The Implications of Privatization on Low-Income People
Will the “Free Market” Solve the Affordable Housing Crisis?

By Peter W. Salsich Jr.

“This is a case that should have been settled.”

With that comment at the end of a six-day trial in July 2001, Senior Judge Stephen N. Limbaugh of the U.S. District Court, Eastern District, Missouri, took under submission a lawsuit challenging the St. Louis Housing Authority’s implementation of a public housing revitalization plan with funds from the federal HOPE VI (Housing Opportunities for People Everywhere Act of 1990) program. At about the same time, housing advocates in St. Louis and across the country were busy drumming up support for legislation to create a National Affordable Housing Trust Fund. The HOPE VI lawsuit and the trust fund bills represent bookends for the current debate over publicly financed housing programs.

The privatization movement has affected government housing programs primarily through a reduction in direct government financial support for housing production. Federal housing policy now features a demand-side emphasis, the Section 8 program, to assist low-income families in the private housing market; a tax expenditure program, the low income housing tax credit, to encourage private investments in affordable rental housing; and the HOPE VI program, the recasting of large urban public housing developments into privately owned mixed-income neighborhoods.

Advocates for low-income families have been warning that the prosperous economy was not reaching persons and families on the lower portions of the eco-


nomic ladder. For persons in the lowest quartile, those making 50 percent or less than their area median income—generally less than $20,000—the search for affordable and decent housing has become harder, not easier. A complex mix of factors creates the difficulties that low-income persons and families face in obtaining decent and affordable housing. These factors include:

- lack of money to pay market prices for housing;
- lack of land allocated for multifamily and congregate living facilities, and
- lack of free choice about where to live.

The private housing market by itself cannot correct any of these deficits because they raise questions of distributive

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4 See, e.g., Jennifer G. Twombly et al., Nat’l Low Income Hous. Coalition, Out of Reach 2001: America’s Growing Wage-Rent Disparity 3 (2001), www.nlihc.org/oor2001/index.htm (calculating that an income of $13.87 per hour on average is required for a person or family to afford a two-bedroom housing unit at the national median fair-market rent). This means that one person making the national minimum wage of $5.15 per hour must work about 100 hours per week or that more than two persons making minimum wage must work 40 hours per week to be able to afford that unit. Id. at 5.

5 Id. at 5.

6 Persons eligible to receive federal housing assistance originally were defined as those “who cannot afford to pay enough to cause private enterprise . . . to build an adequate supply of decent, safe, and sanitary dwellings for their use.” 42 U.S.C. § 1402(2) (1970). In 1974 Congress changed the definition to the current emphasis on percentage of median income. See id. § 1457a(b) (1994 & Supp. 1999). The National Commission on Urban Problems, chaired by former Senator Paul Douglas, stated in 1968: “There is no way for private owners to make a profit by housing the poor in decent standard housing except through some form of aid or by demanding excessive payments from the poor. This fact must be faced.” Nat’l Comm’n on Urban Problems, Building the American City 93 (1968).


8 This lack of free choice about where to live results from the first two factors, coupled with housing discrimination. See, e.g., Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls, 263 F.3d 627, 640 (6th Cir. 2001) (Clearinghouse No. 54,057) (holding that developer can pursue Fair Housing Act discriminatory effect claim against city that allowed referendum to block affordable housing developer’s lawfully approved site plan); Walker v. City of Lakewood, 263 F.3d 1005, 1015 (9th Cir. 2001) (Clearinghouse No. 54,058) (holding that independent fair housing counseling services provider may bring Fair Housing Act claim against city with which it contracts for city’s retaliation against provider’s public advocacy of private tenants’ discrimination suit); see also John Yinger, Housing Discrimination Is Still Worth Worrying About, 9 Housing Pol’y Debate 893, 894–909 (1998) (finding that discrimination in housing continues to be a common experience of blacks and Hispanics).
justice and public resource allocation. However, in partnership with all three levels of government and the nonprofit sector, the private market can be instrumental in solving the affordable housing crisis.

In this article I discuss the tradition of public support for housing; examine the privatization of public housing, including HOPE VI, the Quality Housing and Work Responsibility Act of 1998, and housing vouchers; review proposed housing legislation; and suggest a coordinated housing strategy among the private real estate sector, public sector, and nonprofit sector for approaching the privatization dilemma.

I. Tradition of Public Support for Housing

While most housing units in the United States are developed, financed, and owned by private-sector actors, the public sector plays crucial supporting roles. The first and largest government subsidies for housing are the tax benefits available to homeowners, particularly those who itemize deductions on their tax returns. Imputed rental income—untaxed return on home equity—is a little-noticed but major contributor to the tax benefits of homeownership. In fiscal year 2001 the tax expenditure—taxes foregone—resulting from the mortgage interest deduction was approximately $61 billion, while direct federal appropriations for housing and community development programs totaled about $30 billion.

The second largest governmental housing programs are the Federal Housing Administration Mortgage Insurance and Veterans’ Assistance Mortgage Guarantee programs. These programs, first enacted in 1934, became and remain a significant part of the private housing market, particularly for first-time home buyers. The federally supported secondary mortgage market institutions perform a vital function in the financing of housing. Massive federal funding of highway construction

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9 The private housing market is made up of profit-motivated individuals and organizations whose primary motivation, indeed obligation, is to make a profit. See, e.g., Milton Friedman, The Social Responsibility of Business Is to Increase its Profits, N.Y. TIMES MAG., Sept. 13, 1970, at 32. Distributive justice “orders the relationship between individuals or groups of individuals and the whole community. . . . This type of Justice regulates the sharing in the Common Good . . . [and] requires a proportionate distribution rather than the arithmetical equality of Commutative Justice.” R.J. Henle, General Doctrinal Background for the Treatise, SAINT THOMAS AQUINAS: THE TREATISE ON LAW 72 (R.J. Henle ed., 1993); see also JOHN RAWLS, A THEORY OF JUSTICE 11–17, 60–108 (1971).


11 See, e.g., JOSEPH GYOURKO & TODD SINAI, BROOKINGS INST., THE SPATIAL DISTRIBUTION OF HOUSING-RELATED TAX BENEFITS IN THE UNITED STATES 4, 20 (2001) (stating that, based on 1990 data, homeownership tax benefits are about $164 billion per year—$101.7 billion in untaxed return on house equity, $42.6 billion in mortgage interest tax deduction, and $19.6 billion in property tax deduction).


and water and sewer systems remains a crucial element of public support for the private housing market.\textsuperscript{16}

In the public housing arena, the U.S. Housing Act of 1937, which created the federal public housing program, was a compromise designed in major part to help the country come out of the Great Depression by creating new construction jobs.\textsuperscript{17} Over the years, public housing has accounted for a small but crucial percentage of the national housing inventory. However, during the 1950s and 1960s, intense controversies erupted over the form and use of public housing in major urban centers.\textsuperscript{18} Influenced by utopian theories of urban design, federal housing officials directed the construction of high-rise towers.\textsuperscript{19} These towers became the homes of families with children; many of these families were recent arrivals in northern cities as a result of a vast migration, both from the south and from the countryside, after World War II. Fueled in part by federal policies, pervasive racial discrimination in housing exacerbated the isolation of these families.\textsuperscript{20}

Major efforts to encourage the private market to produce subsidized housing began in earnest in the 1960s with the creation of a variety of programs in which the Federal Housing Administration mortgage insurance model was coupled with interest reduction payments to lenders.\textsuperscript{21}

\textsuperscript{16} For a discussion of the link between highway construction and development of suburbia, see KENNETH JACKSON, CRABGRASS FRONTIERS 157–71, 246–71 (1985).

\textsuperscript{17} U.S. Housing Act of 1937, ch. 896, Pub. L. No. 412, 50 Stat. 888 (codified at 42 U.S.C. §§ 1437 et seq.). Sponsors of the legislation also believed that tenants would need to live in public housing only for a short time and that they would move into homeownership as soon as the economy improved. During World War II the priorities shifted from ending the Depression to building housing for war production workers and still later for veterans returning from the war. Andrew M. Rouse & Kirt Wehbring, \textit{Housing Is a National Priority}, 39 GEO. WASH. L. REV. 674, 677 (1971). The approach that the public housing program took, while supplying the deepest subsidy that has ever been given in any government housing program, still left a large gap in the overall cost of supplying housing for persons at the lowest income levels. Yet at the same time the public housing program’s policy was that only persons of very low income should be allowed to occupy public housing units. Legislative sponsors and supporters crafted this policy in part as a compromise to overcome opposition from private real estate interests that were concerned that the public housing program not directly compete with private home builders and real estate companies. LAWRENCE M. FRIEDMAN, GOVERNMENT & SLUM HOUSING 104–6 (1968).

\textsuperscript{18} See, e.g., JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 392–404 (1992) (proposing that low-income public housing projects be diversified into mixed-income neighborhoods).

\textsuperscript{19} The French architect Charles-Edouard Le Corbusier was particularly influential; he “reimagined the city in glass and steel … towers majestically spaced amid greenery.” Anthony Vidler, \textit{A City Transformed: Designing \textquote{Defensible Space}}, N.Y. TIMES, Sept. 23, 2001, Week in Review, at 6.


However, this approach contained a fundamental conflict. By definition, the beneficiaries of federal programs—low-income persons, eligible applicants, or however one wants to describe them—were “persons who are unable to afford the housing that the private market can provide.”\(^\text{22}\) Yet if the private market could not supply affordable housing for low-income families, why would one expect the private market to be interested in doing so? The idea that the private market can supply housing for low-income persons and families better than the government must confront that question.

The history of private developer involvement in subsidized housing production in this country suggests that private developers tend to seek out people who are at the top end of the eligibility level. This is in part because of the way in which federal housing policy has been implemented. Over the years Congress has approved numerous housing development programs, each one geared to a particular income group. The result is a layer cake of programs in which private developers, as prudent business persons, tend to seek tenants with the highest eligible income levels so that the developers experience less risk of nonpayment of rent.\(^\text{23}\) As a result, the statutory maximum rents become the minimum rents, and people on the lower portion of a particular income eligibility range tend to get squeezed out.

II. Privatization of Public Housing

During the 1980s Jack Kemp, then a U.S. representative (R–N.Y.), led serious legislative efforts to privatize public housing by requiring public housing authorities to sell units to qualified public housing tenants for 25 percent of fair market value.\(^\text{24}\) This was an attempt to revitalize the Turnkey III tenant purchase program first authorized in 1965.\(^\text{25}\) In 1990 Congress enacted the public housing unit sale authorization as Title I of HOPE.\(^\text{26}\)

\(^{22}\) 42 U.S.C. \$ 1402(2) (1970).

\(^{23}\) E.g., low-income families eligible for Section 8 housing are defined as families whose incomes do not exceed 80 percent of the area median income. Id. \$ 1437a(b)(2) (1994 & Supp. 1999). Persons eligible for housing supported by the Low-Income Housing Tax Credit Program must include those in the 50 percent to 60 percent of area median income ranges. I.R.C. \$ 42 (1994 & Supp. 1999). Families of very low income are defined as persons whose incomes do not exceed 50 percent of area median income. 42 U.S.C. \$ 1437a(b)(2) (1994 & Supp. 1999).


Michael Schill, while generally supporting privatization through demand-oriented subsidies as a more efficient way to supply housing assistance, criticized proposals to sell public housing units to tenants as “unfair, unwise and unconstitutional.”27 Although not much activity occurred under this program, Congress reauthorized it in the 1998 Housing Act, and the program laid the groundwork for the major privatization program, HOPE VI.28

A. HOPE VI

HOPE VI grew out of recommendations of the National Commission on Severely Distressed Public Housing.29 The commission concluded that while 94 percent of the 1.4 million public housing units operated by local public housing authorities “continue to provide an important rental housing resource for many low-income families and others,” the 86,000 severely distressed public housing units that were concentrated primarily in high-rise towers in major urban centers were affecting the public’s attitude about the entire public housing program.30 Because of these severely distressed units, public housing had become such a controversial program that the mere mention of any type of government housing in a number of communities instantly conjured up images of vacant high-rise towers that had been vandalized and left in total disrepair. The commission recommended that some experiments be done to find ways to recast the high-rise low-income concentrations into more neighborly environments in which low-income people would not be so isolated.31

In response to the commission’s recommendations, Congress appropriated $300 million for the Urban Revitalization Demonstration Program, which became HOPE VI.32 Acting on a favorable opinion from its general counsel, the U.S. Department of Housing and Urban Development (HUD) authorized public housing authorities in St. Louis, Missouri, and Atlanta, Georgia, to invest federal public housing development funds in a partnership with private investors and public housing residents.33 The resulting developments, Murphy Park in St. Louis and Techwood in Atlanta, became the prototypes of the HOPE VI program.34

1. Private Market Orientation of HOPE VI

The key privatization aspect of HOPE VI is the authorization for public housing authorities to create partnerships with private entities to develop and operate mixed-finance and mixed-income housing developments.35 As a result, under HOPE VI private entities may own housing financed through the public housing programs as long as these entities have a legal rela-

27 Schill, supra note 24, at 879, 913–48; see also Lawrence J. Vale, Public Housing and the American Dream: Residents’ View on Buying into “The Projects,” 9 HOUSING POL’Y DEBATE 267, 278–92 (1998) (reporting interest in homeownership by Boston public housing residents but not necessarily ownership of public housing units).
30 Id. at 2, 36–39.
31 Id. at 124–30.
33 Letter from Nelson Diaz, HUD general counsel, to Joseph Shuldiner, HUD assistant secretary for public and Indian housing (Apr. 13, 1994), discussed in Paul K. Casey, Real Hope at HUD, 7 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 18, 19 (1997) (citing the HUD general counsel’s finding that nothing in the U.S. Housing Act of 1937 prohibits private ownership of public housing, as long as units are occupied by families eligible for public housing and are subject to applicable statutory and regulatory requirements).
34 Casey, supra note 33, at 19.
relationship with a public housing authority. The most popular legal relationship for HOPE VI developments has been a partnership that includes a public housing authority or an affiliate entity, a limited liability company that represents private investors, and a not-for-profit entity representing public housing residents and residents of the surrounding neighborhood.36

A public housing authority’s contribution to a HOPE VI partnership may come from public housing capital and operating funds at its disposal. The contribution may be in the form of a grant, loan guarantee, or other investment in the project; this investment may include collateral or credit enhancement for bonds issued by a public agency or for other forms of public or private borrowing for the construction and rehabilitation of the development.37

Early results of HOPE VI have been mixed. While new mixed-income communities are being created in neighborhoods that previously had low-income concentrations, a substantial reduction in available housing units for low-income persons and families has occurred.38 Some commentators fear a repeat of the urban renewal displacement of the 1950s.39 The St. Louis HOPE VI litigation raises the same concern, as did Chicago, Illinois, litigation that was settled by consent decrees.40

In many ways HOPE VI is an inevitable necessity because of the pervasive discrimination and the mistakes in social planning when the high-rise public housing towers were built. Nevertheless, HOPE VI is reducing rather than adding to the inventory of housing affordable by very low-income persons and families. While a reduction in density and isolation may be a necessary response to the terrible state of high-rise urban housing sites, the fact remains that a large number of families and individuals are not seeing any improvement in their desperate housing conditions through HOPE VI.41


38 See, e.g., Mindy Turbov & Patrick Barry, *Starting Over . . . And Doing It Right* 6 (Feb. 26, 1999) (unpublished paper prepared for Futures Forum on Public Housing Transformation) (on file with Peter W. Salsich Jr.) (emphasizing that public housing families and market rate families are living side by side in Murphy Park in St. Louis, Missouri, and Centennial Place in Atlanta, Georgia, through a private-sector, “income blind” management approach); see also Stephanie E. Bothwell et al., *Restoring Community Through Traditional Neighborhood Design: A Case Study of Diggs Town*, 9 HOUSING POL’Y DEBATE 89, 95–109 (1998) (describing use of New Urbanism design techniques to transform a Norfolk, Virginia, public housing development pre-HOPE VI); James E. Rosenbaum et al., *Lake Parc Place: A Study of Mixed-Income Housing*, id. at 703, 719–29 (reporting achievement of short-term goals of HOPE VI: creating a mixed-income community living in physically attractive, well-managed, well-maintained, and safe buildings, but concluding that research over a longer time frame is needed to assess longer-term goals such as improving residents’ self-sufficiency).


41 For an argument that more rather than fewer units should be targeted for low-income families in HOPE VI developments, particularly in cities with competitive real estate markets, see Lynn E. Cunningham, *Islands of Affordability in a Sea of Gentrification: Lessons Learned from the D.C. Housing Authority’s HOPE VI Projects*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 353 (2001).
2. Resident Involvement in HOPE VI

One of the key issues of the current privatization movement is the appropriate response to public housing residents whom the HOPE VI program affects. The HUD regulations are replete with provisions requiring that residents be consulted on all aspects of HOPE VI planning, including setting goals and identifying means to achieve those goals; that they be made an integral part of HOPE VI planning; that they be given the first opportunity to apply for units in new HOPE VI developments; and that they be welcomed as part of the new mixed-income communities. The St. Louis HOPE VI litigation, however, dramatizes the difficulties in implementing those provisions in a privatized environment.

Public housing residents sued the St. Louis Housing Authority after HOPE VI plans approved in 1995 were changed in 1998 without their approval. The original plan called for demolition of high-rise units at Darst-Webbe and construction of 200 new low-rise family units of public housing in a new 600-unit mixed-income development, called King Louis Apartments, on the Darst-Webbe site. In 1998 a new housing authority administration, at the urging of a private consultant, changed the HOPE VI plan to include demolition of family units in the adjacent Clinton-Peabody low-rise public housing development and reduction of the proposed new family units for public housing-eligible families from the previously approved 200 to 80.

Plaintiffs alleged that the original plan had been developed with the active participation and approval of public housing residents as well as residents in nearby neighborhoods but that the housing authority and HUD approved the new plan without the participation or approval of affected residents. Because the new plan resulted in a net loss of 895 public housing units for very low-income persons and families, most of whom were children, members of minority groups, or both, the tenants alleged that the plan discriminated unlawfully on the basis of race, sex, and familial status. They also alleged that the new plan violated statutory and regulatory requirements regarding demolition, resident participation, and consistency with local consolidated plans.

Housing authority staff testified that the realities of the situation encountered by the new housing authority and city administrations dictated the new plan. The previous housing authority and city administrations almost lost the $46.7 million HOPE VI grant in 1997 because of inaction. The new plan was devised after a team of consultants concluded that the original plan was infeasible in part because of infrastructure costs that the city said it was not able to cover. Plaintiffs acknowledged that residents were involved in extensive meetings after the team of consultants made their findings regarding the original plan but argued that...
residents were not consulted before the decision to change the plan.46

The case dramatizes some issues associated with HOPE VI. For example, who should make necessary decisions about modifications of key plan provisions such as income and tenant mixes? What is the appropriate role of the low-income tenants who are residing in units scheduled to be demolished or renovated? What is the appropriate role of residents in the surrounding neighborhoods? And what is the appropriate role of the city government?

In some respects these issues parallel those that the extensive use of private residential covenants in market-rate residential development raised. Most suburban residential development of the last thirty or forty years has been organized around homeowner associations and other forms of private residential government.47 HOPE VI is attempting to recast traditional public housing in a similar vein. The major difference is that in the suburban residential private developments the members of the governing organizations are property owners, whereas in a HOPE VI development membership in the governing organization is a combination of property owners and tenants.

What, then, is the proper relationship between the two groups, and can the issues associated with control be resolved? These questions are critically important and require early and lasting attention by public housing residents and advocates, as well as public housing authorities and their development partners. Failure to resolve these questions may doom HOPE VI to a repeat of the urban renewal debacle.48

B. The Quality Housing and Work Responsibility Act of 1998

Public housing reform was a major theme of the Quality Housing and Work Responsibility Act of 1998.49 The Act introduced, in addition to HOPE VI, several privatization measures. It articulated a deconcentration policy reducing the required percentage of units set aside for very low-income persons from 75 to 40.50 It repealed federal preferences for admission to public housing in favor of locally established preferences.51 Demolition and disposition of units are regulated but encouraged. To families to be relocated, the local public housing authority must offer “comparable housing . . . that meets housing quality standards . . . [and] is located in an area that is generally not less desirable than the location of the displaced person’s housing.”52

However, any replacement project must contain significantly fewer units than the old project.53 Public housing projects may be converted into tenant-based assistance (vouchers) or transferred to inde-

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46 Trial Testimony, Darst-Webbe Tenant Ass’n Bd., No. 4:99CV00354 (July 16 & 17, 2001). On December 14, 2001, Senior Judge Stephen N. Limbaugh found in favor of the Clinton-Peabody plaintiffs; he ruled that HUD exceeded its authority in adding Clinton-Peabody to the HOPE VI project but ruled in favor of the housing authority and HUD on their decision to reduce the number of public housing units from 200 to 80. Darst-Webbe Tenant Ass’n Bd., No. 4:99CV00354 SNL, at 19–20 (Dec. 14, 2001) (memorandum opinion).


48 For a scathing critique of the urban renewal approach of demolition and displacement, see JACOBS, supra note 18. For a case study of one neighborhood destroyed by urban renewal, see RON FAGERSTROM, MILL CREEK VALLEY: A SOUL OF ST. LOUIS (2000) (copy on file with Peter W. Salsich Jr.).


50 Id. § 513(a) (amending 42 U.S.C. § 1437(n)).

51 Id. § 514(e).

52 Id. § 531(a) (amending 42 U.S.C. § 1437p).

53 Id.
pendent managers at the residents’ request.54 The Act requires new minimum rents and gives public housing authorities greater flexibility in determining eligible income levels.55 Adult residents must participate in community service or economic self-sufficiency programs and may be evicted for illegal drug use.56

The General Accounting Office, in a report to the chair of the House Subcommittee on Housing and Community Opportunity, observed that the 1998 Act included more than eighty provisions, some mandatory and some discretionary, aimed at giving public housing authorities more flexibility in operating their units and encouraging residents to become more self-sufficient.57 It reported that different public housing authorities were implementing the discretionary provisions “to fit their perceived needs and priorities.”58

C. Housing Vouchers

In 1974 Congress created the Section 8 program as a privatized version of public housing.59 It designed the Section 8 program to encourage new construction and substantial rehabilitation of housing with a subsidy level comparable to the public housing program but directed toward private housing developers and owners.60 The same annual contributions contract approach used in delivering the subsidy to public housing was used in the Section 8 housing assistance payments contract.61 The subsidy was based on a percentage of income standard first articulated for public housing in the Brooke Amendment of 1968.62 Although production never achieved the levels recommended by the Douglas, Kerner, and Kaiser reports following the 1968 urban riots, Section 8 produced several million units for the subsidized housing inventory.63

The housing privatization movement in the 1980s actually had its antecedents in a debate during the Carter Administration over the long-term costs of the Section 8

54 Id. § 533(a) (amending 42 U.S.C. § 1437) (permitting conversion of public housing projects into tenant-based assistance); id. § 534 (amending 42 U.S.C. § 1437w) (permitting transfer of public housing projects to independent managers).
55 Id. § 507(a) (requiring new minimum rents); id. § 508 (giving public housing authorities greater flexibility in determining eligible income levels).
56 Id. § 512 (requiring adult residents to participate in community service and economic self-sufficiency programs); id. § 577 (permitting eviction of adult residents for illegal drug use).
58 Id. at 13.
61 Id. § 1437(c). The annual contributions contract is the mechanism by which federal housing subsidies are distributed to local public housing authorities. HUD is authorized to enter into such contracts by id. § 1437(a).
63 NAT’L COMM’N ON URBAN PROBLEMS, supra note 6, at 180 (Douglas report) (recommending the building of 2 million to 2.25 million housing units per year for ten years); PRESIDENT’S COMM’N ON URBAN HOUS., A DECENT HOME 39 (1968) (Kaiser report) (recommending the building or rehabilitating of 26 million housing units in ten years); KERNER COMM’N, REPORT OF THE NAT’L ADVISORY COMM’N ON CIVIL DISORDERS 260 (1968) (Kerner report) (recommending the building of 600,000 units in 1969). The Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, 97 Stat. 1153, repealed authorization for Section 8 new construction and substantial rehabilitation except for section 202 elderly developments.
program. Section 8 housing assistance payments contracts originally ranged from 20 to 40 years long, that is, after the Department of Housing and Urban Development and a local public housing authority entered into such a contract for a particular development, the federal subsidy would continue annually for the life of the contract. Thus an annual Section 8 subsidy of $2,000 per unit for a 100-unit development became a 20- to 40-year commitment of $4 million to $8 million.

As the long-term budgetary implications became clearer, both Congress and the executive branch began searching for a less costly approach. These budgetary concerns—along with controversies over the location of Section 8 developments, allegations of inherent horizontal inequity because so few income-eligible families would obtain such housing, and empirical evidence that demand-oriented subsidies were more efficient—led to a shift from supply-side programs to demand-side subsidies (Section 8 existing certificates and vouchers) and indirect subsidies to private investors (the low-income housing tax credit).

The voucher program has enabled the government to control its costs more effectively, primarily by reducing the length of the voucher commitments to as short as one year. This of course reduces the effectiveness of a voucher for the person or family holding it. Moreover, private landlords have shown a continued reluctance to participate in the Section 8 voucher program.

III. Proposed Housing Legislation

Another major policy issue is what to do about people and families who are not going to be able to afford the housing that the private owners, developers, and managers supply. Congress is beginning to consider this question again. Several bills to create a new housing production program were introduced during the 2001 legislative session. Congress held hearings on these bills but took no action before it adjourned.

Two companion bills establish a national affordable housing trust fund, with a stated goal of producing 1.5 million additional units of affordable housing over a ten-year period. The monies to make

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65 Id. § 1437f(b)(1), (d)(1)(A) (certificates); id. § 1437f(o)(5) (vouchers); I.R.C. § 42 (1994 & Supp. 1999) (low-income housing tax credit); see, e.g., Schill, supra note 24, at 901 (citing Stephen K. Mayo et al., Housing Allowances and Other Rental Housing Assistance Programs—A Comparison Based on the Housing Allowance Demand Experience, Pt. 2: Costs and Efficiency 46–48 (1980)). Regarding the shift from supply-side programs, the high point of new housing appropriations was $32.1 billion in 1978. By 1988 appropriations had declined to $9.8 billion. The number of new households assisted dropped from an average of 316,000 per year in fiscal years 1977–80 to 82,000 per year in fiscal years 1981–88. Peter W. Salsich Jr., Solutions to the Affordable Housing Crisis: Perspectives on Privatization, 28 J. MARSHALL L. REV. 263, 270, n.36 (citing JOEL BLAU, THE VISIBLE POOR: HOMELESSNESS IN THE UNITED STATES 71 (1992)). During the Clinton years the decline in funds for new recipients of housing assistance continued, hitting bottom in the 1997 Appropriations Act when no funds were appropriated for additional Section 8 certificates and vouchers for new recipients. Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1997, Pub. L. No. 104-204, 110 Stat. 2874 (1996), discussed in Jason DeParle, Slamming the Door, N.Y. TIMES MAG., Oct. 20, 1996, at 52.
66 24 C.F.R. § 982.451 (2001) (housing assistance payments contract term is the same as lease term); id. § 982.309 (lease term must be at least one year).
67 Rolf Pendall, Why Voucher and Certificate Users Live in Distressed Neighborhoods, 11 HOUSING POLICY DEBATE 881, 885 (2000). For a review of the housing voucher program and a recommendation that the program be administrated through regional agencies instead of local public housing authorities, see Bruce J. Katz & Margery Austin Turner, Who Should Run the Housing Voucher Program? A Reform Proposal, 12 id. 239 (2001), and comments at 263, 283, 291.
the trust fund operational will come from excess reserves in the Federal Housing Administration’s Mutual Mortgage Insurance Fund and surplus funds of the Government National Mortgage Association (Ginnie Mae). 69

The trust fund will be established in the U.S. Treasury and will be allocated to the states under a formula that the HUD secretary is to establish. The formula must take into account the relative need of each state for affordable housing based on a comparison of a number of factors establishing the need for affordable housing in each state. 70 States must provide a 20-percent match, which may come from low-income housing tax credits, mortgage revenue and other tax exempt bonds, and state revenues as long as the funds are used only for affordable housing and other developments in which at least 50 percent are dwelling units that qualify as affordable housing. 71

States must establish allocation plans for distribution of housing trust fund amounts. 72 Allocation plans must contain assurances of compliance with federal regulations regarding rents and affordability and establish that at least 75 percent of the funds will benefit persons with incomes less than 30 percent of area median income. 73 Important considerations in selecting among applications include the amount of assistance the applicant leverages from private and other nonfederal sources; the extent of local financial and other assistance to be supplied; the degree to which the proposed housing will have residents of various incomes; resolution of siting issues, exclusionary zoning, or other policies that are barriers to affordable housing; and the extent to which the applicant has worked with the local government unit to reduce barriers to affordable housing. 74

Activities eligible to receive housing trust funds include land acquisition; site preparation and improvement, including demolition, new construction, and substantial rehabilitation of existing housing; and limited rental assistance incentives to maintain existing housing as affordable housing and to establish and extend low-income affordability for such housing, including covering capital expenditures and operating costs. 75 Entities eligible to receive housing trust funds include public or private nonprofit or for-profit entities, units of general local government, regional planning agencies, and any other entity engaged in development, rehabilitation, or preservation of affordable housing, as determined by HUD. Eligible subrecipients include public agencies and nonprofit organizations, including community development corporations, housing trust funds, and other intermediaries that a state selects to administer all or a portion of the state’s

69 H.R. 2349, 107th Cong. § 3(b) (1st Sess. 2001).
70 Id. § 4(b).
71 Id. § 4(e)–(f).
72 Id. § 4(g)(5)(B). These allocation plans can be part of the consolidated plans that communities submit to HUD for receiving housing assistance. Id. § 5(d)–(e).
73 Id. § 5(b)(4)(B) (requiring that allocation plans contain assurances of compliance with federal regulations regarding rents and affordability); id. § 5(e)(3)(viii) (establishing that at least 75 percent of the funds will benefit persons with incomes less than 30 percent of area median income).
74 Id. Other factors to be considered include the extent of employment and other economic opportunities for low-income families; the extent to which the applicant demonstrates ability to maintain the units as affordable; the extent to which the applicant demonstrates that the community is experiencing an extremely low vacancy rate; the extent to which the percentage of housing that is located in the community and is extremely old exceeds 35 percent; and whether the applicant has established that 75 percent of the grant funds would be used for eligible activities related to housing in census tracts in which the number of families having incomes less than the poverty line is less than 20 percent and that 25 percent of the grant would be used for housing in census tracts in which the number of families having incomes less than the poverty line is greater than 20 percent and the housing is not located in a community undergoing revitalization. Id.
75 Id. § 6(3).
Tenants receiving assistance from trust fund activities are not required to pay more than 30 percent of their adjusted income for rent. Backers of the trust fund legislation gained an impressive amount of support during the summer and fall of 2001. What impact the terrorist attacks on September 11, 2001, will have remains to be seen, but Congress postponed legislative briefings from September to at least January 2002. However, since the Millennial Housing Commission was not scheduled to issue its report until mid-2002 and the Bush Administration had announced that it would not make any legislative recommendations regarding new housing production programs until it received the commission’s report, most observers had not expected serious legislative debate until 2002 anyway.

Whether renewed federal support for affordable housing production takes the form of a national housing trust fund or an infusion of new money into existing housing production programs may be a matter for reasonable debate. What is crucial is the establishment and significant funding of a new production program. Without new federal money for housing production, the privatization programs offering homeownership and opportunities to live in mixed-income communities will continue to dilute the inventory of housing for very low-income persons and families. The gap between the need for and availability of affordable housing for low-income persons and families will grow even larger.

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76 Id. § 6(4)–(5). The term does not include any public agency or nonprofit organization that, solely as a developer or owner of housing, receives money from the trust fund.

77 Id. § 6(1)(B).

78 The National Low Income Housing Coalition reported that by the end of September 2001 almost 1,400 organizations across the country had endorsed the trust fund bills and that 93 House members had become cosponsors of H.R. 2349. Nat’l Low Income Hous. Coalition, National Housing Trust Fund Update, MEMO TO MEMBERS, Oct. 19, 2001, at 2, available at www.nlinc.org/mtn/mtn6-42.htm#5.


80 Affordable Housing Is High Priority at HUD, But Better Management Leads Agenda, 29 id. 67 (2001).

81 E.g., the St. Louis Housing Authority has proposed to sell seventeen detached houses in the Lookaway public housing development near the city-north county line to public housing residents who make at least $15,000 annually and qualify for mortgage loans. The proposed prices would be geared to resident purchasers’ incomes and could be as low as $20,000 for a house valued at $55,000. Norm Parish, Board OKs Sale of Public Housing to Tenants, ST. LOUIS POST-DISPATCH, July 27, 2001, at B1. Housing advocates were reported to be happy for the particular resident purchasers but worried about the loss of public housing units. Id. Professor Schill makes the same point. See Schill, supra note 24, at 924–25.

82 The dilemma is exacerbated by the understandable desire of low-income families to become homeowners. E.g., when asked to help prepare a plan for neighborhood revitalization, residents of St. Louis’s JeffVanderLou neighborhood, an area of extreme poverty but historic significance (the “Negro (servant class) District” of the mid-nineteenth century), identified for-sale new housing as their first priority. Yvonne Sparks Strauther, executive director, Vashon/JeffVanderLou Initiative Inc., Presentation to Housing Issues Symposium, St. Louis University School of Law (Oct. 4, 2001). Some blocks in that neighborhood were almost completely developed with Section 8 units. The residents wanted to attract working class and middle class families. Id. In New York City neighborhoods a population surge, fueled by immigration and a sustained city effort to supply affordable housing, is raising fears that the poor and minorities are being displaced. Bendix Anderson, Housing Efforts Spark Gentrification Fears, AFFORDABLE HOUSING FIN., Sept. 2001, at 14–15. Brad Lander, the Fifth Avenue Committee’s executive director, an active nonprofit housing developer and manager in Brooklyn, New York, told the Millennial Housing Commission, “In some ways that [the population surge in the New York City neighborhoods] feels wonderful. In some ways it feels entirely awful.” Id.
IV. A Coordinated Strategy

The privatization dilemma in housing is not likely to be resolved by a winner-take-all approach. The private market will not and probably cannot accept total responsibility for housing very low-income—and even low-income—persons and families. It may have the development and “hard” management skills to house people who can afford to pay for housing services, but it does not have the resources or the will to subsidize people who cannot afford to pay market prices.

Nor is the public sector likely to accept full responsibility. It has the resources, but it does not have the development and management skills of the private housing market. Recognition of this fact was one of the points of the 1998 Housing Act. A third player, the nonprofit sector—nongovernmental organizations—may have the experience and sensitivity to respond to family pressures that affect the ability of low-income families to pay their housing bills, that is, “soft management” concerns, but it does not have the resources and “hard” management experience to accept full responsibility for meeting such families’ housing needs.

Advocates and policymakers need to recognize these realities. A new housing strategy should be devised that encourages each of the three sectors to do what it does best.

A. Private Real Estate Sector

Efficient construction and management are hallmarks of the private housing industry. These skills are crucial and should be exploited in any comprehensive affordable housing program. The public sector should encourage private market participation by reducing unnecessary costs of participation in government housing programs and by offering new funds to support construction of additional affordable housing units.

Besides being encouraged to participate in an affordable housing program, the private market needs an exit strategy. No investor believes a particular investment is permanent. However, the history of public housing indicates that a permanent housing program is necessary. Effective involvement of the private market in such a program requires a process by which individual private investors, developers, and managers can get in and get out without suffering public opprobrium for “abandoning the poor.” The nongovernmental organization sector can be a key player in such an exit strategy.83

B. Public Sector

All levels of government have important roles to play in an effective housing program.

New Construction Funding. Perhaps the most important role is resource allocation of both dollars and land. The reality that low-income persons and families are not able to pay market prices for housing makes it imperative that public subsidies be given, on both the supply side and the demand side. Support for increasing the supply of housing units is particularly important because of the substantial loss of existing inventory from the demolition of high-rise public housing units. HOPE VI is an important and necessary effort to cor-

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rect the mistakes of the past; however, it is decreasing, not increasing, the supply of housing for low-income families. Section 8, structured solely as a demand subsidy, will not make up the difference because of the low inventory of available private-market units and private landlords willing to accept Section 8 tenants. A major, long-term public subsidy for new construction and substantial rehabilitation is a critical need. Only the federal government has the resources to accomplish this.

**Land.** One lesson that everyone should have learned from the inner-city public housing debacle is the real estate truism that location counts. Any new housing strategy must face seriously the impact that restrictive and discriminatory land-use regulatory practices have had on the location choices for public and Section 8 housing.84

The private market cannot and will not solve this problem. It does not need to; it simply builds where people who can afford private housing want to live, and they tend to cluster in nondiverse suburban communities.85

In our service and information economy, most of the entry-level jobs available to low-income persons are in suburban and exurban locations far from the inner city.86 However, suburban communities traditionally have been inhospitable to multifamily housing, particularly public and subsidized housing. The primary technique for expressing this attitude has been the insistence on single-family zoning as the preferred strategy for residential development. As a result, large areas of suburbia have little or no housing affordable by people who would fill the entry- and lower-level job slots associated with commercial development.87

State and local governments have a key role in solving this location mismatch. The zoning technique exercised so effectively to block multifamily housing in suburban communities is a form of the police power held by the state. Local governments receive this power by delegation from the state. The U.S. Supreme Court’s unfortunate decision to ignore the exclusionary implications of zoning, its subsequent refusal to hear zoning cases for half a century, and its refusal to extend equal protection suspect-class designation to low-income status effectively opened the door to widespread economic segregation during the suburban development boom of the latter half of the twentieth century.88

Strong state and local political leadership is needed to enact legislation moderating the exclusionary effects of zoning and opening the door for construction of affordable housing within the new suburban and inner-city communities being planned and developed. The moderately priced development unit ordinance of Montgomery County, Maryland, requiring all subdivisions of fifty or more dwelling units to include a minimum number (12.5 percent to 15 percent) of moderately

84 See supra note 20 and accompanying text.
87 Katz & Turner, supra note 67, at 243.
89 *Euclid*, 272 U.S. 365 (ignoring the exclusionary implications of zoning). The district court was more discerning of zoning’s potential for exclusion. “In the last analysis, the result to be accomplished [by zoning] is to classify the population and segregate them according to their income or situation in life.” Ambler Realty Co. v. Village of Euclid, Ohio, 297 F. 307, 316 (1924). Although the U.S. Supreme Court in *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928), indicated a willingness to supervise the application of zoning laws, it did not make another important zoning decision until *Belle Terre v. Boraas*, 416 U.S. 1, 20 (1974) (upholding restrictive definition of “family”). See also Lindsey v. Normet, 405 U.S. 56, 73 (1972); James v. Valtierra, 402 U.S. 137, 143 (1971) (refusing to extend equal protection suspect-class designation to low-income status).
priced units, is a good example and should be emulated. Without major legislative and community efforts to reduce residential land-use segregation, a new affordable housing production program likely will reinforce rather than reduce the isolation that low-income persons and families experience.

Public Housing. In the long and sometimes tortured history of government support for housing in the United States, public housing remains the only program that has reached persons and families at the bottom of the income ladder. Even though public housing was created primarily as a jobs program, it continues to supply decent housing for the vast majority of the people it serves. Public housing is and will remain a critical component of a coordinated housing strategy, but public housing administrators, while seeking to maximize management efficiency, must take care to preserve protections for public housing residents.

C. Nonprofit Sector

Nongovernmental organizations currently are playing several important housing roles in both the homeownership and rental markets. Habitat for Humanity perhaps is the best-known nongovernmental organization in the homeownership market. With chapters throughout the country and in many parts of the world, Habitat makes creative use of two techniques—“sweat equity” and in-kind donations of building materials—to reduce the cost of a modest but attractive new three-bedroom house by about 50 percent. As a result, it can offer realistic homeownership opportunities to families in the $10,000 to $20,000 income range.

Supportive rental housing is another area in which nongovernmental organizations have excelled. Supportive housing is “permanent rental housing linked to comprehensive social, medical and employment services.” Two types of supportive housing have developed—one focusing on homeless or near-homeless individuals suffering from mental illness, addiction, or chronic illness and the other focusing on single-parent families with small children. Beyond Housing Inc. of St. Louis uses a three-pronged strategy that it describes as “environment, services, and capacity building to provide supportive housing for families with children.” The family environment is a modest but decent house in a stable neighborhood. Services are social services that respond to a particular family’s situ-

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90 Montgomery City, Md., Code § 25A (1972), discussed in Salsich, supra note 7, at 462–64.
92 The Habitat for Humanity story is told in Millard Fuller & Linda Fuller, The Excitement Is Building (1990).
94 Id.
95 Peter W. Salsich Jr., A Case Study of Combining Social Services and Affordable Housing, 10 J. Affordable Housing & Community Dev. L. 20, 23 (2000). Beyond Housing Inc. owns 215 single-family housing units in scattered sites throughout St. Louis city and county. It rents these to Section 8 recipients, most of whom are single parents with several small children. Id. at 20–22.
Capacity building focuses on helping families achieve a level of self-support appropriate for their particular situation.96

The private market will not solve the affordable housing crisis. It cannot, unless poverty and racism are eliminated. However, the private market can and should join the public and nonprofit sectors in a coordinated effort to improve housing conditions and choices for low-income people. The most crucial prongs of such a coordinated strategy belong to the public sector: funding for a massive new housing production program, substantial relaxation of exclusionary zoning provisions, and vigilant enforcement of fair housing laws. If these steps are taken, a coordinated strategy has a good chance of succeeding.

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96 Id. at 23.