing commitments, including first mortgages at low interest rates, loans to high credit risk borrowers and specific neighborhood commitments from local lenders.

While the 1992 Act encouraged even greater private sector participation, the elimination of new housing construction requirements proved to be a major advancement in the flexibility of the program. The new construction requirement offered harsh obligations to those participating jurisdictions that required more rehabilitation, rather than new construction. The participating jurisdictions, which were initially required to produce a specific percentage of new construction housing, found that the money would achieve a more useful goal if the HOME new construction funds could be committed to other eligible HOME activities. The elimination of the specific percentage requirement offered greater flexibility for the program across the country.

As the program became more pliable and the participating jurisdictions became more experienced, one factor still remained to be solved: administrative costs. A participating jurisdiction may only develop housing up to the capacity of its staff. Initially, no funds for administrative purposes were allowed, thereby causing many participating jurisdictions not to commit adequate time for HOME-assisted projects. Furthermore, many participating jurisdic-

tions lacked the capacity to develop affordable housing and the funds to pay for the assistance from housing consultants. The 1992 Act allowed the participating jurisdictions to take 10% of the allocation amount for participating jurisdictions to develop capacity and offset the high administrative costs of implementing the program.

Finally, the allowance of technical assistance funds will further reduce wasted costs at the staffing and construction level. The development of staff capacity and the increased number of competent staff will increase the likelihood of greater project development. The development of innovative building technologies should provide more energy-efficient and cost-effective housing, which in time may last longer and not require further federal assistance for rehabilitation.

The 1992 Act, in its broad sweep of corrective legislation, could have achieved more by providing less. The legislation should have been limited to strictly technical improvements to existing affordable housing programs while maintaining the Congressional intent of the NAHA.²⁰³ The period between the passing of the NAHA in 1990 and the enactment of the 1992 Act evidenced too limited a time to evaluate the HOME program and its shortfalls for Congress to aggressively mandate technical alterations.²⁰⁴ Given that the NAHA provided the basic foundation for a vehicle to effectively and efficiently address this Country's affordable housing needs, the HOME program was not afforded adequate time to fully mature into its intended *deus ex machina*.²⁰⁵

²⁰³ S. REP. NO. 332, *supra* note 90, at 205. Congress sought to enact legislation that would reauthorize and modestly alter existing federal affordable housing programs. *Id.* However, the bill evolved into an intensive and substantially complex proposal that created new federal affordable housing programs, modified current policies and programs, mandated further burdensome requirements on HUD and addressed internal management challenges. *Id.*

²⁰⁴ *Id.* At the time the SBHUA drafted S. 3031, HUD issued additional regulations for the implementation of the HOME program and other NAHA provisions. *Id.* Many of the NAHA's programs did not receive initial funding until fiscal year 1992 and a substantial amount of NAHA provisions had not yet been implemented. *Id.* HUD's apparent delay in bringing the HOME program on-line was a direct result of the new legislation's tremendous workload on a limited staff. *Id.* Senators Garn, D'Amato and Mack stated that "[w]e note the irony in the fact that the demands placed upon HUD to monitor and participate in Congress's legislative hearings and the reauthorization process have exacerbated the difficulties in achieving timely implementation of the NAHA." *Id.*

²⁰⁵ *Id.* at 212. Many in the Senate "preferred a simple reauthorization bill" to adjust

The HOME program is still a very young and impressionable federal program, and it is not the first of new programs, nor will it be the last that proceeded with such a tumultuous and burdensome beginning. Other highly successful and less complex programs of HUD floundered and wallowed in their formative years.²⁰⁶ The "learning curve" of its success may be shallow at the present time, but given a more reasonable time period to develop and implement local HOME projects by the participating jurisdictions, the success rate will expand exponentially.²⁰⁷

programmatic issues concerning the NAHA and various HUD programs, rather than the proposal as delineated in S. REP. NO. 332. *Id.* The NAHA offered the necessary "basic tools" that would address this country's affordable housing needs. *Id.* The NAHA was enacted at a time when the entire housing industry was mired in an unstable environment. *Id.* Given a stronger economy and a more stable environment, the HOME program and other NAHA provisions may have achieved greater success than that which was recently demonstrated. *Id.*

²⁰⁶ *HOME Investment Partnerships Program: Hearings on S. 1299 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 103d Cong., 1st Sess. 5 (1993)* (statement of Diane Voneida, Director, Community Development Department, Rockford, Ill.) (on file with the *Seton Hall Legislative Journal*). Nearly 20 years before the passage of the NAHA, Congress established the CDBG program. *Id.* As one of HUD's most successful programs, the CDBG program experienced difficulties in its early stages that were more troublesome than those of the HOME program. *Id.* The Rental Rehabilitation program, a less complicated program from HUD, also faced similar difficulties at its inception. *Id.*

²⁰⁷ *Id.* Voneida stated that "[t]he learning curve . . . is slowly but surely catching up with the high expectations of the authors of the HOME program." *Id.*