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In 1918, Congress made the United States Shipbuilding Corporation the first federal entity in the affordable housing field by authorizing $100 million to build 25 war-worker projects providing more than 5,000 homes. Previously, in 1892, Congress had authorized $20,000 for a federal investigation of slum conditions. And in 1908, President Theodore Roosevelt appointed the President's Housing Commission to look into the need for decent housing for low-income Americans and recommended federal aid. Nothing came of either effort.[1]

This bit of history reveals a pattern of housing programs and funding that continues to this day: affordable housing is not deemed to be an end in itself, but a way to serve another purpose—for example, to house defense workers during the world wars, to create jobs during the Depression, to provide an antidote to civil unrest in the 1960s, or to stimulate the economy in today's Great Recession.

This will not be a chronological history. Rather, it primarily addresses key areas: public housing, nonprofit and private-sector programs, tax incentives for housing, housing preservation, and low-income home ownership. Fair housing, a subject of crucial importance, presents a long, separate, and important story that cannot readily be summarized here.[2]

I participated in the legislative struggles that produced the programs to be discussed, except for the 1937 enactment of public housing when I was only two years old. Although this history will be accurate and factual, the interpretations and perspectives included are those of the author. If any are controversial and serve to keep the reader awake, so much the better.

I. The Public Housing Program

A. The Beginning

As World War I produced the United States Shipbuilding Corporation, the Great Depression produced public housing. Significantly, Congress did not address decent housing for low-income Americans as its first priority in the New Deal era. The primary concern was to stabilize the housing market for middle-income Americans by creating a mechanism to encourage banks to lend money for home purchases. The first seminal piece of

1. Barry G. Jacobs, Kenneth R. Harney, Charles L. Edson & Bruce S. Lane, Guide to Federal Housing Programs 3–4 (Bureau of National Affairs, Inc. 1986).

2. Maeve Elise Brown, *Federal Regulation of Financing for Affordable Housing* at 230, *in* Legal Guide to Affordable Housing (Tim Iglesias & Rochelle E. Lento eds., 2011).

housing legislation, the National Housing Act of 1934,[3] created the Federal Housing Administration (FHA), now an integral part of the Department of Housing and Urban Development (HUD), to insure single-family housing loans. Congress amended this act through the years to insure multifamily projects and, as will be later discussed, added some subsidy programs to the mix. But basically FHA should be viewed as an insurance company with middle-class housing its prime concern.

After a two-year struggle, Congress enacted the United States Housing Act[4] in 1937, creating the statutory structure for public housing—for many years the nation's prime affordable housing effort. Its structure remains intact to this day. Catherine Bauer, a regional planner turned lobbyist, led the legislative effort through the Labor Housing Conference.[5] Her efforts led to Senate passage by a 64–16 margin, with equal success in the House. Very significantly, the statutory preamble lists job creation as the act's first purpose, followed by the provision of decent housing.[6] Again, this is an apt example of affordable housing being a means to the more popular end of job creation.

The act created the United States Housing Authority (USHA) to administer the program and placed it in the Interior Department under crusty New Dealer Harold Ickes.[7] The USHA soon gave way to the United States Public Housing Administration (USPHA) as the program administrator. USPHA became a constituent of the Housing and Home Finance Agency (HHFA) and, along with FHA, the Urban Renewal Administration, and the Community Facilities Administration, morphed into the Department of Housing and Urban Development in 1965.[8] Because the Sixth Circuit ruled that federal government housing ownership under the Public Works Administration was unconstitutional,[9] the act directed that the program be administered by local public housing authorities, now 3,148 in number, owning 1.1 million units of public housing.[10]

3. National Housing Act of 1934, Pub. L. No. 84-345, 69 Stat. 646, 12 U.S.C. § 1701 (2010).

4. United States Housing Act of 1937 (Wagner-Steagall Act), Pub. L. No. 93-383, 88 Stat. 653, 42 U.S.C. § 1437 (2010).

5. H. Peter Oberlander & Eva Newbrun, Houser: The Life and Work of Catherine Bauer 118 (UBC Press 1999) (*Houser* is perhaps the raciest housing book ever written. In addition to describing Bauer's titanic efforts to get the bill passed, it also details her affair with Lewis Mumford, one of the most renowned urbanists of the early 20th century).

6. United States Housing Act of 1937, Pub. L. No. 93-383, 88 Stat. 653, 42 U.S.C. § 1437 (2010).

7. Oberlander & Newbrun, *supra* note 5, at 155.

8. Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451, 12 U.S.C. § 1701, Sec. 101 (2010).

9. United States v. Certain Lands in Louisville, Jefferson County, Ky., 78 F.2d 684 (6th Cir. 1935).

10. Alex F. Schwartz, Housing Policy of the United States (Routledge 2010).

Congress authorized the USPHA to make loans, capital grants, and annual contributions to the local authorities. A hybrid financing mechanism evolved. The local public housing authority (PHA) would issue tax-exempt bonds to finance the project's construction. The federal government would make annual contributions in amounts sufficient to amortize the principal and interest on the bonds. A New York City bond lawyer named John Mitchell (who later became the Attorney General under President Nixon) created this structure. Project tenants would pay rent in an amount necessary to cover operating expenses.

This arrangement worked well in the early days of the program. Tenants were mainly nuclear families who had fallen on hard times during the Depression. Then came World War II and a requirement under the Lanham Act[11] that PHAs house defense workers in their projects. After the war, returning veterans populated the projects at a time of severe housing shortages. In virtually the only time that housing was at the top of the political agenda, Congress, in the Housing Act of 1949,[12] expanded the program dramatically, authorizing up to 810,000 units, and set the goal of "a decent home and a suitable living environment for all Americans."[13] Thus, there was a tenancy that could pay rent equal to operating expenses.

Things changed dramatically by the mid-1960s. Relatively easy homeownership terms sucked middle-class families out of the projects, to be replaced by single-parent households, many on welfare. PHAs had to charge rents to cover operating expenses, and these rents jumped to 60–70 percent of a tenant's income in many cases. In response, Congress capped tenant rent at 25 percent of income (increased to 30 percent in 1981), but this necessitated federal payment of operating subsidies to the PHAs, accomplished by an amendment to the act by Senator Edward Brooke of Massachusetts, popularly known as the Brooke Amendment.[14] As the federal operating subsidy amount began to spiral steeply upward, pundits claimed that there was one too many letter "o"s in Brooke.

As public housing tenancy has evolved, so have income limits. Up until 1981, PHAs had leeway in setting eligible tenants' income generally below 80 percent of median income. In that year, Congress limited public housing occupancy to lower-income families, that is, families with household income less than 50 percent of median income. Congress, reacting to the desperate need of very poor families, required that 40 percent of public housing units be reserved for families below 30 percent of median income—i.e., very low income.[15]

11. Lanham Public War Housing Act, ch. 862, 54 Stat. 1125 (1940), 42 U.S.C. § 1521 (2010).

12. Housing Act of 1949, ch. 338, 63 Stat. 413, 42 U.S.C. § 1441 (2010).

13. *Id.* § 2.

14. Housing and Urban Development Act of 1969 (Brooke Amendment), Pub. L. No. 91-152, 83 Stat. 379, 12 U.S.C. § 1701 (2010).

15. Housing and Community Development Amendments of 1981, Pub. L. No. 97-35, 95 Stat. 384, 42 U.S.C. § 8107 (2010).

B. Public Housing Evolves

Through the late 1960s, public housing was administered in a conservative fashion, both by the U.S. Public Housing Administration and, after 1965, by HUD. Public housing was always on shaky political ground, as exemplified by a successful 1970 California initiative that required voters to approve new public housing in their jurisdiction. The United States Supreme Court upheld the requirement against a constitutional challenge in *James v. Valtierra*.[16] Also, public housing authorities were very wary of the emerging tenant rights movement. It took a U.S. Supreme Court decision[17] to get a recalcitrant PHA to follow a HUD directive to inform a tenant of the reasons for her eviction from a public housing project. It was not until the late 1960s that HUD promulgated elaborate Lease and Grievance Procedures ensuring tenants a modicum of due process in both admissions and evictions.[18]

In the late 1960s, things began to change. For example, PHAs traditionally built new housing projects through the conventional means of competitive bids, rigorous PHA supervision, and overall bureaucratic controls—a very time-consuming process. Through the creative efforts of Joseph Burstein, a longtime HUD Assistant General Counsel for Public Housing, HUD created the Turnkey Program. Under this far more expeditious program, a private developer would build the project on its own land, and then turn the key over to the PHA. Likewise, in the late 1960s, HUD promulgated elaborate Lease and Grievances Procedures ensuring tenants a modicum of due process in both admissions and evictions.

Beginning in the 1980s, PHAs started to become more entrepreneurial. The major impetus was the advent of the Low Income Housing Tax Credit (LIHTC) in 1986. Several PHAs created limited partnerships as subsidiaries or affiliates and became general partners in tax credit projects. Proceeds from the resulting equity syndication achieved the twin goals of building affordable housing and producing revenue for the authority. These public-private ventures were the prelude to large-scale ventures under the HOPE VI program.

The National Commission on Severely Distressed Public Housing suggested, and in 1993 Congress adopted, the HOPE VI program to demolish distressed housing and to replace it with new developments.[19] Generally, a limited partnership, with a PHA and developer general partner and a syndication entity as the limited partner, developed the project. Attractive design is the hallmark of these projects, with low-rise, less dense units re-

16. James v. Valtierra, 402 U.S. 137 (1971).
17. Thorpe v. Hous. Auth. of Durham, 393 U.S. 268 (1969).
18. 24 C.F.R. § 966 (2010).
19. Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1993, Pub. L. No. 102-389, 106 Stat. 1571.

placing the obsolete multistory developments of the 1950s and 1960s. Many of the projects are mixed-income, which means that not all former tenants can return. These displaced tenants received housing vouchers—not always a perfect solution, but on balance, HOPE VI has proved to be a very successful program.[20]

In addition to HOPE VI funding, Congress allocates around $2.5 billion annually for capital improvements in PHA projects. Further, as part of the 2010 stimulus package, Congress in the American Relief and Recovery Act[21] funded $4 billion for rehabilitation of public housing projects—yet another example of using affordable housing as a means to that familiar end of job creation. Generous as $4 billion may seem, it does not come close to meeting the estimated rehabilitation need of $25 to $30 billion. For that reason, HUD, in 2010, proposed a new program known as Transforming Rental Assistance (TRA), whereby the traditional annual contributions contract would be replaced by a Section 8 project-based contract or by project-based vouchers. This change would enable the local housing authority to own the project in a private-public partnership, to syndicate the project using the LIHTC, and to bring in needed revenue for project modernization and revitalization. This proposal met with skeptical congressional reaction, and its fate is uncertain as of late 2010.[22] However, the trend toward private-public partnerships owning PHA projects seems unstoppable because proceeds of equity syndication are a much-needed source of revenue to cash-strapped public bodies.

II. The Nonprofit and Private-Sector Programs

A. Section 202 and Section 221(d)(3)

Until 1959, public housing authorities had a monopoly in providing affordable housing. Congress broke this pattern by creating the Section 202 program in the Housing Act of 1959. Under the 202 program, as it is popularly known, HUD made direct loans to nonprofit developers of housing for the elderly.[23] The statute originally permitted limited dividend developers, but every year the appropriations act limited participation to nonprofits at the behest of the powerful senior lobby. Originally, the interest rate was 3 percent, but Congress soon set the rate based on the cost of federal funds.

In the Cranston-Gonzalez National Affordable Housing Act of 1990 (Cranston-Gonzalez), Congress restructured the program, creating a sepa-

20. Barry G. Jacobs, Handbook of Housing and Development Law 108–09, § 2:101 (West 2009–2010) (2009).

21. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 26 U.S.C. § 1 (2010).

22. Barry G. Jacobs, *Frank Says He Can't Support HUD's Transforming Rental Assistance Plan Because of Risk to Public Housing*, 38 Hous. & Dev. Rep., Current Devs. 323, 323–24 (2010).

23. Housing Act of 1959, Pub. L. No. 86-372, 73 Stat. 654, 12 U.S.C. § 1701, Sec. 202 (2010).

rate program for the handicapped (Section 811) and replacing the federal loans with capital advance grants and project rental assistance payments, also known as PRACs.[24] In 2000, Congress[25] removed the restriction on limited dividend sponsorship as long as the general partner is a nonprofit, thus permitting tax credit syndication.

The program has been exceedingly popular and oversubscribed for its 50-plus years of life, with more than 350,000 units under occupancy.[26] The Obama administration proposed a severe cut in funds for Section 202 in fiscal year 2011, but Congress did not concur in such parsimony.

In 1961, when the Kennedy Administration proposed, and Congress adopted, the Section 221(d)(3) Below Market Interest Rate (BMIR) program, few were aware of this revolutionary development.[27] From then on, the nation would look to the private sector to provide the vast bulk of the nation's affordable housing. Under the program, Fannie Mae, then a governmental agency, purchased loans at a 3 percent rate that were made to mainly limited dividend sponsors. Developers would, in effect, pass the subsidy through to tenants in the form of reduced rents.

Under newly adopted budget procedures, the total loan amount was charged against the federal budget for the year in which the loan was made; thus, Congress terminated the 221 program in 1968. To ease this budgetary impact, in the same year Congress created the Section 236 program, which utilizes an annual subsidy mechanism. The Section 221(d)(3) program created 184,000 units in its seven years.[28]

B. Section 236 and Section 515

The mid-1960s were a period of great urban unrest; large-scale urban civil disturbances prevailed during that period, culminating in the severe rioting triggered by the assassination of Martin Luther King in April 1968. Deplorable housing conditions for low-income Americans, especially minorities, were one cause of the unrest. In response, President Johnson appointed two commissions to suggest new efforts to remedy this situation: the President's Commission on Urban Housing, chaired by famed industrialist Henry Kaiser, and the National Commission on Urban Problems, chaired by the venerated Illinois senator Paul Douglas. Again, this is yet another example of external events shaping federal government's involvement in affordable housing. Following the general recommendations of the Kaiser Commission, in 1968, Congress created the Section 236 program,

24. Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (1990), 42 U.S.C. § 12701, Sec. 811 (2010).

25. American Homeownership and Economic Opportunity Act of 2000, Pub. L. No. 106-569, 114 Stat. 2944, 12 U.S.C. § 1701 (2010).

26. SCHWARTZ, *supra* note 10, at 241.

27. Housing Act of 1961, Pub. L. No. 87-70, 87 Stat. 149, 12 U.S.C. § 1701 (2010).

28. SCHWARTZ, *supra* note 10, at 241.

which, in conjunction with favorable tax provisions enacted the next year, harnessed a full-scale private effort to provide affordable housing.

Under the Section 236 program, a private lender would make an FHA-insured loan[29] at the then-prevailing interest rate—about 7 percent—to limited dividend and nonprofit developers. HUD would then make interest assistance payments to the lender, subsidizing the rate actually paid by the developer down to 1 percent. This enabled the owner to charge lower rents than those available under the 3 percent rate of the 221(d)(3) program. Not to neglect our rural areas, in the same act, Congress provided the same interest subsidy to multifamily direct loans made by the Farmers Home Administration (now the Rural Housing Service) under its Section 515 program. About 450,000 units are currently subsidized under that program.[30]

Section 236 proved very popular, producing about 544,000 units. However, the subsidy mechanism proved too inflexible during inflationary times. Analogous to the situation in public housing, the tenant had to pay rent sufficient to amortize a 1 percent loan, cover operating expenses, and provide a return to the owner. This discipline caused many tenants to pay an inordinate portion of their income for rent. Congress alleviated this situation somewhat by permitting rent supplement payments, and later Section 8, to be used in Section 236 projects.[31]

On January 8, 1973, President Nixon declared a moratorium on all federally assisted housing programs. For rental programs, the brunt of this decision fell on Section 236, then the most active program by far. The president impounded funds for these programs, triggering a rash of constitutional court challenges.[32] However, President Nixon did not intend to end assisted housing altogether. Instead, he appointed a task force to develop a replacement program, leading to the birth of the Section 8 program.[33]

C. *Section 8*

As January 8, 1973, was a day of anguish for the affordable housing community, September 19, 1973, was a day of great joy. On that date, President Nixon announced the results of his task force, stating that the Section 23 Leased Housing Program, with significant modifications, could be the basis of the country's new housing effort.[34]

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29. Except in the case of state housing finance agencies, which could make uninsured loans pursuant to Section 236(b).

30. Schwartz, *supra* note 10, at 160.

31. Jacobs, Harney, Edson & Lane, *supra* note 1, at 125.

32. *Brief Claims That Section 236 and Rent Supplement Contract Authority Will Be Virtually Exhausted by HUD*, 1 Hous. & Dev. Rep., Current Devs. A-15-16 (1973).

33. Lawrence L. Thompson, A History of HUD 9-11 (Thompson 2006).

34. *Nixon Housing Proposals Stress Easing Credit Crunch and New Subsidized Production*, 1 Hous. & Dev. Rep., Current Devs. AA-1-4 (1973).

Section 23 was a curious predecessor. Congress added the section in the Housing and Urban Development Act of 1965[35] under the sponsorship of Republican Representative William Widnall of New Jersey to utilize existing housing instead of building new structures under the rent supplement program favored by the Democratic majority in the same legislation. Under Section 23, a housing authority would lease private existing units in the community and then sublease them to low-income tenants. Thus, it was a precursor to certificate and voucher programs. Although the statute specifically required that the assisted units be "existing" and that the contract term have a five-year limit, HUD's creative assistant general counsel, Joseph Burstein, turned the program into a significant new construction effort. Burstein construed "existing" to mean "new," as in once a project is built, it exists. He also permitted the five-year contract to be renewed up to seven times at the start of the first term, resulting in the 40-year lease term. These interpretations enabled private developers to enter into a handshake deal with the housing authority whereby the PHA agreed to lease the unit once it was built—that is, became *existing*. The private development community liked the program very much and was thrilled that President Nixon had announced it as the program of the future. However, the Nixon Administration had other things in mind.

In the early 1970s, HUD commissioned widespread demonstrations of a housing allowance program in which the government would provide funding to low-income people to rent individual units in the private market. The administration was pleased with the results of this experiment. It envisioned that the revised Section 23 program (soon to be renumbered as Section 8) would be mainly a certificate program. New housing projects could be eligible for assistance only if they were not FHA-insured, not financed by tax-exempt bonds, and allotted no more than 20 percent of housing to low-income families.[36] No production program could exist under these circumstances; the terms were a far cry from the PHA rental of all project units under the Section 23 construction-for-leasing program or the guaranteed subsidy stream under Section 236.

During the spring and summer of 1974, the affordable housing community brought its concerns to Congress through furious lobbying by such groups as the National Association of Homebuilders, the Section 23 Leased Housing Association (now the National Leased Housing Association), the National Council of State Housing Agencies, and the National Low Income Housing Coalition. As a result, in the Housing and Community Development Act of 1974, Congress passed a workable program to fund new construction or substantial rehabilitation with the administration's restrictions

35. Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451, 12 U.S.C. § 1701 (2010).

36. *House Subcommittee Completes Mark-up*, 2 Hous. & Dev. Rep., Current Devs. AA-1 (1974).

removed. However, the administration succeeded in obtaining a significant housing certificate program, as we shall see in Section IV, *infra*.

Under the Section 8 program, HUD, either directly or acting through a state finance agency[37] or local housing finance agency, would subsidize the difference between a HUD-approved contract rent (based on the Fair Market rent published for the area) and 25 percent (raised to 30 percent in 1981) of the tenant's income. To keep up with inflation, rents would be raised annually by published annual adjustment factors. Thus, Section 8 avoided the pitfalls of the original public housing program and Section 236 because it did not raise the subsidy with inflation.

The Section 8 program prospered. During the later years of the Ford Administration and early years of President Carter's Administration, Congress funded the program at the 200,000-unit level. Overall, the program contributed about 850,000 units to the affordable-housing stock until 1983, when Congress, at the request of the Reagan Administration, terminated the new construction–substantial rehabilitation part of the program.[38]

III. Capital Grant Programs

The Section 8 and Section 236 programs imposed costly, ongoing budget burdens on the federal government for up to 40 years. The housing community began looking for a one-time grant mechanism to finance housing construction to obviate the reliance on annual appropriations. The first effort in this regard was the short-lived Housing Development Action Grant Program (HoDAG) which started in 1983 and ended in 1988.[39] It was patterned after the successful Urban Development Action Grant Program (UDAG), an initiative of the Carter Administration in 1977, which funded local urban and economic development projects. Likewise, under HoDAG, HUD made grants to developers to construct affordable housing.

A. The HOME Program

In 1989, a blue-ribbon task force headed by James Rouse, a visionary developer, and David Maxwell, a former president of Fannie Mae, recommended a block grant program for housing patterned after the popular Community Development Block Grant (CDBG) program in effect since 1974. States and localities could only use CDBG funds for housing on a very limited basis, such as to purchase land for housing, for infrastructure improvements, etc. The Rouse-Maxwell task force fashioned a block grant program exclusively for housing. Congress, in the Cranston-Gonzales Na-

37. This provision gave significant impetus to the creation of state housing finance agencies. During the Section 236 era, only about seven of such agencies existed, but as a result of the ability to administer the Section 8 contract, such agencies now prevail in all states.

38. Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, 97 Stat. 1159–1240, 12 U.S.C. § 1701 (2010).

39. *Id.*

tional Affordable Housing Act in 1990, established the housing block grant in the HOME (fortunately not an acronym for anything) program.[40]

Under HOME, HUD funds local participating jurisdictions (60 percent of funding) and states (40 percent) for housing development purposes. Fifteen percent of the grant amount must go to nonprofits known as Community Housing Development Organizations, or CHDOs. For rental projects, HOME alone is not sufficient; generally, it is combined with the LIHTC to make the project feasible.

HOME funds can be used for development costs, land costs, soft costs, and reserves. For rental housing, the assistance is generally in the form of long-term, non-interest-bearing loans. Congress committed about $30 billion to the program through 2010, assisting about 1.2 million families with incomes under 80 percent of median (for home ownership uses) and 50–60 percent of median (for rental housing use).[41] In 1993, Congress amended the HOME statute to make it consistent with the LIHTC rules; this change accounts for much of its success.[42]

B. Other Grant Programs

1. McKinnney-Vento Homeless Assistance Act

In the mid 1980s, homelessness reached the national housing agenda, in part because of the shortage of housing for low-income families, and in significant part because of an emerging practice of mainstreaming persons into society who had been institutionalized for mental disabilities.

Congress, in the Homeless Housing Act of 1986,[43] appropriated $15 million for a shelter demonstration program. The following year Congress made $500 million available for homeless assistance and renamed the legislation the "Stewart B. McKinney Homeless Assistance Act of 1987" to honor the memory of Stu McKinney, a moderate Republican congressman from Connecticut and a tireless housing advocate. In 2000, after the death of Bruce Vento, a Democrat from Minnesota equally zealous on housing issues, Congress renamed the legislation "the McKinney-Vento Act."

A principal thrust of the legislation is to fund Emergency Shelter Grants to bring buildings into suitable conditions to become homeless shelters. Funds are also available for tenant services, rental assistance, and funding for permanent housing for homeless people.

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40. Cranston-Gonzales National Affordable Housing Act of 1990, P.L. 101-625, 104 Stat. 4085, 42 U.S.C. § 12701 (2010).

41. SCHWARTZ, *supra* note 10, at 217.

42. Joseph A. Haas & Robert S. Swierczek, *Clinton Signs Budget with Permanent Tax Credit, Mortgage Bond Extensions, Enterprise Zones*, 21 HOUS. & DEV. REP., CURRENT DEVS. 193, 222–23 (1993).

43. Homeless Housing Act of 1986, Pub. L. No. 99-500, § 101(g), 100 Stat. 1783-242, and Pub. L. No. 99-591, § 101(g), 100 Stat. 3341–3342, 42 U.S.C. § 11361 (2010).

2. Federal Housing Finance Board Affordable Housing Program

In 1989, Congress passed the Financial Institutions Reform, Recover and Enforcement Act[44] to bail out and restructure the savings and loan industry. Rep. Henry Gonzales, chair of the House Banking and Urban Affairs Committee and a staunch friend of affordable housing, insisted that the legislation include a program to assist affordable housing. Congress required the 12 Federal Home Loan banks to establish an affordable housing program (AHP) by making subsidized cash advances to member institutions, generally savings and loans, so they could make below-market-rate loans for affordable housing. The legislation also required each Federal Home Loan bank to contribute the greater of 10 percent of earnings or $100 million to its affordable housing fund. Member banks utilize the funds to finance the purchase, construction, or rehabilitation of single and multifamily housing for low- and moderate-income families. Such funds are often used to aid the feasibility of LIHTC projects.

3. Housing Trust Fund

Since the early years of the twenty-first century, housing advocates, led by the National Low Income Housing Coalition, have been actively lobbying for a federally funded housing trust fund. Due to this activity, and the strong support of such traditional housing supporters as Senators John Kerry (D-MA), Bernard Sanders (I-VT), Jack Reed (D-RI), and Rep. Barney Frank (D-MA), Congress authorized the Housing Trust Fund in the Housing and Economic Recovery Act of 2008. As of September 2010, Congress has yet to appropriate funds to get the program started. When money becomes available, the fund will utilize the block grant mechanism pioneered by HOME. However, fund-assisted projects will have stricter income limits, usually 30 percent of median.

IV. Tax Incentives for Affordable Housing

A. The Early Incentives

As previously discussed, in the late 1960s the nation faced unprecedented urban unrest, poor housing being a significant cause. Congress launched a two-pronged attack on the problem. First, it created the Section 236 program in 1968. Next, the Tax Reform Act of 1969 created favored tax treatment for affordable housing projects. The groundwork for the latter change was the aforementioned report of the President's Commission on Urban Housing chaired by industrialist Henry Kaiser. The Commission recommended favorable tax incentives for low-income housing and recommended the creation of a federally chartered private-sector entity, the National Housing Partnerships.[45]

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44. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 10173, 103 Stat. 183, 12 U.S.C. § 1811 (2010).

45. PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME 85–86 (1968).

Congress adopted both recommendations, favoring affordable housing development by such tax devices as rapid depreciation, the ability to deduct construction interest during the construction period, a five-year write-off for rehabilitation expenses, liberalized recapture rules, and a rollover of gain if a Section 236 project is sold for low-income home ownership.[46] Congress also created the National Corporation for Housing Partnerships to encourage business investments in affordable housing.[47] The well-intentioned Congress need not have bothered to create such an entity, as private syndication firms quickly jumped into the business of attracting private investors who needed tax shelters. Indeed, proceeds from equity syndication were the engine that made Section 236 and Section 8 successful. Housing programs and the Internal Revenue Code were as intertwined as bagels and lox.

B. The Low Income Housing Tax Credit (LIHTC)

All this came to a crashing end when Congress enacted the Tax Reform Act of 1986. Congress's overriding intent was to eliminate tax shelters that permitted wealthy individuals to escape paying taxes altogether while lowering the basic tax rate to 28 percent. However, in so doing it created a new and better shelter for affordable housing—the Low Income Housing Tax Credit. Although skeptics at first doubted that it would work, LIHTC has proven successful beyond its sponsors' wildest dreams.

In the legislative process, the House passed a bill that would keep the traditional incentives for low-income housing. The Senate Finance Committee took an entirely different approach by creating a tax credit, worth a dollar on the dollar, instead of income tax deductions whose value varied depending on the taxpayer's bracket. The Committee bill would not permit use of the credit with subsidy programs such as Section 8 or Section 515, but Senator George Mitchell (D-ME) sponsored a successful amendment on the Senate floor to remove such restrictions.[48]

Congress outlined its rationale for the credit in the "General Explanation" of the bill prepared by the Joint Committee on Taxation. The report criticized prior tax subsidies because they were scattered throughout the Internal Revenue Code in incoherent fashion, were not sufficiently targeted to low-income people, and the subsidy was not linked to the number of low-income units in the project.[49]

The LIHTC program addresses these problems by limiting occupancy to 50 or 60 percent of area median, limiting the credit to qualified low-income

46. Jacobs, Harney, Edson & Lane, *supra* note 1, at ch. 10.

47. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476, 12 U.S.C. § 106 (1968).

48. *Senate Passes Tax Reform Bill After Modifying Low-Income Housing Tax Credit*, 14 Hous. & Dev. Rep., Current Devs. 95, 98–99 (1986).

49. General Explanation of the Tax Reform Act of 1986, H.R. 3838, 99th Cong., p. 152 (1986).

units, and recapturing the credit if units are not occupied by low-income persons. The credit got off to a slow start in 1987 and 1988, but by the end of the decade was going full blast. By 2010, it had produced well over a million units of affordable housing. However, legislative and policy struggles persist up to the present. First, Congress provided that the LIHTC would sunset at the end of 1989. Congress did extend the program on a yearly basis until the end of 1992. For the first half of 1993, there was no authorization for the credit. However, in August of that year, Congress voted to make the credit permanent.[50]

Permanent, however, did not mean permanent if some in Congress had their way. After the Republicans took Congress in 2004, William Archer (R-TX) became chair of the Ways and Means Committee and proposed to sunset the credit on December 31, 2007. Archer was displeased that the preceding Congress made the housing tax credit permanent but not some of his favorites, such as research and development. In 1996, Congress actually passed a tax act that, among other things, did sunset the LIHTC, but President Clinton's veto ended that effort.[51]

In 2003, President George W. Bush's proposal to exempt corporate dividends from taxation presented the credit's next challenge. Under the proposal, such exemption would not apply if the corporation's income was sheltered through the use of LIHTC. If adopted, this provision would have choked off corporate demand for the credit. After substantial lobbying from a unified affordable housing and tax credit community, the proposal was dropped.[52]

Finally, the Great Recession beginning in 2007 proved another challenge. Corporations no longer needed to purchase the credit to shelter nonexistent income. This was especially true in the case of Fannie Mae, Freddie Mac, and large banks. Congress adopted two measures to mitigate the problem. First, it passed the Tax Credit Assistance Program (TCAP) in the American Recovery and Reinvestment Act of 2009, which provided $2.25 billion additional HOME funding for tax credit projects.[53] Second, in the same bill, Congress created a credit exchange program whereby the state agency administering the credit could exchange tax credits for cash grants to the developers.[54]

To sum up previous significant housing production programs: Section 221(d)(3), Section 236, and Section 8 had seven-year lives. However, the LIHTC, which started slowly, has lived to be bar mitzvahed in 2000,

50. Revenue Reconciliation Act of 1993, Pub. L. 103-66, Aug. 10, 1993, 107 Stat. 416, 26 U.S.C. § 1.

51. Seven-Year Balanced Budget Reconciliation Act of 1995, H.R. 2491, 104th Cong. (as vetoed by the president, Dec. 6, 1995).

52. Barry G. Jacobs, *Dividend Cut in Final Tax Bill Doesn't Threaten Housing Tax Credit*, 31 Hous. & Dev. Rep., Current Devs. 321, 351 (2003).

53. American Recovery and Reinvestment Act, Pub. L. No. 111-5, tit. XII (2009).

54. *Id.*

vote in 2005, take a legal drink in 2008, and still keeps going in today's rocky times.

V. Affordable Housing Preservation

A. Sections 515, 221(d)(3), and 236

The preservation battle began in the countryside; the Section 515 rural rental housing program was the battlefield. In the late 1970s, a handful of owners prepaid their 50-year loans from the FHA and converted the projects to market rate, resulting in the displacement of low-income tenants. Owners enjoyed this prepayment right under their loan agreement with Farmers Home, and indeed were required to prepay if they could obtain credit elsewhere. In the Housing and Community Development Act of 1979, Congress, at the behest of tenant advocates, retroactively restricted this prepayment right and, in so doing, abrogated the owners' contractual right. In 1980, Congress, shocked at what it had done, repealed the retroactive prepayment restriction.[55]

Congress's shock did not last very long. More rural prepayments occurred in the mid-1980s, and in appropriations acts in 1985 and 1986, Congress again restricted the prepayment right. When prepayment started to occur in HUD 221(d)(3) projects, the stage was set for the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA).

ELIHPA treated the HUD programs and Section 515 differently. For Section 515, Congress adopted permanent legislation effectively barring loan prepayment. Incentives were provided, such as increased return, refinancing of the original loan, and fair market sale to a nonprofit buyer. However, these provisions were convoluted and not adequately funded, thus giving rise to the successful litigation discussed below. For HUD projects, Congress effectively barred the prepayment right but again provided incentives, specifically Section 8 assistance, thus enhancing their income stream. The restrictions on HUD prepayment expired in two years (having been extended for another year in 1990), necessitating permanent legislation.[56]

In 1987, the private owner community was somewhat taken by surprise by the enactment of ELIHPA. By 1990, it had prepared well for the legislative struggle that ensued over enacting permanent legislation for the HUD programs. Owners maintained that prepayment restrictions abrogated their contractual right to prepay their mortgage after 20 years. Tenant and nonprofit housing advocates cited the critical necessity that the relatively small stock of affordable housing continue to be available to low-income persons. The question really boiled down to who should bear the burden of preserving affordable housing—the owners or the public at large? After

55. Housing and Community Development Act of 1980, Pub. L. 95-128, Oct. 8, 1980, 94 Stat. 1614, 42 U.S.C. § 5301.

56. Housing and Community Development Act of 1987, Pub. L. 100-242, tit. II, Feb. 5, 1988, 101 Stat. 1815, 42 U.S.C. § 5301.

much back and forth, Congress adopted the Low-Income Housing Preservation and Resident Homeownership Act (LIHPRHA) of 1990 that attempted to provide fair compensation to the owners for extending the use restriction.[57] Again, subsequent litigation demonstrated that the compensation was not as full as it should have been.

LIHPRHA provided that in exchange for maintaining the low-income restriction for the project's remaining useful life, the owner would receive an 8 percent return on the project's appraised value.[58] Using an insured equity take-out loan under Section 241 of the National Housing Act, the owner could convert the enhanced income stream to a lump sum of cash. The incentives, although not fully compensating owners, still proved very expensive, and in 1996 Congress deemed them too expensive. Congress repealed the incentives and the prepayment restrictions.

LIHPRHA's relatively generous benefits and the ultimate repeal of the prepayment restrictions on projects not receiving LIHPRHA benefits did not mitigate the legal challenges to the program. The owners' main complaint was the delay in providing the benefits or in removing the prepayment restrictions. Owners sued HUD under the twin theories of breach of contract and uncompensated takings. In a controversial 2-1 decision, the Court of Appeals for the Federal Circuit reversed the Court of Federal Claims and held for HUD on the contract claim, deciding that there was no privity of contract between the owner and HUD, as the loan was from a third-party lender.[59] HUD owners have since started to have some success on the takings theory; some settlements have been reached, but other cases must be tried on their individual facts. Concerning the Section 515 litigation, owners have succeeded on the contract theory because under that program the owner's loan is directly with the Rural Services Administration—a direct loan. The government has paid many millions in settlement payments.

Preservation efforts by no means ended with LIHPRHA's demise in 1996. Creative developers and their lawyers soon devised an innovative way to obtain capital for preservation of Section 236 projects known as IRP decoupling. Under this method, HUD permits the owner to cancel the FHA insurance on the loan, to decouple the subsidy from supporting the first loan, and to utilize same to support a bond issuance to raise funds for project rehabilitation. Section 8 certificates and LIHTC syndication proceeds

57. Low-Income Housing Preservation and Resident Homeownership Act of 1990, Pub. L. 100-242, tit. II, Feb. 5, 1988, 101 Stat. 1877, 12 U.S.C. § 4101.

58. High by today's standards, 8 percent was a normal return at the time.

59. Cienega Gardens v. United States, 162 F.3d 1123 (Fed. Cir. 1998). *See also* CCA Assocs. v. United States, 91 Fed. Cl. 580, 598 (2010) (for a critical analysis of this decision by a claims court judge who felt bound to follow the decision even though he disagreed with its failure to recognize HUD as the real party of interest on the loan).

provided the necessary financing.[60] Tax credit syndications and Section 8 vouchers have also been used in other preservation efforts.

B. Section 8 Projects

About 850,000 Section 8 New Construction and Substantial Rehabilitation projects were built in the late 1970s and early 1980s. Projects not utilizing tax-exempt financing had 20-year Section 8 Housing Assistance Payment (HAP) contracts. Accordingly, in the late 1990s, Section 8 preservation became the cardinal housing issue. Congress addressed this issue in the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRAA).[61]

During the legislative process leading up to MAHRAA, Congress focused on renewing the Section 8 contracts for up to 20 years. However, there was great concern that Section 8 rents became too high due to HUD's faulty administration of the Housing Assistance Payment (HAP) contract provision limiting Section 8 project rent increases to those of comparable unassisted projects. The issue spawned multiple litigations, including *Cisneros v. Alpine Ridge Group*,[62] which upheld HUD's right to conduct project-based comparability studies. Thus, on renewals, Congress instructed HUD to mark the rents down to then-current market rents—"mark to market," as it was popularly called. This created problems for HUD in the case of an FHA-insured mortgage if the reduced rents were not sufficient to permit mortgage amortization. To solve this problem, Congress also authorized HUD to reduce the size of the FHA-insured mortgage.[63]

An unexpected consequence occurred shortly after this legislation was enacted due to significantly increasing market rents at the close of the second millennium. It turned out that in many cases, Section 8 contract rents were not above market but below it. Naturally, owners with expiring contracts indicated that given the alternative of below-market rents under a HUD contract or market rents without it, the choice was obvious. For that reason, in 1999 Congress directed a reluctant HUD to mark rents up to market to encourage owners to stay with the program.[64] Mark-Up-to-Market has been quite successful in getting owners to stay in the program.

As of July 2010, 3,300 projects entered the restructuring program, and HUD has completed 2,350 restructurings.[65]

60. Emily P. Achtenberg, Stemming the Tide: A Handbook on Preserving Subsidized Multifamily Housing 2 (Local Initiatives Support Corp. 2002).

61. Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRAA), Pub. L. 105-65, tit. V, Oct. 27, 1997, 111 Stat. 1384, 12 U.S.C. § 1701.

62. 508 U.S. 10 (1993).

63. MAHRAA, *supra* note 61.

64. *House Hearing Shows Bipartisan Support for Legislation to Address Section 8 Opt-Out Problem*, 62 Hous. & Dev. Rep., Current Devs. 1 (1999).

65. *HUD Will Use Green Retrofit Criteria in Market-to-Market Restructuring*, 38 Hous. Dev. Rep., Current Devs. 489 (2010).

VI. Certificates and Vouchers

Generally, affordable housing has been a very bipartisan or nonpartisan issue. Beginning with the United States Housing Act of 1937, Congress usually enacts housing legislation with large majorities from both sides. If there has been any difference between the parties, it is on the issue of whether to construct new units or to utilize the existing stock.

Although there is no clear-cut line, generally Republicans emphasize existing housing units and Democrats favor new construction. For example, as mentioned before, the Section 23 Leased Housing Program championed by Rep. William Widnall, ranking Republican on the House Banking and Urban Affairs Committee, was designed to house public housing tenants in units leased from private owners. Likewise, the Nixon Administration in the early 1970s conducted housing allowance demonstrations to examine the feasibility of voucher-type programs. And President Nixon, in his 1973 announcement ending the housing moratorium, proposed Section 8 as mainly an existing housing program because of his favored restraints on new construction.

That being said, there is now general consensus in the housing field that if there is an adequate supply of existing housing in an area, vouchers should be utilized to make the units affordable for low-income families. In the absence of such supply, new units should be built.

The landmark Housing and Community Development Act of 1974 authorized the Section 8 existing program. Similar to the Section 8 new construction–substantial rehabilitation provisions, an owner enters into a housing assistance payment (HAP) contract with the government agency administering the program, usually the local public housing authority. The owner agrees to receive a contract rent based on the Fair Market Rent (FMR) set by HUD for the area. The owner then enters into a lease with a tenant who has obtained a Section 8 Certificate from the PHA and agrees to pay a portion of the rent equal to 30 percent (25 percent before 1981) of family income. The PHA pays the owner a housing assistance payment (HAP) equal to the contract rent minus the tenant's share.

In 1983, in the Housing Urban and Rural Recovery Act, Congress created a demonstration voucher program, which became permanent in 1987. In contrast to certificates, voucher tenants could pay more than 30 percent of their income for rent, and the owner could receive rent greater than the HUD-designated payment standard.

From 1983 to 1998, HUD administered both the certificate and voucher programs. However, in 1998, Congress enacted the Quality Housing and Work Responsibility Act (QHWRA) that merged the two programs, with vouchers the clear winner.[66] Under the revised voucher program, tenants could pay up to 40 percent of their income for rent, and while rents would

66. Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, tit. V, Oct. 21, 1998, 112 Stat. 2518, 42 U.S.C. § 1437.

not be subject to the Fair Market Rent limitation, the PHA must find the rent reasonable—the so-called "rent reasonableness" test.

Although the voucher program emphasizes the use of existing housing, it does not do so exclusively. In a 2000 revision to the United States Housing Act, a PHA can utilize 20 percent of its funding for project-based units, meaning that a departing tenant cannot take the voucher with him or her, and the Section 8 subsidy remains with the project. In such cases, the owner can obtain financing backed by this guaranteed income stream. Generally, no more than 25 percent of a specific project's units can be project-based vouchers.[67]

As of 2010, HUD is assisting over 2 million units under the voucher program. Vouchers are an extremely flexible form of assistance. They can be utilized in LIHTC as well as in Section 236 projects where the owner has prepaid the Section 236 mortgage but the tenant wants to stay in the unit. In that case, the owner receives a market rent and the voucher sticks to the unit ("sticky vouchers") as long as the tenant remains there.[68]

VII. Low-Income Home Ownership

Home ownership is the American dream long extolled by both political parties, Presidents Bill Clinton and George W. Bush, and society at large. It seems only right that lower-income Americans should share in that dream. However, the history of governmental programs to make low-income families homeowners tells a very mixed story. HUD's efforts in this regard have generally not worked. And Fannie Mae, Freddie Mac, and private-sector efforts in the field turned out to be the prime cause of the current Great Recession.

A. HUD Programs

During the legislative process leading up to the enactment of the Housing and Urban Development Act of 1968, Senators Robert Kennedy (D-NY) and Charles Percy (R-IL) led the effort to include subsidized home ownership in the act. Their efforts resulted in adding Section 235 to the National Housing Act. Analogous to its multifamily counterpart, HUD would subsidize the difference between the loan's market rate and 1 percent for income-eligible borrowers. Initially, the program spurred significant new construction during slow economic times in the early 1970s. "Stay alive through 235" became a popular slogan among single-family developers. HUD assisted 500,000 units between 1969 and 1973, significant activity during the credit crunch of that era.[69]

It did not take long for the program to become troubled. Default rates soared to an unacceptable 10 percent level. A major scandal developed re-

67. Jacobs, *supra* note 52, at 253–54, § 3:77.
68. Achtenberg, *supra* note 60, at 15.
69. Jacobs, Harney, Edson & Lane, *supra* note 1, at 101.

sulting from developers making cosmetic repairs to existing homes and then reselling them at exorbitant profits. In cities such as Detroit, the combination of Section 235 with Section 223(e) (which directed HUD to insure loans in declining areas) led to large-scale defaults, decimating some neighborhoods.[70] President Nixon's 1973 moratorium halted Section 235 activity. Although HUD revised the program, it limped along until Congress ceased funding for it as of October 1, 1989.[71]

Also in the late 1960s, HUD administratively created a home-ownership program utilizing the public housing program. Another innovation of HUD's creative assistant general counsel, Joseph Burstein, the program in effect diverted HUD's annual contributions from building up equity for the PHA owning the project to the tenants in the project. Thus, when the bonds financing the project were paid off, the project tenants would own the units instead of the housing authority.[72] The tenants were required to perform routine maintenance; the amount budgeted for this work by the PHA was credited to the tenant, providing additional funding to pay off the bonded indebtedness. Although several PHAs initiated Turnkey IIIs in their jurisdictions, the program really never got off the ground. It was very complicated to administer and to explain to potential tenant participants. The program is no longer active.

HUD Secretary Jack Kemp was a strong believer in home ownership. At his urging in 1990, Congress enacted several home-ownership initiatives, namely the HOPE program (Homeownership and Opportunity for People Everywhere). Under this program, HUD would provide financial assistance to purchase units in public housing and other HUD-held, -assisted, or -insured properties. Congress did not fund the program, and subsequent administrations were less than enthusiastic.[73]

Another Kemp home-ownership initiative in the 1990 legislation proved equally unsuccessful. As discussed in Section V, *supra*, to address the prepayment problem, Congress adopted LIHPRHA. At Secretary Kemp's urging, Congress enacted provisions providing for purchase by the tenant resident council of properties where the owners sought to prepay. No known tenant purchases were made under this provision.

The HUD record of assisting home ownership is bleak. However, the Section 502 rural housing program has proven more successful.[74] Under that program, the Rural Housing Service (formerly, Farmers Home Administration) makes direct loans to low- and very low-income families at a 1 percent rate. The statute permits 60 percent of the funds to be used for low-income families at 80 percent of area median income, with only

70. *Id.*
71. Section 401(d) of the Housing and Community Development Act of 1987.
72. Jacobs, Harney, Edson & Lane, *supra* note 1, ch. 8.
73. Jacobs, *supra* note 52, at 423, § 5:34.
74. National Housing Act of 1949, Pub. L. 81-171, 63 Stat. 413, 42 U.S.C. § 1490.

40 percent of the funds available for very low-income families at 50 percent of median.[75] Thus, it is not a home-ownership program for the really poor. Likewise, the single-family mortgage bond program, in which state housing finance agencies utilize their tax-exempt financing to make below market loans, is directed toward moderate-income families.

B. Subprime Loan Confusion

To a very large extent, defaults on subprime loans and similar schemes to make low-income home ownership readily available caused the financial crisis and the resulting recession of the past several years. These loans were packaged into mortgage-backed securities. When the homebuyers could no longer make mortgage payments, defaults occurred and the securities' value went down, causing great losses to the Wall Street houses and banks that owned them as well as to Freddie Mac, Fannie Mae, AIG, and others that guaranteed them. There were significant dollars to be made from these loans by mortgage lenders, appraisers, packagers, Wall Street investment bankers, bond rating firms, guarantors, and their counsel taking advantage of very low-income people beguiled by the American home-ownership dream. Affordable housing advocates have had to point out to a confused public that this entire process had nothing to do with the HUD and LIHTC programs, which basically provided assistance to create affordable rental housing.

VIII. Concluding Thoughts

All Americans recognize that they share a vital interest in such domestic issues as health care, energy, transportation, environment, and education. As the debate over President Obama's health care proposal demonstrated, these issues captivate the public. However, except for a few years after World War II, there has never been such public concern on housing issues, especially affordable housing. The reason is simple: the vast majority of Americans are well housed, so the issue is of no real concern to them. This explains why providing housing has generally been a secondary goal to some other purpose for enacting affordable housing legislation.

This by no means minimizes the need for affordable housing for the people that it serves. Nor does it minimize the efforts of the often lonely advocates in the housing community who for 75 years have fought for the enactment and funding of the housing programs described in these pages in the face of general public apathy.

Today's programs are the product of past struggles undertaken by participants in all sectors of the housing community. The future will be no different.

75. Jacobs, *supra* note 52, at 524, § 6.2.