Articles

Coming Affordable Housing Challenges for Municipalities After the Great Recession

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> "In America today, we are nearer a final triumph over poverty than is any other land."
>
> —President Herbert Hoover, 1928

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I. Introduction

Four years after the start of the Great Recession in the United States,[1] municipalities face an ongoing financial predicament.[2] At the same time that municipal and state budget cuts are carving out funding for critical areas such as education and public safety programs,[3] the need for affordable housing has never been greater. As of November 2012, 12.3 million Americans were unemployed and an additional 8.3 million were seeking, but unable to find, full-time work.[4] For low-income individuals who are able to find employment, the disparity between wages and housing affordability is stark. An individual working a forty-hour week and earning minimum wage today is unable to afford a modest, two-bedroom unit in any state in the United States, except Wyoming.[5] Recent research has also shown that the high cost of housing no longer disproportionately affects just the very low-income individuals; people earning 50 to 100 percent of their city's median income now spend approximately 59 percent of their salaries on transportation and housing.[6]

Alhough housing prices have fallen approximately 30 percent since 2006,[7] adjustments in value have done little to ease the financial burden of rental housing.[8] Unfortunately, at a time when federal fiscal support for affordable housing is imperative, the U.S. Department of Housing

1. The Business Cycle Dating Committee of the National Bureau of Economic Research officially sets the business cycle contraction marking the start of the Great Recession as December 2007 with the cycle concluding in June 2009. *See* http://www.nber.org/cycles/sept2010.html (Sept. 10, 2010).

2. Lisa Lambert, *States' Revenue Surge Ebbs at End of 2011: Report*, Reuters, Mar. 19, 2012, *available at* http://www.reuters.com/article/2012/03/19/us-usa-states-revenues-idUSBRE82I0S120120319. For fiscal year 2013, twenty-nine states are closing or have closed budget gaps of $47 billion.

3. *Id. See also* U.S. Dep't of Justice, The Impact of the Economic Downturn on American Police Agencies (Oct. 2011), *available at* http://cops.usdoj.gov/Publications/e101113406_Economic%20Impact.pdf.

4. U.S. Dep't of Labor Bureau of Labor Statistics, Economic News Release (June 1, 2012), *available at* http://www.bls.gov/news.release/empsit.nr0.htm.

5. Suzy Khimm, *Why Affordable Housing Is a Myth, in One Chart*, Wash. Post, Mar. 19, 2012, *available at* http://www.washingtonpost.com/blogs/ezra-klein/post/why-affordable-housing-is-a-myth-in-one-chart/2012/03/19/gIQA8p3FNS_blog.html.

6. For a definition of "moderate income," see note 13 *infra*. Peter Haas & Stephanie Morse, Ctr. for Hous. Pol'y & Ctr. for Neighborhood Tech., Losing Ground: The Struggle of Moderate-Income Households to Afford the Rising Costs of Housing and Transportation 8 (Oct. 2012), *available at* http://www.cnt.org/repository/LosingGround.FINAL.pdf.

7. Ruth Mantell, *Rising Home Prices Signaling "Recovery,"* Wall St. J., Nov. 30, 2012, *available at* http://articles.marketwatch.com/2012-11-30/economy/35475896_1_home-prices-construction-and-existing-home-sales-euro-zone.

8. *See* Part II of this article.

and Urban Development's (HUD) fiscal year 2012 budget included an 11 percent cut to the Community Development Block Grant (CDBG) program and a 38 percent cut to the HOME Investment Partnerships (HOME) program.[9] Compounding the problem, an additional 6.8 million affordable rental units are needed to meet the needs of extremely low-income individuals—those earning less than 30 percent of their area's median income.[10] Furthermore, over a million affordable units have been lost due to conversion, demolition, or abandonment in the decade between 1997 and 2007,[11] and an estimated $26 billion would be required to adequately support current capital needs of public housing.[12] Increased demand during the Great Recession for rental units has further served to push up rental rates and create incentives for the conversion of below-market-rate housing, resulting in greater hardship for low-income individuals and families and adding an additional 900,000 to their ranks between 2007 and 2010.[13]

As recipients of CDBG block grants and HOME formula grants and gatekeepers of comprehensive plans, state and municipal governments are uniquely positioned to guide the local development of new affordable housing and the preservation of existing buildings. HOME formula grants provide states and local municipalities with the ability to direct funds to the housing projects and local housing developers where they are needed.[14] Additionally, municipal recipients of CDBG block grants have an existing obligation to review current housing stock for deficiencies. They must "(1) [c]onduct an analysis to identify impediments to fair housing choice within the jurisdiction, (2) [t]ake appropriate actions to overcome the effects of any impediments identified through the analysis, and (3) [m]aintain records reflecting the analysis and actions taken in

9. Daria Daniel, *Counties React to Cuts in CDBG, HOME Programs*, NAT'L ASS'N OF CNTYS. CNTY. NEWS, Jan. 30, 2012, *available at* http://www.naco.org/newsroom/countynews/Current%20Issue/1-30-12/Pages/CountiesreacttocutsinCDBG,HOMEprograms.aspx. HUD annually grants funds to cities and counties to support a range of economic and low- and moderate-income housing programs and initiatives. The HOME program provides grants to such entities to support the rehabilitation or construction of existing or new affordable housing. More information on each program is available at http://www.hud.gov.

10. NAT'L LOW INCOME HOUS. COALITIONS, OUT OF REACH 2012: AMERICA'S FORGOTTEN HOUSING CRISIS 3 (2012), *available at* http://nlihc.org/sites/default/files/oor/2012-OOR.pdf. [hereinafter OUT OF REACH 2012].

11. CTR. FOR HOUS. POL'Y, TOOLBOX TO PRESERVE AFFORDABLE RENTAL HOMES, *available at* http://www.housingpolicy.org/toolbox/strategy/policies/preservation.html#fn1 (last visited June 16, 2012).

12. OUT OF REACH 2012, *supra* note 10.

13. *Id.* at 2.

14. *See HOME Program Summary*, http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/programs/home [hereinafter *HOME Program Summary*].

this regard."[15] Supporting affordable housing also provides a number of benefits to a local municipality: affordable housing alleviates the burden of transportation costs on its low-income citizens, promotes local economic growth, and reduces the risk of household foreclosures.[16]

Given the decrease in federal funding, however, municipalities seeking to facilitate the construction or maintenance of affordable housing stock face many challenges and have limited tools available to them. This article will explore changing affordable housing demand and supply indicators, demand projections, and the projected conversion and loss of additional HUD-financed housing units, and compare several opportunities for action that municipalities could take to stem the loss of such rental units.

II. Great Recession's Rapid Growth in Cost-Burdened Households

A. Affordable Housing Supply and Demand Gap

A confluence of financial and economic factors during the Great Recession emphasizes the growing affordability crisis and disparities between renter and owner households. In 1960, only 24 percent of renters were moderately cost burdened, with 12 percent considered severely burdened.[17] By 2009, however, the number of moderately burdened households grew to 49 percent, with 26 percent of renters severely burdened.[18] This marked an 11 percent increase in moderately burdened households and a 6 percent increase in severely burdened households since 2000 alone.[19] Furthermore, unlike any time prior, as recent research by Harvard University's Joint Center for Housing Studies shows, middle-class renters and owners are now affected as well. Trends in vacancy rates continue to point to a greater demand for rented units,[20] and, as shown by the uneven

15. *See, e.g.*, HUD Fair Housing Planning Guide 1–2, 24 C.F.R. § 570.904, *available at* http://www.hud.gov/offices/fheo/images/fhpg.pdf.

16. Ctr. for Hous. Pol'y, The Role of Affordable Housing in Creating Jobs and Stimulating Local Economic Development: A Review of the Literature (Jan. 2011), *available at* http://www.nhc.org/media/files/Housing-and-Economic-Development-Report-2011.pdf.

17. Joint Ctr. for Hous. Studies of Harvard Univ., America's Rental Housing: Meeting Challenges, Building on Opportunities 4 (2011), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/americasrentalhousing-2011.pdf [hereinafter America's Rental Housing]. Units are generally understood to be "affordable" if renters spend less than 30 percent of their income on rental and utility costs. Renters may also be "moderately" burdened, where they spend between 30 and 50 percent of their income on such costs, or "severely" burdened, where more than 50 percent of income is spent on rent and utility costs.

18. *Id.*

19. *Id.*

20. Hui-yong Lu, *Apartment Vacancies in U.S. Decline to a Decade Low as Rental Rates Climb*, Bloomberg News, Jan. 4, 2012, *available at* http://www.bloomberg.

pace of housing sales, even individuals and families who are able to purchase new homes are not rushing to buy them.[21] Combined with an existing shortage of affordable units in the nation and lower construction starts than in decades,[22] it is reasonable to expect that cost-burdened households will continue to shoulder the worst of this burden.

Between 2006 and 2010, the net increase in renter households and decrease in owner households nearly wiped out all previous gains in the previous decade.[23] During these four years, approximately 692,000 additional households chose or were forced to rent units, and 201,000 less owner-occupied households were added each year.[24] The Joint Center for Housing Studies' research also found that by 2010, 18.8 million American households had fallen into the category of moderately cost-burdened renting households.[25] With a total of 37 million households renting at the close of 2010, this figure represents a substantial and troublingly large share of all renting households in the United States.[26] Furthermore, 69 percent of the growth in cost-burdened renters occurred in households already severely burdened by rent and utility costs.[27]

At the same time, the available supply of low-cost housing units continued a decade-long decrease. As of 2003, before the Great Recession began, only 40 percent of needed units within a price range affordable to extremely low-income households were available to meet demand.[28] An additional 5.6 million units would have been required to match the number of households seeking to spend less than 50 percent of their

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com/news/2012-01-05/u-s-apartment-vacancies-decline-to-a-decade-low-of-5-2-rents-increase.html.

21. Pending home sales were down in February 2012 from the previous month, according to the National Association of Realtors, but remained 8.8 percent higher than levels the previous year. Sales of distressed homes (foreclosures and short sales) comprised approximately one-third of all sales in February 2012. *See* http://www.realtor.org/press_room/news_releases/2012.

22. *See* Part II.B.

23. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2011, at 22, *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2011.pdf [hereinafter STATE OF THE NATION'S HOUSING 2011]. The Joint Center for Housing Studies issued a revised State of the Nation's Housing 2012, predicting recovery in the for-sale housing market and restating its forecast for increased demand in the rental market leading to widespread rent increases. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2012, *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2012.pdf.

24. STATE OF THE NATION'S HOUSING 2011, *supra* note 23.

25. AMERICA'S RENTAL HOUSING, *supra* note 17, at 28.

26. STATE OF THE NATION'S HOUSING 2011, *supra* note 23, at 22.

27. *Id.*

28. AMERICA'S RENTAL HOUSING, *supra* note 17, at 32.

limited income on housing costs.[29] In only six years, however, this gap rose to approximately 6.8 million units by 2009, resulting in only 35 percent of households having access, theoretically, to a unit at an affordable price point.[30] For moderately cost-burdened households with greater income flexibility, the supply gap was still significant. Between 2003 and 2009, the number of such households grew from 16.3 million to 18 million, but the supply of affordable units dipped by 3.4 percent, resulting in a 2009 supply gap of approximately 33 percent.[31]

Notably, low household growth over the course of the past decade did little to alleviate the housing burden on low-income renters. The number of independent households headed by individuals aged 20–24 fell by 2.6 percent since 2007; the corresponding number for individuals aged 25–29 fell by 2.8 percent.[32] An additional 44.7 percent of 20–24-year-old individuals and 18 percent of 25–29 year olds resided with their parents in 2010.[33] Yet even though fewer young adults rented units, the Great Recession took a heavy toll on the earning capacity of lower-income individuals, driving a strong increase in cost burdens among the poorest of Americans and reducing homeownership rates among minority groups.[34] The bottom 25 percent of Americans by income accounted for 60 percent of the growth in all renting households, and as of 2010, 70 percent of all renters fell below the 50 percent threshold for all Americans in household income.[35] Homeownership rates also dipped by 3.8 percent among all black households and 2.1 percent in Hispanic households, while decreasing by only 1.5 percent in white households.[36]

Municipalities should note that the greatest increases in percentage of income spent on rental costs occurred in households earning between $45,000 and 60,000,[37] signifying that housing affordability challenges are affecting the traditional middle class as well. The increased number of households in this bracket spending nearly 30 percent of their income on housing costs grew by 7.9 percent between 2001 and 2009.[38] The rise and fall of vacancy rates also makes long-range planning for housing challenging for municipalities, since rates have been fluid over the past several years. At the midpoint of the past decade, overall vacancy rates in both

29. *Id.*
30. *Id.*
31. *Id.*
32. State of the Nation's Housing 2011, *supra* note 23, at 13.
33. *Id.*
34. America's Rental Housing, *supra* note 17, at 18; State of the Nation's Housing 2011, *supra* note 23, at 19.
35. America's Rental Housing, *supra* note 17, at 17.
36. State of the Nation's Housing 2011, *supra* note 23, at 19.
37. *Id.* at 4.
38. *Id.* at fig. 5.

single and multifamily housing rose from 8 percent in the 1990s to approximately 10 percent; however, a sharp spike occurred in 2009 when the rate rose to 10.6 percent due to the influx of 3.5 million foreclosed homes into the rental market between 2008 and 2010.[39] However, by 2010, the vacancy rate had fallen to 10.2 percent[40] and since then may have even fallen to a ten-year low of approximately 5.2 percent as of January 2012.[41] The Joint Center for Housing Studies' research reflects that this number remains volatile and varies widely by region. A statistical sampling by the U.S. Census of housing vacancies and homeownership levels shows that at the end of 2011, the South had a vacancy average of 12 percent while the Northeast's rate was only 7.5 percent.[42] As these numbers oscillate,[43] it is important to view them in light of the added pressure that greater household growth would place on existing rental units if the pent-up demand is realized as discussed below.

B. Rental Housing Demand Projections

Given the decline in homeownership rates and vacancy rates, particularly the nearly 15 percent decline in homeownership among individuals aged 25–44,[44] the demand for rental units will continue on its upward trajectory. Although approximately 50 percent of renters are age 40 or older and 65 percent are white,[45] demographic drivers of future growth in rental households will likely come from minority households, and the baby boomer generation is expected to play a large role in future growth as well.

Between 2001 and 2010, minorities were responsible for 81 percent of all growth in rental households, and approximately half of all immigrants rent rather than buy their residences.[46] Approximately 59 percent of HUD-assistance recipients are minorities.[47] With the ability to purchase

39. *Id.* at 22; AMERICA'S RENTAL HOUSING, *supra* note 17, at 9.

40. AMERICA'S RENTAL HOUSING, *supra* note 17, at 9.

41. *See HOME Program Summary*, *supra* note 14. The U.S. Census presents a slightly different vacancy rate (9.4 percent) for the close of 2011, *available at* http://www.census.gov/hhes/www/housing/hvs/qtr411/files/q411press.pdf.

42. *See* U.S. Census Bureau, Housing Vacancies and Homeownership–Fourth Quarter 2011, Table 2. Vacancy Rates by Area, *available at* http://www.census.gov/hhes/www/housing/hvs/qtr411/q411ind.html.

43. *See* U.S. Census Bureau, Housing Vacancies and Homeownership–First Quarter 2012, Table 2, Vacancy Rates by Area, *available at* http://www.census.gov/hhes/www/housing/hvs/qtr112/q112ind.html (reflecting an overall vacancy rate of 8.8 percent, with a vacancy rate of 10.8 percent in the South and a 7.8 percent rate in the Northeast).

44. AMERICA'S RENTAL HOUSING, *supra* note 17, at 19.

45. *Id.* at 16.

46. *Id.* at 16–17.

47. *Id.* at 37.

a home less likely among minorities,[48] it appears that many may be unable to take advantage of the more favorable mortgage rates and median home prices and will remain renter households.[49] The Pew Research Center's population projections based on trends drawn from U.S. Census data suggest that 20 percent of the U.S. population will be comprised of immigrants by 2050, with minority groups comprising approximately 51 percent of the population.[50] Should these patterns continue, coupled with additional demand propelled by doubled-up minority families and young adults currently living with parents who move into their own units,[51] it is clear that the current supply gap and pressure on lower-income households to spend a higher percentage of their income on rental costs will continue to escalate.[52]

As the baby boomer generation reaches retirement age, their housing choices and population size will similarly resonate throughout the rental housing market. Some estimates place the number of baby boomers expected to sell their homes to purchase smaller homes at 3.8 million households,[53] which is projected to compete with demand for entry-level starter homes from the "echo boomer" generation.[54] Demand for smaller units may incentivize existing multiunit rental building owners to reexamine unit profitability as rental units or condo conversions. If household creation among this generation continues on its current track during this decade, the number of households headed by individuals aged 55 to 74 will rise by 10.2 million.[55] Approximately 2 million of these households are expected to rent.[56] With an early 2011 U.S. Census report placing the percentage of individuals aged 65 and older living in poverty at 8.9 percent (adjusted to 16.1 percent with additional medical and other factors included),[57]

48. STATE OF THE NATION'S HOUSING 2011, *supra* note 23, at 19 (finding that minorities, on average, have only $300 cash savings and $2,700 in net worth, according to 2007 data).

49. *Id.* ("Payments on the median-priced home as a share of median household income also hit a new low of 18 percent in the fourth quarter of 2010, down from 20 percent a year earlier and from 32 percent at the end of 2005.").

50. Jeffrey Passel & D'Vera Cohn, *U.S. Population Projections: 2005–2050*, PEW RESEARCH CTR., Feb. 11, 2008, *available at* http://www.pewhispanic.org/2008/02/11/us-population-projections-2005-2050/.

51. Alejandro Becerra, Nat'l Ass'n of Hispanic Real Estate Prof'ls, *The 2011 State of Hispanic Homeownership Report* (Mar. 2012), *available at* http://nahrep.org/downloads/state-of-homeownership.pdf.

52. STATE OF THE NATION'S HOUSING 2011, *supra* note 23, at 4.

53. *Id.* at 3.

54. *Id.* at 15. "Echo boomer generation" refers to the generation born after 1986.

55. *Id.* at 13.

56. AMERICA'S RENTAL HOUSING, *supra* note 17, at 18.

57. Kathleen S. Short, *Who Is Poor? A New Look with the Supplemental Poverty Measure* (U.S. Census Bureau, Housing & Household Econ. Statistics Div., Working

it is reasonable to estimate than an additional 178,000 individuals in that age category will require federal and state aid in order to obtain rental housing at a price point that is affordable for their fixed incomes.

Many of these households seeking affordable housing will have difficulty obtaining quality units at a price within reach due to increased rental rates and above-market rentals. As many as 3.6 million foreclosed homes may be added to the market through 2013, which would assist in increasing stock and buttressing the decline in housing prices.[58] Nonetheless, two factors point to a sustained shortage in low-cost housing.

First, if the decline in vacancy rates continues, the equilibrium point in sustaining a competitive rental market may be reached much sooner than anticipated.[59] At the close of 2010, a surplus of approximately 700,000 rental units was available to rental households.[60] At the anticipated household growth rate, a balanced vacancy rate of 8 percent would have been theoretically reached this past year.[61] However, given the wide swings in the housing market over the past two decades, the Joint Center for Housing Studies suggests that a "sustainable" vacancy rate could be closer to 10 percent, and available housing stock may be lower than surveys indicate.[62] Rental costs reflect this irregularity: overall rents had fallen in sixty-one of sixty-four metropolitan areas in 2009, yet had risen at a level faster than inflation in the same number of metropolitan areas at the close of 2010.[63]

Second, given the Great Recession's effect on the economy and the unavailability of financing, new multifamily construction starts were lower than they had been since 1959.[64] Approximately half of multifamily rentals completed between 1995 and 2009 were market-rate, but it appears that growth in this market is concentrated on above-market rental households.[65] While new apartments comprise 14 percent of rental housing stock, approximately one-third rent for $1,250 or more.[66] In contrast, the rent for a unit affordable to an extremely low-income individual would be between $377 and $505.[67]

Paper No. 2010-15, Jan. 31, 2011), *available at* http://www.census.gov/hhes/povmeas/methodology/supplemental/research/SGE_Short.pdf.

58. William C. Dudley, President and C.E.O., Federal Reserve Bank of New York, Remarks at the New Jersey Bankers Association Economic Forum (Jan. 6, 2012), *available at* http://www.newyorkfed.org/newsevents/speeches/2012/dud120106.html.

59. AMERICA'S RENTAL HOUSING, *supra* note 17, at 10.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 23.

65. *Id.*

66. *Id.*

67. OUT OF REACH 2012, *supra* note 10, at 4.

C. *Affordable Housing Preservation Obstacles*

Federal assistance and intervention remain crucial to ensuring that a portion of low-income individuals have subsidized access to affordable housing. However, private housing stock comprises the bulk of affordable units and is thus vulnerable to a great risk of loss. In 2009, three times as many unsubsidized units housed individuals at a below-market price point as federally subsidized ones.[68] However, multifamily unit construction costs may continue to hinder new projects and high maintenance costs may impede the preservation of existing older units.[69] The Joint Center for Housing Studies estimates that a return of 1 percent of property value, and thus a median unit rent of $1,067 according to a 2009 U.S. Census survey, is required for multifamily unit investment to be financially prudent.[70] As illustrated above, this is far higher than what is affordable for most low-income renters. Multifamily housing property debt also doubled to $800 billion between the years of 1998 and 2008, higher than levels seen for the previous twenty-three years.[71] Although net operating income rose over the last two years of the past decade,[72] thereby alleviating some of the existing cost burden on owners, the 2001 U.S. Census's Residential Finance Survey found that older multifamily housing required approximately 15 percent investment of rental income into capital upkeep costs.[73] This figure represents nearly twice the amount owners of buildings less than ten years old must usually expend.[74] As the median age in 2009 of the average rental housing building was thirty-eight years, capital costs will become an increasingly greater financial burden on the majority of rental building owners, with fewer built to replace such buildings over the past decade during the Great Recession than in the past fifty years.[75]

It should come as little surprise that since 1995, nearly one in five affordable housing units has been lost.[76] As to be expected, the units most affordable to the most vulnerable low-income individuals are the ones at greatest risk for permanent loss because the margin of profitability is often very slim.[77] Between 1999 and 2009, 11.9 percent of all units renting below $400 were removed from available housing stock, and as the Joint Center for Housing Studies noted, this figure represents a four-

68. America's Rental Housing, *supra* note 17, at 22.
69. *Id.* at 24.
70. *Id.*
71. *Id.* at 11.
72. State of the Nation's Housing 2011, *supra* note 23, at 25.
73. America's Rental Housing, *supra* note 17, at 26. "Older" is considered a multifamily building twenty years old or more.
74. *Id.* at 25.
75. *Id.*
76. *Id.* at 35.
77. *Id.* at 25.

fold increase over the removal of units renting for more than $800.[78] "Opting out" or "expiring use," terms that describe privately owned housing that are intentionally removed from federally assisted housing stock once their federally backed mortgages or subsidies expire or are prepaid,[79] is also a concern. HUD mortgages are granted for a period of up to forty years.[80] A 2004 Government Accountability Office report found that approximately 21 percent of HUD-subsidized mortgages, or 237,000 units, are scheduled to mature by 2013.[81] The National Housing Trust anticipates that 12,968 units will mature in 2012 alone.[82] For owners whose properties are located in competitive markets with low vacancy rates and higher average market rents, the temptation to convert at the conclusion of their HUD contracts to market-rate rents may be too financially appealing to resist.[83]

78. *Id.*

79. For a more in-depth study of housing stock that has opted out or opted in over the past five decades, see U.S. DEP'T OF HOUS. & URB. DEV., MULTIFAMILY PROPERTIES: OPTING IN, OPTING OUT AND REMAINING AFFORDABLE (Jan. 2006), *available at* http://www.huduser.org/Publications/pdf/opting_in.pdf.

80. *See* Nat'l Hous. Law Project, *Mortgage Maturity Problem Still Awaits Congressional Action*, HOUS. L. BULL. (July 2011), *available at* http://nhlp.org/files/Mortgage%20Maturity%20Problem.pdf ("Affected properties are those with budget-based rent restrictions under the Section 221(d)(3) Below Market Interest Rate, Section 236, and Section 202 programs developed in the late 1960s and early 1970s, as well as rural properties financed by the United States Department of Agriculture under the Section 515 Rural Rental Housing program.").

81. Miriam Axle Lute, *Slipping Away*, SHELTERFORCE (Fall/Winter 2009), *available at* http://www.shelterforce.org/article/print/1849/.

82. Nat'l Hous. Law Project, *supra* note 80.

83. AMERICA'S RENTAL HOUS., *supra* note 17, at 38. Federal legislation has been introduced in the last few years to provide HUD with more expansive tools to preclude turnover in affordable housing units but has failed to pass. In 2010, Massachusetts Rep. Barney Frank introduced the Housing Preservation and Tenant Protection Act (H.R. 4868), which would have converted expiring supplemental project-based housing into Section 8 housing and provided HUD with a right of first refusal to purchase such properties. *See* H.R. 4868, *available at* http://www.govtrack.us/congress/bills/111/hr4868. A coalition of Realtor associations and affordable housing groups expressed concern over the right of first refusal provisions, among other things, and the bill died in committee. *See* H.R. 4868 Housing Preservation and Tenant Protection Act of 2010 Amendments Needed to Protect Private Sector Participation in Affordable Housing, *available at* http://www.housingpreservation.org/fact_sheet.pdf. In 2010, Minnesota Rep. Keith Ellison introduced the Rental Housing Revitalization Act (H.R. 6468) to allow HUD and property owners under short-term assistance contracts to voluntarily convert to longer-term rental contracts, rehabilitate units, and/or provide tenant vouchers to ensure one-to-one replacement of units. *See* H.R. 6468, *available at* http://www.govtrack.us/congress/bills/111/hr6468. This bill also died in committee.

III. Comparative Municipal Approaches to Housing Preservation

For municipalities that remain constrained by budgetary cutbacks and lower tax revenues yet are dedicated in their efforts to preserve and provide fair and affordable housing to their residents, options may appear limited.[84] Three statutory and policy methods that states and municipalities have employed during and after the Great Recession to curtail the ongoing loss and conversion of affordable housing units have proven effective in several geographic locations and may be a cost-effective way for others to engage in similar efforts.

A. "No Net Loss" of Housing Stock Goals

At a minimum, counties and cities can choose to demonstrate their support for affordable housing retention by enacting a "no net loss" policy. Such statements generally set forth a commitment to one-for-one replacement of affordable housing units as they age out of existing stock or are converted to market-rate housing. In California, government code regulations require municipalities to inventory sites and determine housing stock to ensure no net loss or reduction in housing units in the development of real property.[85] Alternatively, if residential density is to be reduced, an additional site must be identified to supplant the downzone

84. The Great Recession's effects on the construction and lending markets has exacerbated the financing gap between low-income housing tax credits (LIHTC) and private investment and the actual cost of affordable housing construction or rehabilitation. This gap is projected to persist or increase as available sources of gap financing decline. *See* Jerry Ascierto, *Fannie Looks Ahead,* AFFORDABLE HOUS. FIN., Jan./Feb. 2012, *available at* http://www.housingfinance.com/ahf/articles/2012/january-february/0112-finance-Fannie-Looks-Ahead.htm. The HOME program provides states and local governments with grants to assist in bridging these gaps in housing project financing, permitting projects to move forward and developers to offer units at more affordable rental rates.

See U.S. Dep't of Hous. & Urb. Dev., *Using LIHTC with HOME Funds, available at* http://www.hud.gov/offices/cpd/affordablehousing/training/web/lihtc/homefunds/. However, HUD, which was the subject of a *Washington Post* investigation in 2011, has come under fire for reportedly mismanaging funding or granting funds to projects that did not have financing in place to move forward. *See* Debbie Cenziper & Jonathan Mummolo, *A Trail of Stalled or Abandoned HUD Projects,* WASH. POST, May 14, 2011, *available at* http://www.washingtonpost.com/investigations/a-pattern-of-hud-projects-stalled-or-abandoned/2011/03/14/AFWelh3G_story.html. Many municipalities remain dependent upon CDBG and HOME funds to provide gap financing to affordable housing projects in the form of low-interest loans. However, others, such as Boulder, Colorado, and San Jose, California, have diversified their funding sources to draw from bonds and other affordable housing funds. *See* BOULDER, COLO., DIV. OF HOUS., http://www.bouldercolorado.gov/index.php?option=com_content&view=article&id=2635&Itemid=843; CITY OF SAN JOSE, CAL., HOUS. DEP'T, http://www.sjhousing.org/depart/fundsource.html.

85. CAL. GOV'T CODE § 65863(b).

and the consequent reduction in construction of affordable housing units that would have occurred at the higher density.[86] Across the country, in Montgomery County, Maryland, the draft housing policy for 2012 proposed a first-line priority goal of establishing no net loss of affordable housing units where redevelopment is permitted, in addition to setting other incentives and streamlining processes for affordable housing projects.[87] An early adopter of "no net loss" in 1981, the City of Alexandria, Virginia, established a comparable goal for redevelopment projects in its Resolution 830.[88] During its efforts to renovate a seventy-year-old complex, the City of Seattle found that "no net loss" policies are useful to assuage public concerns over housing shortfalls in urban renewal redevelopment plans.[89] In order to finance the gap between the redevelopment costs and the loss of federal funding to the Seattle Housing Authority, Seattle redesigned the community to incorporate mixed-use buildings and both commercial and residential uses.[90] Sales of those spaces were intended to offset redevelopment costs.[91] When community activists expressed concern, the Seattle Housing Authority held twenty-eight public Citizen Review Committee meetings and hired several staff to ensure transparency and alleviate fears that housing would be lost.[92] To date, the Citizen Review Committee has committed to the one-for-one replacement principle[93] and redevelopment plans were approved in May 2011.[94]

B. *Rights of First Refusal*

For jurisdictions seeking to take a more involved, assertive step toward preserving existing housing stock, states and municipalities have enacted

86. *Id.* § 65863(b)(2).

87. Montgomery County Draft Housing Policy 2012, *available at* http://www.montgomerycountymd.gov/content/DHCA/housing/housing_P/Policy/PDF/housingpolicy2012-draft.pdf.

88. *See, e.g.*, Alexandria, Va., Housing Project Braddock East, *available at* http://alexandriava.gov/BraddockEast; *see also* Coalition for Smarter Growth Affordable Housing Coverage of Resolution 830, *available at* http://smartergrowth.net/anx/index.cfm/1,147,html/Affordable-Housing.

89. Aaron Burkhalter, *Yesler Terrace 2.0*, REAL CHANGE, Mar. 7, 2012, *available at* http://www.realchangenews.org/index.php/site/archives/6309/.

90. *Id.*

91. *Id.*

92. Archived Yesler Terrace committee meeting information may be found at http://www.seattlehousing.org/redevelopment/yesler-terrace/archive/.

93. *See* Seattle Hous. Auth., *One-for-One Replacement Housing*, *available at* http://www.seattlehousing.org/redevelopment/yesler-terrace/principles/replacement/.

94. Press Release, Seattle Hous. Auth., Board Approves Yesler Terrace Development Plan (May 19, 2011), *available at* http://www.seattlehousing.org/news/releases/2011/board-approves-yesler-terrace-development-plan/index.html.

"rights of first refusal" granting state housing agencies, municipal housing agencies, or nonprofit organizations the right to notice of an owner's intent to sell within a certain time frame and an opportunity to purchase expiring or opting-out affordable housing units.[95] Although each state or municipality may have its own preferred procedures, the basic mechanism for these rights of first refusal is largely uniform. Notice is first given prior to termination of the subsidy or restriction; state agencies or other designated entities then are provided with time to negotiate to buy or a right to purchase the property at its fair market value or qualified contract price.[96]

The City of Portland (Oregon) enacted a notice provision in 1998 requiring that owners provide tenants and the city with prior notice of the intended turnover, sale, or opting out of locally or federally subsidized multiunit affordable housing.[97] Portland's mechanism provides for a preservation process under which owners must provide a one-year prior notice to both tenants and the city of the Section 8 contract expiration, 210 days' notice of their intent to opt out of a long-term federal contract, and 150 days' notice of their intent to opt out of a one-year extension to a long-term contract.[98] During this period, the city or its designee may negotiate a purchase of the property from the owner.[99] The Portland Bureau of Housing and Community Development is directed to financially assist tenants who are involuntarily relocated from federally supported properties.[100] Similarly, the city or its designee may, but is not obligated to, offer to purchase property financed through local state or municipal loan programs at a fair market value price or move forward with condemnation proceedings under Oregon's statutory guidelines for the public acquisition of property.[101]

Some jurisdictions go further to ensure the prevention of turnover in affordable housing by enumerating steps that must be taken to allow a successor entity the opportunity to purchase publicly assisted property

95. James R. Grow, Nat'l Hous. Law Project, State and Local Regulatory Initiatives to Preserve At-Risk Affordable Housing (2007), *available at* http://www.housingpolicy.org/assets/preservation%20resources/Grow.pdf.

96. Owners seeking to sell LIHTC-funded properties may also voluntarily approach HUD to facilitate a search for a buyer prior to the termination of the funding contracts. *See* 26 U.S.C. § 42(h)(6)(E); 26 C.F.R. § 1.42-18(c).

97. *See* Portland City Code §§ 30.01.010 et seq. (added by Ordinance No. 172844, eff. Nov. 4, 1998), *available at* http://www.portlandonline.com/auditor/index.cfm?c=28481.

98. *Id.* § 30.01.050.

99. *Id.* § 30.01.050(E).

100. *Id.* § 30.01.060.

101. Or. Rev. Stat. §§ 35.015 et seq. (2007).

at fair market value.[102] In Texas, the Department of Housing and Community Affairs (DHCA) adopted a new rule to provide DHCA with a two-year window of time, or one year if within the last year of LIHTC compliance,[103] during which it can identify a willing nonprofit housing organization, tenant organization, management corporation, or similar buyer for the property.[104] During this time, the housing seller must provide DHCA with a list of property income documents, photographs, and title report.[105] A component of the rule requires the owner to also produce a recent appraisal and the prior year's monthly operating statements.[106] If DHCA is unable to find a nonprofit buyer within the provided time, the owner is permitted to proceed with a private sale.

Massachusetts enacted a similar preservation law in late 2009 requiring that a minimum of two years prior to the termination of its housing restrictions, publicly assisted affordable housing linked to one or more of thirteen enumerated programs provide prior written notice of such expiration.[107] Owners are also obligated to provide a second, subsequent notice one year prior to termination. The Massachusetts Department of Housing and Community Development (DHCD), tenants and any tenant organizations, the chief executive officer of the municipality, and the Massachusetts Community Economic Development Assistance Corporation all must receive timely notice of the impending turnover, and the statute provides for a detailed multi-entity offer process, including DHCD's prerogative to assign its right of first refusal to another public housing or nonprofit organization.[108] The constitutionality of such provisions has largely been unchallenged,[109] perhaps due in part to the difficulty

102. Jurisdictions enacting such housing laws include Illinois (310 ILL. COMP. STAT. §§ 60/3 through 60/8), Rhode Island (R.I. GEN. LAWS §§ 34-45-7, -8), Maine (ME. REV. STAT. ANN. tit. 30A, § 4973), and New York City (N.Y.C. ADMIN. CODE §§ 26-801 et seq.).

103. 10 TEX. ADMIN. CODE § 1.9(a).

104. *Id.* § 1.9(e).

105. *Id* § 1.9(f)(1)(A)–(E).

106. *Id.*

107. *See generally* MASS. GEN. LAWS ch. 40T, *available at* http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleVII/Chapter40T.

108. *See, e.g.*, Paul E. Bouton et al., *Massachusetts Enacts Preservation Law with Right of First Refusal*, AFFORDABLE HOUS. ALERT (Dec. 8, 2009), *available at* http://www.nixonpeabody.com/linked_media/publications/AFHS_Alert_12_08_2009.pdf.

109. *See* Laurel Park Cmty., LLC v. City of Tumwater, 698 F.3d 1180 (9th Cir. 2012) (upholding City of Tumwater zoning ordinances restricting conversion of manufactured home parks, in part because plaintiffs failed to demonstrate the substantial economic impact of the regulation on the value of the properties); Richman Towers Tenants' Ass'n, Inc. v. Richman Towers LLC, 17 A.3d 590 (D.C. 2011) (holding that transfer of ownership to different entity constituted a sale under Tenants' Opportunity to Purchase Act, D.C. CODE §§ 42–3404.02(a) et seq. (2001), thus triggering, and upholding, tenant association's right of first refusal to purchase

in proving a takings claim where each statute's notice and fair market value appraisal process would not appear to result in any diminution in property value.[110] Rights of first refusal do not prohibit owners from selling the property, and states or municipalities must search for a buyer on a timely basis.[111] Municipalities should be cautious, however, of enacting regulations that would otherwise conflict with state or federal law, thereby triggering preemption challenges that may result in nullification of such provisions.[112]

C. *Municipal Building Codes*

Municipal building codes can play a very basic but important role in impeding or encouraging the building and renovation of affordable housing properties.[113] As the median age of such properties continues to climb, capital upkeep costs to maintain building code compliance

housing accommodation); Kenneth Arms Tenant Ass'n v. Martinez, 2001 U.S. Dist. LEXIS 11470 (E.D. Cal. 2001) (holding that California notice requirements for owners withdrawing from federal housing programs did not conflict with and were not preempted by federal law).

110. Where HUD, states, or municipalities have attempted to restrict owners' right to prepay federally subsidized mortgages, however, courts have analyzed the merits of regulatory takings claims and the extent to which such provisions interfere with owner's investment-backed expectations. *See, e.g.*, Cienega Gardens v. United States, 331 F.3d 1319 (Fed. Cir. 2003) (holding that a compensable, temporary taking occurred when a regulation prevented owners from prepaying twenty-year federally subsidized mortgages and exiting housing program).

111. *See, e.g.*, ME. REV. STAT. § 4973(2) (providing the Maine State Housing Authority with ninety days to respond to an owner's notice of its intent to sell or transfer its property and with an additional ninety days to buy or produce a buyer for the property before the owner may sell to another third party).

112. Real Estate Bd. of New York, Inc. v. City of New York, 842 N.Y.S.2d 218 (2007) (holding that city's imposition of additional restrictions giving tenants of a property withdrawing from federal Mitchell Lama program a right of first refusal to purchase the building or an additional six-month tenancy after the conclusion of the program was inconsistent with and therefore preempted by federal law).

113. As many municipalities are undoubtedly aware, a recent case before the Supreme Court concerned the enforcement of municipal codes in St. Paul, Minnesota, under a Fair Housing Act disparate impact theory. In *Magner v. Gallagher*, 619 F.3d 823 (8th Cir. 2010), the Eighth Circuit reversed the district court's grant of summary judgment in favor of the city, finding that plaintiffs, private landlords of low-income housing, had produced sufficient evidence to withstand summary judgment based on the claim that they had been unfairly targeted for housing code violations. Although the city requested dismissal of its motion for certiorari before oral argument, *Magner v. Gallagher*, 132 S. Ct. 1306 (2012), the Supreme Court may revisit this theory this term in *Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 658 F.3d 375 (3d Cir. 2010), *petition for cert. filed*, (U.S. June 11, 2012) (No. 11-1507). Municipalities would thus be prudent to monitor this area of law as it develops.

become prohibitively expensive.[114] The high costs of modernization for older buildings, if necessary improvements are left unaddressed, may lead to greater abandonment of distressed buildings.[115]

The Municipal Research and Services Center of Washington (MRSC) highlights a few of the efforts municipalities have undertaken in Washington State to accommodate these properties.[116] In Puyallup, the city elected to waive permit fees pursuant to Municipal Code § 17.04.110 for affordable housing projects. Similarly, in Lakewood, building permits and land use fees have been reduced for affordable housing projects under its Municipal Code § 18A.50.760.

Other cities, such as San Luis Obispo in California, have taken a more proactive approach. San Luis Obispo's affordable housing incentives, part of its Municipal Code ch. 17.90, enable affordable housing developers to take advantage of measures designed to encourage such housing projects.[117] These measures include the waiver of development review fees, density bonuses, development impact fees, and parking requirements. The city's affordable housing fund, established in 1999, helps to offset these fees through financial assistance to nonprofit organizations and private developers.[118]

California's 1979 density bonus law[119] is considered an impetus for the later voluntary and mandatory inclusionary development laws adopted in individual cities and counties.[120] As with other U.S. cities that have implemented or are considering similar laws,[121] the density bonus is tiered to allow a development that includes a certain low-income unit percentage to build an increased, proportionate percentage of market-rate residential units above what would otherwise be permitted by the city or county code.[122] This incentivizes developers to provide integrated affordable housing in advantageous locations, and it appears that some municipalities in California have found this approach, and the flexibility it allows

114. AMERICA'S RENTAL HOUSING, *supra* note 17, at 26.

115. *Id.*

116. Affordable housing ordinances and flexible provisions are available at http://www.mrsc.org/subjects/housing/ords.aspx (last updated Dec. 2010).

117. *See Affordable Housing Incentives*, CITY OF SAN LUIS OBISPO, http://www.slocity.org/communitydevelopment/housing/affordableincentives.asp.

118. *See* San Luis Obispo's Affordable Housing Fund, *available at* http://www.slochtf.org.

119. CAL. GOV'T CODE §§ 65915 et seq.

120. David P. Lanferman, *Inclusionary Zoning in California: Legal Questions and Answers*, 29 CAL. REAL PROP. J. 2 (Spring 2011).

121. *See, e.g.*, AUSTIN, TEX., CITY CODE ch. 25-2, Subch. B Zoning Procedures; Salt Lake City, Utah, Comprehensive Housing Policy, *available at* http://www.slcdocs.com/Planning/Planning%20Commission/2012/October/Housing.pdf.

122. CAL. GOV'T CODE § 65915(f).

developers and municipalities, preferable to mandatory inclusionary zoning programs.[123]

IV. Conclusion

The Great Recession's effect on affordable housing in America was undeniably pervasive, and the statistical figures of cost-burdened rental households appear bleak when compared against the ongoing losses in rental housing stock. With fewer renters than ever supported through HUD assistance programs,[124] however, municipalities simply cannot afford to downplay the ramifications of additional housing unit loss, particularly as it appears that the number of rental households is poised for continued growth over the current decade. As illustrated above, municipalities can and should implement the limited and cost-efficient tools they have at their disposal to mitigate the impact of an increasingly competitive rental market on their low-income residents.

123. Lanferman, *supra* note 120.

124. In the 1970s, approximately 228,000 additional renters were aided each year through federal assistance. This number fell to 121,000 annual renters in the 1990s, falling dramatically to 74,000 individuals in the 2000s. *See* STATE OF THE NATION'S HOUSING 2011, *supra* note 23, at 29.