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## **A Quiet Crisis in America: Meeting the Affordable Housing Needs of the Invisible Low-Income Healthy Seniors**

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## ARTICLES

### A Quiet Crisis in America: Meeting the Affordable Housing Needs of the Invisible Low-Income Healthy Seniors

Patricia E. Salkin\*

#### INTRODUCTION

In 2002, the Commission on Affordable Housing and Health Facility Needs for Seniors in the 21<sup>st</sup> Century transmitted its report to Congress, warning that “a quiet crisis is looming for America’s Seniors.”<sup>1</sup> The Commission explained that the “quiet crisis” has developed over time, with seniors accounting for less than five percent of the U.S. population in 1990, about 12% of the population in 2002, and a projected increase to approximately 20% of the population by 2030.<sup>2</sup> This demographic shift raises concerns, about, among other things, how to provide adequate affordable housing to meet the needs of the healthy senior population who may have limited access to financial resources.

In anticipation of the general demographic growth projections, the turn of the century witnessed a boom in the senior housing industry.<sup>5</sup> However, this

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1. COMM’N ON AFFORDABLE HOUS. AND HEALTH FACILITY NEEDS FOR SENIORS IN THE 21<sup>ST</sup> CENTURY, A QUIET CRISIS IN AMERICA: A REPORT TO CONGRESS (June 30, 2002), [http://govinfo.library.unt.edu/seniorscommission/pages/final\\_report/html\\_Index.html](http://govinfo.library.unt.edu/seniorscommission/pages/final_report/html_Index.html) (last visited Sept. 2008) [hereinafter “COMM’N ON AFFORDABLE HOUS.”]. The Commission was established by Congress in 1999 pursuant to Section 525(f) of Public Law 106-74, as amended, and the Commissioner was appointed in January 2001 for the purpose of reporting back to Congress about housing needs for current seniors and for the baby boomers who will comprise the next generation of seniors. *See also* Patricia E. Salkin, *Where Will the Baby Boomer Go? Planning and Zoning for an Aging Population*, 32 REAL EST. L.J. 181 (Fall 2003).

2. COMM’N ON AFFORDABLE HOUS., *supra* note 2, at 2.

3. Based on Census data. *See* U.S. Census Bureau, Census 2000 Brief: The 65 Years and Over Population: 2000, table 1, <http://www.census.gov/prod/2001pubs/c2kbr01-10.pdf>; U.S. Census Bureau, National Population Projections, Summary Tables 2 and 3 (2008), <http://www.census.gov/population/www/projections/summarytables.html>.

4. *Id.*

5. CITIZENS’ HOUS. AND PLANNING ASSOC., Age Restricted Active Adult Housing in Massachusetts: A Review of the Factors Fueling Its Explosive Growth and the Public Policy Issues It Raises 11 (2005) [hereinafter Age Restricted Active Adult Housing].

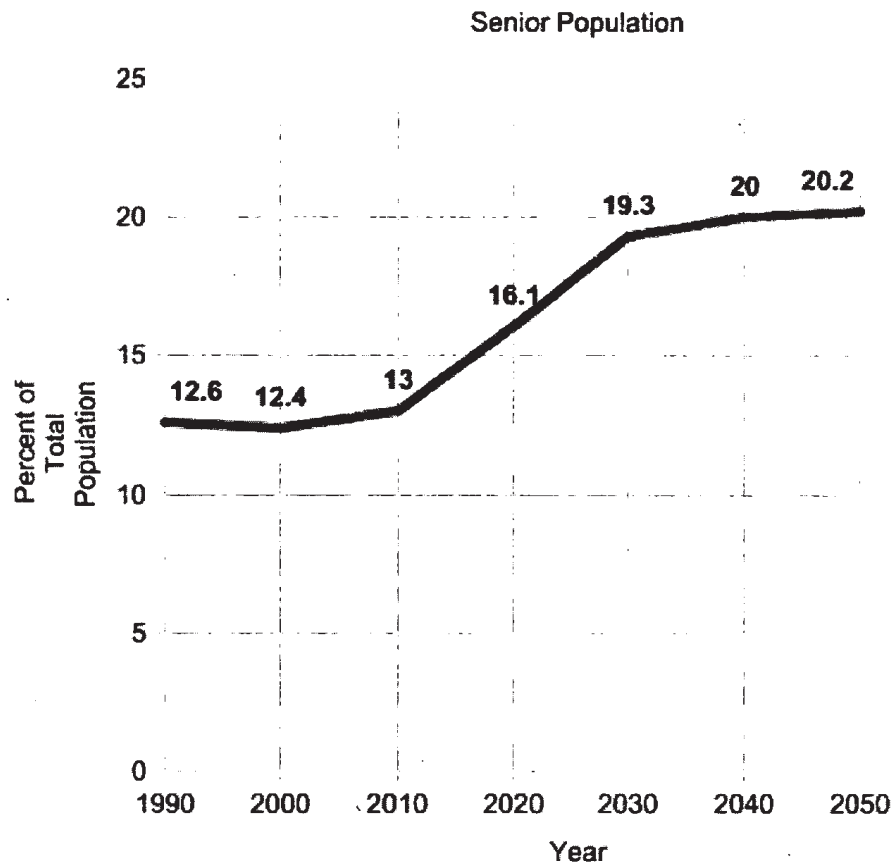


FIGURE 1. 65+ Population, Percent of Total Population.<sup>3</sup>

construction has been fueled in large part by seniors with financial resources to pay for a range of higher-end housing options;<sup>6</sup> those seniors with an inability to pay have been mostly ignored. This article focuses on those latter seniors.<sup>7</sup> In particular, this article will discuss the obstacles and possible solutions for those low-income seniors who are relatively healthy and who are physically able and

6. See Victoria M. de Lisle, *Senior Housing: Zoning for the Future*, 12-APR Prob. Prop. 33 (Mar./Apr. 1998) (noting that the “demographics have fueled tremendous growth in the senior housing industry”). See also *Age Restricted Active Adult Housing*, *supra* note 6, at 8.

7. For purposes of this article, the generic term “seniors” refers generally to a range of ages beginning at age 55. While today the age of 55 may not seem to reflect modern conceptions of someone who is elderly, many laws, including local zoning laws, still use this as the earliest age when a person qualifies for senior status. For eligibility under specific housing related programs, readers must consult individual laws for age minimums. Typically, the eligibility for most federal housing programs is age 62. For example, the National Housing Act defines an “elderly person” as meaning a household where one or more of the persons is age 62 at the time of occupancy. National Housing Act section 1701q. Other regulations pertaining to seniors, such as Social Security benefits, define senior citizens as those people over the age of 65.

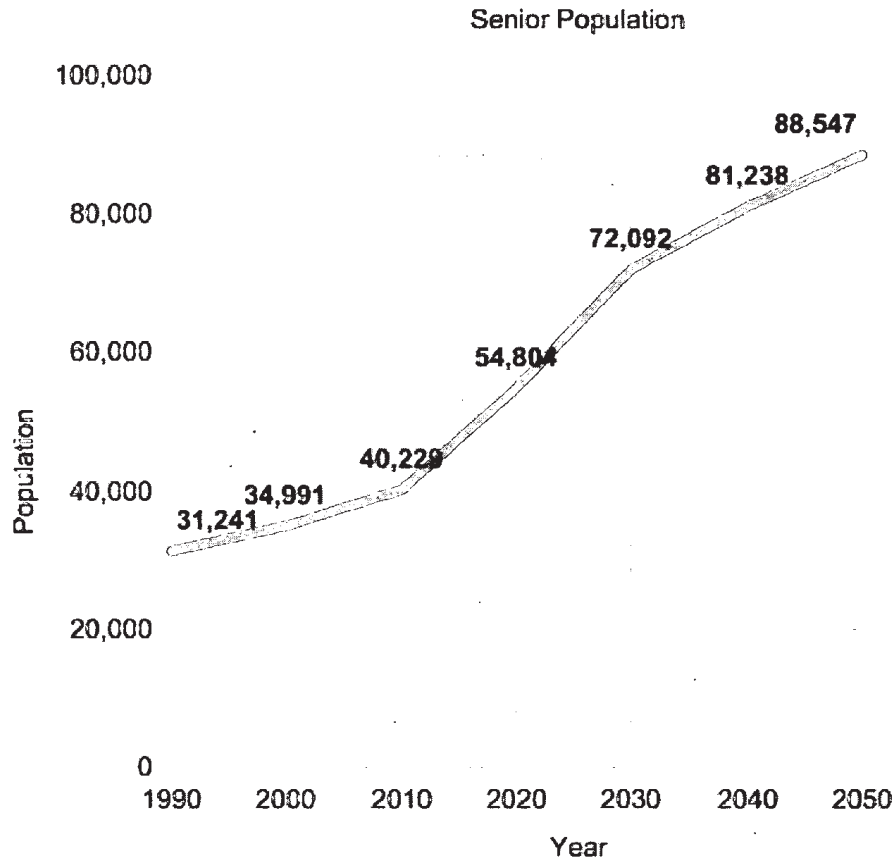


FIGURE 2. Total 65+ Population (x1,000).<sup>4</sup>

desire to live independently,<sup>8</sup> yet who lack the financial ability to either remain in their present housing situations or to rent or purchase housing in their communities.<sup>9</sup>

Providing housing for low-income seniors presents a particular challenge. Many seniors are forced to live on a small fixed income—drawing limited amounts from social security and possibly pensions—and for those who do not have sufficient savings, the costs of housing can be difficult to sustain. Even before the current national fiscal crisis, many seniors had been experiencing difficulties in staying in the homes they owned and occupied for decades due to rising costs associated with property taxes,<sup>10</sup> energy, accessibility modifications,

8. This article will not examine housing for seniors who have health related challenges and who require varying degrees of assisted living, ranging from continuing care retirement communities through acute nursing home care.

9. Seniors with financial means to purchase housing in retirement communities, active living communities, age restricted housing communities or other market rate housing are not the subject of this examination.

10. Although many states have adopted various models of real property tax aimed at seniors, these programs have proven to be both ineffective and simply not enough, given the economic climate, to

routine maintenance and repairs.<sup>11</sup> Seniors may also have mobility concerns and require aids such as elevators, wheelchair ramps, wider doorways, grab bars and one level dwellings.<sup>12</sup> Although federal legislation now requires that governments make reasonable accommodations in this regard, the fact remains that these modifications must still be paid for by the seniors, adding at times to the challenge of affordable housing options.<sup>13</sup> In 2003, the General Accounting Office, in a report to Congress, identified housing affordability as the single greatest problem facing elderly households.<sup>14</sup>

With the rapid increase in the senior population due to the aging of the baby boomers, communities can no longer rely on federal and state government programs to deliver the necessary affordable housing stock to meet demands. Federal subsidized housing programs simply cannot add enough units to their stock to meet demand. And while other federal, state and local programs may offer limited financial assistance aimed at keeping seniors in their own homes,

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enable low-income seniors with limited financial resources to maintain their homes. In an article about tax relief programs for seniors, Robert C. Christopherson explained that “[t]he payment of property taxes is one of the major costs of maintaining a home . . . For many elderly, the property tax burden is a critical factor in determining the feasibility of remaining in their current residence.” He concluded that “[p]roperty tax relief programs for the elderly represent incomplete state policies regarding affordable housing needs of senior citizens.” However, the author noted that there has been little evidence beyond newspaper accounts to suggest that large numbers of seniors are forced to leave their homes as a direct result of the property tax. Robert C. Christopherson, *Missing the Forest for the Trees: The Illusory Half-Policy of Senior Citizen Property Tax Relief*, 13 ELDER L.J. 195 (2005). See also Abrandt, *Housing Needs for the Elderly: Programs Available to the Elderly of Modest Means or Less, Representing the Elderly Client* 1990, PLI Order No. D4-5215 (July 1990) (outlining three types of property tax relief: circuit breakers, income tax relief, and property tax deferrals).

11. See e.g., Brenda J. Buote, *Through the cracks More and more seniors struggle to make ends meet, and many wonder how they'll survive the winter freeze*, BOSTON GLOBE, Oct. 5, 2008; Jane Adler, *Rural, Urban Seniors Share in Housing Woes: Studies Examine Problems Among Elderly Residents*, CHICAGO TRIBUNE, Dec. 19, 2004 (explaining that seniors are likely to live in older buildings that are in need of substantial repairs, but that repairs may be postponed due to seniors' low incomes). See also COMM'N ON AFFORDABLE HOUS., *supra* note 2, at recommendation 1.6, [http://govinfo.library.unt.edu/seniorscommission/pages/final\\_report/recomendations.html](http://govinfo.library.unt.edu/seniorscommission/pages/final_report/recomendations.html). The reverse mortgage industry grew out of the need to provide some relief to cash-strapped seniors who found themselves house rich and cash poor. See Virginia Munger Kahn, *The Ins and Outs of Reverse Mortgages*, NEWSDAY, Feb. 7, 2004 (explaining how elderly homeowners can use reverse mortgages to obtain money for home repairs, property taxes and other costs). See also Nat'l Ctr. for Home Equity Conversion, *A Capsule History of Reverse Mortgages in the United States*, <http://www.reverse.org/History.htm>.

12. See generally Bryan Trandem, *The Accessible Home: Updating Your Home for Changing Physical Needs* (2003).

13. See, e.g., Fair Housing Act Amendments of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988) (amending 42 U.S.C. § 3604 to prohibit discrimination in housing based on handicaps); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (requiring reasonable accommodations). In addition to these federal statutes, a number of states have enacted similar laws designed primarily to prevent discrimination in housing targeted at seniors. See Timothy C. Cashmore, Steven J. Weiss & Jason A. Yots, *Housing for Older Persons: Providing for a Graying America or Unlawfully Excluding the Balance?*, 6 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 212 (Spring 1997) (discussing statutory approaches in Illinois, Florida, New Jersey, Connecticut, Texas, California and New York).

14. U.S. GEN. ACCOUNTING OFFICE, *ELDERLY HOUSING: PROJECT FUNDING AND OTHER FACTORS DELAY ASSISTANCE TO NEEDY HOUSEHOLDS*, GAO-03-512 (May 30, 2003).

these efforts lack a focus on the production of affordable dwelling units or on methods designed to convert existing housing stock into more affordable options for seniors. Fortunately, this deficiency may be creatively and, perhaps more appropriately, addressed at the local government level through the exercise of existing planning and zoning authority.

Part I of this article discusses population statistics in greater detail, exploring available financial demographics of seniors and showing that many seniors are likely to be in need of affordable housing today, and that many more will likely join this group in the future. Part II discusses the role of the federal and state governments in providing affordable senior housing and concludes that these programs have typically failed to yield effective results on a wide enough basis. Part III focuses on the impact that local governments can have immediately in helping to address the affordable senior housing crisis through the use of planning and land use regulatory authority. The article concludes in Part IV with a call for the federal and state governments to further incentivize local governments to provide front-line relief in the quest for affordable senior housing. This may, in the end, produce the quickest, most efficient and most cost effective solution to a crisis that started quietly but is about to explode with a big bang.

## I. DEFINING THE PROBLEM

### A. *Debunking the Myth: Not All Seniors Are Financially Secure*

The number of seniors (ages 65 and over) living at or below the federally defined poverty threshold<sup>15</sup> was about 3.6 million in 2007, or about 9.7% of all seniors.<sup>16</sup> Many of these people cannot afford market-rate housing, and the same is true for many low-income seniors who do not fall within the federal poverty measure. In its May 2007 Worst Case Housing Needs Report to Congress, HUD reported that elderly households constituted 21.5% of the worst case housing needs in 2005, representing an increase from 14.3% two years earlier.<sup>17</sup>

In all, more than 15% of seniors in the United States live at near poverty

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15. See generally U.S. CENSUS BUREAU, POVERTY DATA, available at <http://www.census.gov/hhes/www/poverty/poverty.html>; see also U.S. Dep't of Health & Human Serv., Frequently Asked Questions Related to the Poverty Guidelines and Poverty, available at <http://aspe.hhs.gov/poverty/faq.shtml>.

16. U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007, at 12 (Aug. 2008), available at <http://www.census.gov/prod/2008pubs/p60-235.pdf>.

17. U.S. DEP'T OF HOUS. AND URBAN DEVELOPMENT, AFFORDABLE HOUSING NEEDS 2005: REPORT TO CONGRESS 19 (May 2007), available at <http://www.huduser.org/Publications/pdf/AffHsgNeeds.pdf>. In part, HUD explains that this is due to the increase in the number of elderly very low income renters. *Id.* The report defines "worst case needs" as households with "unassisted renters with very low incomes (below 50% of area median income) who either pay more than half of their income for housing or who live in severely substandard housing." *Id.* at 7.

**Table. Seniors living at or near poverty by state.<sup>18</sup>**

<b>Jurisdiction</b>	<b>Total seniors (x1,000) at or below the poverty level</b>	<b>% of seniors at or below the poverty level</b>	<b>Total seniors (x1,000) at or below 125% of the poverty level</b>	<b>% seniors at or below 125% of the poverty level</b>
United States	3,394	9.4	5,638	15.6
Alabama	65	11	111	18.8
Alaska	3	*	5	*
Arizona	49	7.1	69	10
Arkansas	51	15.1	74	22.2
California	236	6.2	516	13.7
Colorado	39	8.1	68	14.2
Connecticut	36	7.9	58	12.8
Delaware	9	8.1	13	10.8
District of Columbia	11	*	15	*
Florida	306	10.6	452	15.7
Georgia	81	10.1	120	15
Hawaii	13	7.8	22	12.9
Idaho	13	7	27	14.6
Illinois	124	8.6	206	14.3
Indiana	69	9.8	96	13.7
Iowa	28	7.1	40	10.1
Kansas	26	7.2	48	13.1
Kentucky	83	17.3	112	23.4
Louisiana	62	10.9	107	18.8
Maine	18	9.8	30	16.6
Maryland	48	7.4	76	11.7
(Continued)				

18. The table is compiled from data taken from the Current Population Survey. See U.S. CENSUS BUREAU & BUREAU OF LABOR STATISTICS, CURRENT POPULATION SURVEY, ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT: 2006, available at [http://pubdb3.census.gov/macro/032007/pov/new46\\_100125\\_06.htm](http://pubdb3.census.gov/macro/032007/pov/new46_100125_06.htm); David Baer, AARP, State Handbook of Economic, Demographic and Fiscal Indicators (2008), available at [http://www.aarp.org/research/reference/statistics/d19014\\_fiscal.html](http://www.aarp.org/research/reference/statistics/d19014_fiscal.html) (provides additional state-by-state data on seniors and poverty rates as well as other economic indicators).



Table (continued)

<b>Jurisdiction</b>	<b>Total seniors (x1,000) at or below the poverty level</b>	<b>% of seniors at or below the poverty level</b>	<b>Total seniors (x1,000) at or below 125% of the poverty level</b>	<b>% seniors at or below 125% of the poverty level</b>
Massachusetts	80	9.6	124	14.9
Michigan	96	7.6	189	14.9
Minnesota	26	4.1	70	10.9
Mississippi	67	20.7	92	28.5
Missouri	52	6.7	93	12.1
Montana	15	12.8	26	21.7
Nebraska	11	5.2	25	11.6
Nevada	16	5.1	26	8.1
New Hampshire	9	5.2	17	10.1
New Jersey	99	8.9	133	12
New Mexico	32	12.8	49	19.6
New York	314	12.7	490	19.8
North Carolina	117	11	187	17.6
North Dakota	6	7.5	10	13.4
Ohio	99	7.1	175	12.4
Oklahoma	53	11.2	85	18.1
Oregon	30	6.6	58	12.4
Pennsylvania	128	7.2	225	12.6
Rhode Island	13	9.7	22	16.5
South Carolina	48	9.2	96	18.3
South Dakota	12	11.5	20	18.9
Tennessee	110	13.4	167	20.3
Texas	338	13.1	556	21.6
Utah	18	8.4	30	14.4
Vermont	7	*	12	*
Virginia	73	9.3	110	13.9
Washington	53	7.6	103	14.6
West Virginia	31	13.5	50	21.5
Wisconsin	63	9.7	123	18.9
Wyoming	5	*	10	*

\* Denotes a statistically unreliable percentage.



levels.<sup>19</sup> Poverty and near poverty among senior citizens is substantial across the country, with the percentage of seniors at or below 125% of the poverty level ranging from 8.1% in Nevada to 28.5% in Mississippi.<sup>20</sup> Recent studies also reveal that seniors in both rural and urban areas face many of the same affordable housing challenges, although seniors living in rural areas are more likely to have lower incomes than those living in cities.<sup>21</sup> Poverty rates for elderly persons belonging to minority groups tend to be significantly higher than for whites.<sup>22</sup> A recent study in Massachusetts revealed that the Commonwealth's older seniors are not as financially well off as the growing number of younger seniors, noting that in two-thirds of the cities and towns within the Commonwealth, more than half of all homeowners over age 65 are low-income.<sup>23</sup> The American Association of Homes and Services for Aging estimated that 1.4 million low-income senior households spend at least half of their income on housing or live in substandard housing.<sup>24</sup>

These statistics do not include the 78.2 million baby boomers—those born between 1946 and 1964.<sup>25</sup> The oldest members of the baby boomers will not turn 65 until 2011 and the youngest will not reach that age until 2029. With the aging of the baby boomers, it has been estimated the population of seniors will increase 36 percent to nearly 55 million by 2020,<sup>26</sup> and that more than 70 million seniors will be living in the country by 2030.<sup>27</sup> Combining the high poverty rates among seniors and their growing population share, the United States may be facing a

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19. These numbers reflect the population of elderly adults living below 125% of the poverty level. *Id.*

20. Arkansas, Kentucky, Montana, Tennessee, Texas and West Virginia join Mississippi with more than 20% of their senior citizens living at or below 125% of the poverty level. *Id.* Alabama, Louisiana, New Mexico, New York, Oklahoma, South Carolina, South Dakota and Wisconsin lag close behind with more than 18%. *Id.*

21. See Jane Adler, *Rural, Urban Seniors Share in Housing Woes: Studies Examine Problems Among Elderly Residents*, CHICAGO TRIBUNE, Dec. 19, 2004 (comparing studies of the housing conditions of rural and urban seniors and finding that in both cases seniors are likely to live in older houses in need of significant repairs). See also Housing Assistance Council, *Rural Seniors & Their Homes* (Sept. 2003) (noting that "elderly nonmetro renters consistently live in the poorest quality housing" and reporting that the median income among elderly nonmetro households is \$16,800, or 44% less than the median income of \$30,000 for nonmetro households).

22. See, e.g., Hous. Assistance Council, *Rural Seniors & Their Homes*, *supra* note 22, at 11 (noting that "[p]overty rates among minority seniors in rural areas are even greater with 33 percent of African-American, 28 percent of Native American, and 27 percent of Hispanic households living in poverty").

23. Age Restricted Active Adult Housing, *supra* note 6, at 8.

24. Patricia Salkin, *Where Will the Baby boomers Go? Planning and Zoning for an Aging Population*, *supra* note 2, at n.27 (citing American Association of Homes and Services for the Aging, *Affordable Housing Vital to Meeting the Needs of an Aging Population*).

25. See U.S. CENSUS, PRESS RELEASE, OLDEST BABY BOOMERS TURN 60!, available at [http://www.census.gov/Press-Release/www/releases/archives/facts\\_for\\_features\\_special\\_editions/006105.html](http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/006105.html) (explaining that the baby boomer generation includes those persons born between 1946 and 1964).

26. Annual Social and Economic Supplement: 2006, *supra* note 19; see also U.S. DEP'T OF HEALTH AND HUMAN SERV., ADMIN. ON AGING, A PROFILE OF OLDER AMERICANS: 2007, <http://www.agingcarefl.org/aging/AOA-2007profile.pdf>.

27. Annual Social and Economic Supplement: 2006, *supra* note 19.

looming crisis of an expanding impoverished elderly population.<sup>28</sup>

It should also be pointed out that although federal income statistics are useful for measuring the population of low-income seniors, the same dollar amount defines poverty throughout the United States, regardless of differences among regions in the average cost of living.<sup>29</sup> The result of this universal threshold is that seniors who live in areas with high costs of living may not be identified as living in poverty, when in actuality they are. These seniors are not only omitted from the statistics, they may also be ineligible for various types of governmental assistance, making their situation all the more difficult.<sup>30</sup>

### *B. Factors Affecting Income Levels Among Seniors*

While some individuals enter their “golden years” already in poverty, “the propensity to become poor after the age of 64 is greatly enhanced by the transition out of the labor force, as well as by major life disruptions, such as serious illness or becoming widowed . . . .”<sup>31</sup> Seniors often have only limited incomes from pensions, investments and social security.<sup>32</sup> These income sources may prove to be insufficient if an older adult suffers a financial emergency, but fixed incomes may also become inadequate over time simply because of increases in the costs of living due to inflation and rising energy costs.<sup>33</sup>

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28. Nancy Libson, *The Sad State of Affordable Housing for Older People*, Generations, (Winter 2005-2006 ed.), available at <http://generations.metapress.com/content/u3840u16g8244044/?p=13bbe6a8469c42adb1d78819c1be878e&pi=2> (last visited Oct. 2008).

29. See Cara Buckley, *City Refines Formula to Measure Poverty Rate*, N.Y. TIMES, Jul. 14, 2008, available at <http://www.nytimes.com/2008/07/14/nyregion/14poverty.html>.

30. To account for the variation in cost of living and more accurately identify persons whose income and assets place them in a state of poverty, New York City Mayor Michael Bloomberg has implemented a new method for calculating the poverty threshold. The New York City formula factors in housing, medical, transportation and energy costs, while the federal method—based only on food costs—does not. As a result, the percentage of elderly poor as calculated by New York’s method was 32%, while the federal government calculated only 18%. See *id.*; see also Editorial, *Poverty’s Real Measure*, N.Y. TIMES, July 22, 2008, available at <http://www.nytimes.com/2008/07/22/opinion/22tue2.html>.

31. Housing Assistance Council, *Rural Seniors and Their Homes*, *supra* note 22, at 11.

32. See generally M.L. Reig, *The Unspoken Poor: Single Elderly Women Surviving in Rural America*, 9 ELDER L.J. 257, 260 (2001) (explaining that “Social Security, or Old-Age, Survivors and Disability Insurance (OASDI) as it is officially known, was enacted in 1935 as a means to provide benefits to elders who had spent their lives working. When it was created, Social Security was not intended to be the primary source of retirement income for the elderly. Rather, it was seen as part of a triad of income sources to support the retired that included Social Security, personal investments, and private pension plans. Yet, despite the intent of the original three-pronged approach, elders have come to rely on Social Security more heavily than other sources of retirement income. Of the current elder population, nearly ninety-two percent collect monthly Social Security benefits and three out of five rely on Social Security for more than half of their monthly income”).

33. A recent study in Wisconsin showed the financial gap between income and basic needs, revealing, for example, that one in five Wisconsin seniors relies on Social Security as the only form of income. As explained in an article reporting the study, “[t]he average Social Security benefit for Wisconsin seniors is \$13,165 for individuals and an estimated \$21,485 for couples . . . well short of the index expenses. The gap is even greater when compared with the federal poverty guideline of \$10,400 for individuals and

Middle-class adults, for these reasons, may be faced with declining resources as they age, especially if they do not have health insurance or if they do not adequately plan for their retirements.<sup>34</sup> The financial crisis of 2008 could exacerbate the problem given the effect that the market disturbance may have on the long term value of retirement accounts and other assets.<sup>35</sup>

## II. INADEQUATE FEDERAL AND STATE PROGRAMS TO MEET THE HOUSING NEEDS OF LOW-INCOME SENIORS

Despite the problems facing seniors who live on low and fixed incomes, federal funding for subsidized senior housing has been decreasing steadily over the past several years.<sup>36</sup> New units have not been funded in sufficient numbers, and existing units are not being adequately preserved.<sup>37</sup> More units will be needed to house the growing low-income senior population, which is only expected to increase.<sup>38</sup>

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\$14,000 a year for elder couples.” Bill Glauber, *Elderly hit hard by expenses: Low-income seniors see gap in income needs*, MILWAUKEE SENTINEL JOURNAL, July 9, 2008 at A1.

34. See, e.g., N.R. Kleinfeld, *Golden Years, On \$678 a Month; In City, Growing Older and Poorer Often Go Together*, N.Y. TIMES, Sept. 3, 2003, available at <http://query.nytimes.com/gst/fullpage.html?res=9C03E3DC1338F930A3575AC0A9659C8B63>; Alex Johnson, *Economy Hitting the Elderly Especially Hard*, MSNBC, July 28, 2008, available at <http://www.msnbc.msn.com/id/25804814/>; Carole Fleck, *Bankruptcies Wallop Older Americans*, AARP Bulletin Today, Aug. 27, 2008, available at [http://bulletin.aarp.org/yourmoney/personalfinance/articles/bankruptcies\\_wallop.html](http://bulletin.aarp.org/yourmoney/personalfinance/articles/bankruptcies_wallop.html).

35. See President George W. Bush, President’s Address to the Nation, Sept. 24, 2008, <http://www.whitehouse.gov/news/releases/2008/09/20080924-10.html> (warning that “[m]ore banks could fail, including some in your community. The stock market would drop even more, which would reduce the value of your retirement account. The value of your home could plummet. Foreclosures would rise dramatically. And if you own a business or a farm, you would find it harder and more expensive to get credit. More businesses would close their doors, and millions of Americans could lose their jobs. Even if you have good credit history, it would be more difficult for you to get the loans you need to buy a car or send your children to college. And ultimately, our country could experience a long and painful recession”); Kim Dixon, *Ripples From Housing Crisis Slow Senior Living*, REUTERS, May 23, 2008, <http://www.reuters.com/article/email/idUSN2352177820080523?pageNumber=2&virtualBrandChannel=0&sp=true> (explaining that “[a]mong those 65 years and older, nearly a third are postponing retirement due to stock market losses”).

36. See KIM BRIGHT, AARP, SECTION 202 SUPPORTIVE HOUSING FOR THE ELDERLY (Mar. 2006), [www.aarp.org/research/housing-mobility/accessibility/fs65r\\_housing.html](http://www.aarp.org/research/housing-mobility/accessibility/fs65r_housing.html) (explaining that demand for Section 202 units is outstripping supply and that as of 2004, new housing production was just 58% of the level that it was in the early 1980s).

37. According to testimony before the Commission on Affordable Housing and Health Facility Needs for Seniors in the 21<sup>st</sup> Century, “currently, neither the Federal or State governments recognize the critical nature of preserving affordable senior housing. Estimates are that there have been 300,000 units lost between 1997 and 1999. It is easy to see that we are losing units faster than we are gaining them . . . . The difficulty is that there is little energy for preservation at the Federal and State level; however, there is often a great deal of energy at the local level.” COMM’N ON AFFORDABLE HOUSING, *supra* note 2, at 8-9 (testimony of Thomas W. Slemmer, president, National Church Residences, Sept. 24, 2001), available at <http://www.house.gov/financialservices/media/pdf/071701ts.pdf>

38. *Id.* at 3.

*A. Federal Housing Programs for Low-Income Seniors*

The primary federal program designed to provide housing for low-income seniors is the Section 202 Supportive Housing for the Elderly program.<sup>39</sup> Enacted in 1959, the program provides direct loans and capital advances to private developers for the construction of housing for older persons. Eligibility for the approximately 263,000 units of Section 202 housing is limited to very low income seniors, and HUD reports that most residents are elderly women who live alone.<sup>40</sup> The Section 202 program, unfortunately, has failed to meet the needs of low-income seniors. Waiting lists for Section 202 units are long, and there has been a decrease in the number of new units being constructed.<sup>41</sup> According to the AARP, “[d]emand has outstripped supply since the 1980s and the gap continues to grow.”<sup>42</sup>

Section 202 is complemented by a number of other federal public housing programs. HUD funds public housing developments,<sup>43</sup> the Section 8 project-based and tenant-based programs,<sup>44</sup> Section 221(d)(3) BMIR,<sup>45</sup> Section 236,<sup>46</sup>

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39. See BRIGHT, *supra* note 37.

40. U.S. DEP'T OF HOUS. AND URBAN DEV., SECTION 202 SUPPORTIVE HOUSING FOR THE ELDERLY: PROGRAM STATUS AND PERFORMANCE MEASUREMENT 5 (June 2008), [http://www.huduser.org/Publications/pdf/sec\\_202\\_1.pdf](http://www.huduser.org/Publications/pdf/sec_202_1.pdf).

41. ANDREW KOCHERA, AARP, DEVELOPING APPROPRIATE RENTAL HOUSING FOR LOW-INCOME OLDER PERSONS: A SURVEY OF SECTION 202 AND LIHTC PROPERTY MANAGERS (Dec. 2006), [http://www.aarp.org/research/housing-mobility/affordability/dd149\\_lihtc.html](http://www.aarp.org/research/housing-mobility/affordability/dd149_lihtc.html) (last visited Oct. 10, 2008) (explaining that the supply of federally assisted housing is inadequate to meet the growing needs of low-income older renters, as evidenced by long waiting lists (on average 50 people on a list) and vacancy rates substantially below the national average).

42. AARP, PRESS RELEASE, NEW HOME FOR THE NEW YEAR . . . NOT LIKELY AARP REPORTS GROWING ELDER HOUSING SHORTAGE; CHALLENGES WASHINGTON LEADERS TO REVERSE TREND, Jan. 9, 2007, available at [http://www.aarp.org/research/press-center/presscurrentnews/elder\\_housing\\_shortage.html](http://www.aarp.org/research/press-center/presscurrentnews/elder_housing_shortage.html) (last visited Oct. 9, 2008); see also BRIGHT, *supra* note 37.

43. The federal public housing program was initiated in 1937, with the Wagner-Steagall Housing Act. Pub. L. No. 75-412, 50 Stat. 888. No new units of public housing have been constructed for more than 10 years, and many of the existing units are in need of renovation. Although the HOPE VI program has been providing grants for such modernization since 1993, it has been estimated that “a net loss of units available to low-income seniors often results from a HOPE VI development, because the program does not require ‘one for one’ unit replacement.” COMM’N ON AFFORDABLE HOUS., *supra* note 2, at 40.

44. The Section 8 program includes funding for “project-based” assistance (i.e. new construction and rehabilitation) and “tenant-based” assistance. Most construction under Section 8 has been ended, with emphasis today being placed on the “tenant-based” housing choice vouchers and certificates. Tenant-based assistance permits a recipient to rent a private, market-rate unit at 30% of monthly income, with the balance being paid by the government directly to the landlord. See U.S. DEP'T OF HOUS. AND URBAN DEVELOPMENT, PROGRAMS OF HUD: MAJOR MORTGAGE, GRANT, ASSISTANCE, AND REGULATORY PROGRAMS (2006), <http://www.huduser.org/resources/hudprgs/ProgOfHUD06.pdf>. The Commission on Affordable Housing and Health Facility Needs for Seniors in the 21<sup>st</sup> Century concluded in its report that “[a] voucher program may permit an older person to relocate closer to family and community support. HUD estimates that approximately 1.5 million vouchers are currently in use and that 17 percent of voucher holders are elderly households. Seniors may encounter significant difficulty in locating acceptable units. Housing Choice Vouchers are limited in their utility for older seniors with physical impairments or transportation problems. These difficulties are compounded in areas of the country with



and the HOME Investment Partnership block grant program.<sup>47</sup> Section 515 Rural Rental Housing loans are offered by the U.S. Department of Agriculture's Rural Housing Service,<sup>48</sup> and the federal Low-Income Housing Tax Credit is also provided as an incentive for private developers to construct affordable housing.<sup>49</sup> In addition to providing affordable housing subsidies, the federal government operates several funding programs for home repair and modification, including HUD's Community Development Block Grants<sup>50</sup> and HOME Investment Partnership,<sup>51</sup> the Rural Housing Service's Section 504<sup>52</sup> grant programs, and the Department of Energy's Weatherization Assistance for Low Income Persons.<sup>53</sup> These programs may be critical for seniors who wish to remain in their own homes but whose incomes are insufficient to cover the costs of home maintenance, repair and modification.

Units funded under these programs constitute a significant source of housing for low-income seniors,<sup>54</sup> but even taken together, they are not enough. The

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low vacancy rates or where fair-market rents lag behind market rents." COMM'N ON AFFORDABLE HOUS., *supra* note 2, at 40.

45. See KOCHERA, *supra* note 42.

46. *Id.*

47. The HOME program was initiated in 1990 and is intended to support affordable housing measures through partnerships among different levels of government and between the public and private sector. Federal funds are disbursed under the program to qualifying state and local governments, and while "HOME could be an important resource for seniors in that it is locally administered and could potentially combine services with housing[.]" the program is not limited to affordable senior housing initiatives.

48. The Section 515 program provides low interest loans for the development of multi-family affordable housing in rural areas. About 58% of Section 515 units are occupied by seniors. See COMM'N ON AFFORDABLE HOUSING, *supra* note 2, at 44-45.

49. The Low-Income Housing Tax Credit (LIHTC) was enacted in 1986 and offers an incentive to private developers to construct affordable rental housing. See generally U.S. DEP'T OF HOUS., *How Do HOUSING TAX CREDITS WORK?*, <http://www.hud.gov/offices/cpd/affordablehousing/training/web/lihtc/basics/work.cfm>. Today, the LIHTC is one of the most important federal affordable housing programs. The states, which administer the tax credit, also have the ability to make senior housing a priority under the program, and it is estimated that the program produces more than 13,000 units of senior housing each year. However, in contrast to programs like Section 8, which limits rents to 30% of tenants' monthly income, LIHTC units must be priced affordably based on area median incomes, and their prices are therefore not keyed to individual renters' incomes. See COMM'N ON AFFORDABLE HOUS., *supra* note 2, at 42-43.

50. Community Development Block Grants have been providing funds to local governments for various economic development initiatives, including affordable senior housing developments, since 1974. See COMM'N ON AFFORDABLE HOUS., *supra* note 2, at 42.

51. In addition to providing funds for construction of affordable senior housing units, as described *infra* note 53, HOME funds can also be used by local governments for home repair grants and loans for low-income owners. See generally PROGRAMS OF HUD: MAJOR MORTGAGE, GRANT, ASSISTANCE, AND REGULATORY PROGRAMS, *supra* note 45, at 16-17.

52. Section 504 loans are available to low-income and elderly homeowners for repairs, and seniors may use the funds for accessibility modifications and other health and safety related improvements. See COMM'N ON AFFORDABLE HOUS., *supra* note 2, at 45; see also 7 C.F.R. §§ 3550.1 et seq.

53. See generally U.S. DEP'T OF ENERGY, *ABOUT THE WEATHERIZATION ASSISTANCE PROGRAM*, <http://apps1.eere.energy.gov/weatherization/about.cfm>.

54. See ANDREW KOCHERA, *AARP, A SUMMARY OF FEDERAL RENTAL HOUSING PROGRAMS* (2001), <http://www.aarp.org/research/housing-mobility/affordability/aresearch-import-778-FS85.html> (provid-

Commission on Affordable Housing and Health Facility Needs for Seniors in the 21<sup>st</sup> Century has called for the increased funding of the Section 202 program, an amendment to the Low-Income Housing Tax Credit to provide a 15% credit boost, and modifications to the Section 515 program. However, despite calls for a Senior Housing Division within HUD and a comprehensive national policy for affordable senior housing,<sup>55</sup> many of the Commission's recommendations have gone unanswered. The inability of the federal government to adequately plan for, and respond to, the rising affordable senior housing crisis demands that seniors, their family members, advocates and policymakers look to other levels of government.

### B. State Housing Programs for Low-Income Seniors

State governments would seem the next logical level of government to initiate meaningful, affordable senior housing programs to best serve the particular needs of the senior population within the State. Surprisingly, there are very few state initiated housing programs aimed specifically at providing affordable housing for seniors. Massachusetts is an example of one state that has focused attention in this arena. The State provides subsidized senior housing through its chapter 667 program.<sup>56</sup> The program is open to persons age 60 or older who meet the income limit of 80% of the area median income (AMI).<sup>57</sup> Connecticut provides rental assistance to certain low-income seniors<sup>58</sup> and subsidizes the construction and operation of some congregate care facilities.<sup>59</sup> Additionally, a few states and some local governments finance affordable senior housing construction through housing trust funds.<sup>60</sup>

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ing data on the number of units provided by these programs and the number of such units occupied by seniors).

55. See COMM'N ON AFFORDABLE HOUS., *supra* note 2, at 9-10 (quoting testimony that "there should be a whole senior division from U.S. HUD"); *id.* at 17 (recommending that "[g]overnment at all levels should coordinate and consolidate funding and programs). See also U.S. SENATE SPECIAL COMMITTEE ON AGING, ISSUES: AFFORDABLE SENIOR HOUSING, <http://aging.senate.gov/issues/housing/index.cfm>.

56. See MASS. EXECUTIVE OFFICE OF HOUS. AND ECON. DEV., ELDERLY AND HANDICAPPED LOW-INCOME HOUSING, [http://www.mass.gov/?pageID=ehedterminal&L=3&L0=Home&L1=Housing+Development&L2=Public+Housing+Management&sid=Ehed&b=terminalcontent&f=dhcd\\_factsheets\\_ehlih&csid=Ehed](http://www.mass.gov/?pageID=ehedterminal&L=3&L0=Home&L1=Housing+Development&L2=Public+Housing+Management&sid=Ehed&b=terminalcontent&f=dhcd_factsheets_ehlih&csid=Ehed). In addition, Governor Deval Patrick recently announced a commitment of \$100 million to support the development of new rental housing aimed at developers who produce housing for income eligible seniors and others. See Press Release, *Patrick-Murray Administration Pledges \$100 Blend of Public and Private Resources to Develop New Rental Housing*, Jan. 24, 2008, [http://mcahinfo.org/uploads/3-1-08\\_DHCD\\_Grants.pdf](http://mcahinfo.org/uploads/3-1-08_DHCD_Grants.pdf) (last visited Oct. 2008).

57. See MASS. EXECUTIVE OFFICE OF HOUS. AND ECON. DEV., *supra* note 57 (Under the program, rents are subsidized to 30% of seniors' monthly income).

58. Conn. Dep't of Econ. and Cmty. Dev., *Elderly Rental Assistance Program*, <http://www.ct.gov/ecd/cwp/view.asp?a=1096&q=256914> (last visited Oct. 2008).

59. Conn. Dep't of Econ. and Cmty. Dev., *Congregate Services Operating Subsidy Program*, <http://www.ct.gov/ecd/cwp/view.asp?a=1096&Q=256936> (last visited Oct. 2008).

60. See, e.g., Ill. Hous. Dev. Auth., *Illinois Affordable Housing Trust Fund*, <http://www.ihda.org/ViewPage.aspx?PageID=46> (making funds available for special needs housing for the elderly and

While only a few states fund the construction of affordable senior housing, a number of state programs are designed to enable seniors to remain in their homes by providing direct financial assistance.<sup>61</sup> For example, the State of Maryland offers a zero interest deferred payment loan program for seniors to make accessibility improvements to their homes.<sup>62</sup> Alaska's Housing Finance Corporation provides a similar program, offering grants to seniors over age 55 for accessibility modifications,<sup>63</sup> and the Tennessee Housing Development Agency operates an Emergency Repair Program for the Elderly that "provide[s] grants to low income, elderly homeowners who are 60 years or older to correct, repair or replace an essential system and/or a critical structural problem."<sup>64</sup> Many states, such as Connecticut and Alaska, operate weatherization assistance programs for low-income residents.<sup>65</sup> Connecticut provides grants and low-interest loans for accessibility upgrades for persons with disabilities<sup>66</sup> and also operates a funding program for elderly homeowners who wish to convert space in their homes into accessory apartments.<sup>67</sup> Additionally, some states and local governments provide

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physically disabled); Tenn. Hous. Dev. Agency, *Housing Trust Fund*, <http://www.thda.org/trustfund/cover.html>; *Affordable Housing for Seniors Blooming in Broome County*, U.S. STATE NEWS, Jul. 11, 2008 (reporting that three new affordable senior housing developments received funds from the New York State Housing Trust Fund Program); *\$800G for Seniors Housing*, JERSEY JOURNAL, Jul. 3, 2008 (reporting that an affordable senior housing apartment building with 43 units received \$800,000 from Jersey City's affordable housing trust fund). See generally Ctr. for Cmty. Change, *The Housing Trust Fund Project*, <http://www.communitychange.org/our-projects/htf> (last visited Oct. 2008) (providing background information on housing trust funds).

61. Other state programs, such as home meals and adult foster care, provide alternative services for low-income seniors who do not wish to be placed in nursing care facilities. See, e.g., Mass. Executive Office of Hous. & Econ. Dev., *Supportive Senior Housing Initiative*, [http://www.mass.gov/?pageID=Ehedterminal&L=3&LO=Home&L1=Housing+Development&L2=Public+Housing+Management&sid=Ehed&b=terminalcontent&f=dhed\\_factsheets\\_sshi&csid=Ehed](http://www.mass.gov/?pageID=Ehedterminal&L=3&LO=Home&L1=Housing+Development&L2=Public+Housing+Management&sid=Ehed&b=terminalcontent&f=dhed_factsheets_sshi&csid=Ehed); State of N.J., Dep't of Health & Senior Serv., *Adult Family Care*, <http://www.state.nj.us/health/senior/altfamcare.shtml>; MONT. DEP'T OF PUB. HEALTH & HUMAN SERV., ADULT FOSTER CARE, <http://www.dphhs.mt.gov/sltc/programs/homehousingoptions/HHAdultfos tercare.shtml>.

62. State of Md., *Accessible Homes for Seniors Program*, <http://www.mdhousing.org/Website/programs/ahsp/ahsp.aspx> (last visited Oct. 2008). Program eligibility requires that applicants must "[b]e Maryland residents with at least one resident age 55 or older[.]; Generally must own and occupy the home to be renovated as their principal residence. Seniors living with relatives will be considered on a case by case basis[.]; Reside in a home that is structurally sound and free of health and safety hazards[.]; Not have any outstanding federal or state tax liens, open bankruptcy or foreclosure [; and] Meet income requirements." *Id.*

63. Alaska Hous. Fin. Corp., *Senior Housing Accessibility Modification Grants*, [http://www.ahfc.state.ak.us/grants/accessibility\\_modification.cfm](http://www.ahfc.state.ak.us/grants/accessibility_modification.cfm) (last visited Oct. 2008).

64. Tenn. Hous. Dev. Agency, *Emergency Repair Program for the Elderly*, <http://www.thda.org/Programs/commpro/erp/erpcvr.htm> (last visited Oct. 2008).

65. See, e.g., State of Conn. Dep't of Soc. Servs., *Energy Assistance—The Connecticut Weatherization Assistance Program*, <http://www.ct.gov/dss/cwp/view.asp?a=2353&q=305196> (last visited Oct. 11, 2008); Alaska Hous. Fin. Corp., *Home Energy Rebate, Weatherization, and Loan Programs*, [http://www.ahfc.state.ak.us/energy/weatherization\\_rebates.cfm](http://www.ahfc.state.ak.us/energy/weatherization_rebates.cfm) (last visited Oct. 2008).

66. State of Conn., *Long Term Care Services & Supports, Grants and Loans for Home Modification*, <http://www.ct.gov/longtermcare/cwp/view.asp?A=1398&Q=306798#Grants> (last visited Oct. 2008); State of Conn., *Long Term Care Services & Supports, Home Barrier Evaluation Removal*, <http://www.ct.gov/longtermcare/cwp/view.asp?A=1398&Q=306798#Barrier> (last visited Oct. 2008).

67. State of Conn., *Long Term Care Services & Supports, Apartment Conversion for the Elderly Program*, <http://www.ct.gov/longtermcare/cwp/view.asp?A=1398&Q=306798#Apartment> (last visited Oct. 2008).



property tax relief for elderly persons.<sup>68</sup> Other states have developed state-wide planning goals for affordable senior housing.<sup>69</sup>

Some local governments, relying on state or federal funding, also provide similar funding programs for emergency home repairs and accessibility improvements. The City of Temecula, California, for example, offers grants of up to \$3,000 for seniors with incomes not exceeding 120% AMI for needed home repairs (e.g. roofing, plumbing, electrical, code corrections, windows).<sup>70</sup> Redwood City, California, disburses home repair grants of up to \$500 to low income seniors and provides low-interest loans of up to \$5,000.<sup>71</sup> In Detroit, one-time home repair grants of up to \$12,000 are available to low income, owner-occupier seniors for emergency repairs and serious code violations.<sup>72</sup> Many other municipalities have similar programs.<sup>73</sup>

Despite these examples, the reality is that most states have focused attention on the demand for senior housing in general, tending to recommend programs that are best suited for seniors who do not have the same income limitations as those who are truly on fixed incomes and living close to the poverty level or at the lower end of the spectrum of income for the communities where they may reside. The tendency has been to promote programs for healthy seniors who desire active living lifestyles in age restricted communities and who tend to be more affluent.

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68. See, e.g., State of Conn., *OLR Research Report, State Elderly Programs* (2008), <http://www.cga.ct.gov/2008/rpt/2008-R-0337.htm> (last visited Oct. 1, 2008) (describing the state's Circuit Breaker, Tax Freeze, and Municipal Option Property Tax Relief for Seniors programs); Allegheny County, Pa., *Senior Citizen Property Tax Relief Program*, <http://www.alleghenycounty.us/treasure/act77.aspx> (last visited Oct. 1, 2008); Whatcom County, Wash., *Property Tax Relief Programs and Exemptions*, <http://www.co.whatcom.wa.us/assessor/taxguides/homeowners/exemption.jsp> (last visited Oct. 1, 2008); Pa. Dep't of Revenue, *Property Tax/Rent Rebate Program*, <http://www.revenue.state.pa.us/prr/site/default.asp> (last visited Oct. 1, 2008); S.D. Prop. Tax Div., *Property and Sales Tax Relief Programs*, <http://www.state.sd.us/drr2/prospectax/property/relief.htm> (last visited Oct. 1, 2008).

69. For example, the Senior Housing Office within the Alaska Housing Finance Corporation is responsible for "promot[ing] a comprehensive response to the needs of senior citizens for adequate, accessible, secure, and affordable housing in the state." In addition to administering the state's senior housing loan program, the office is encouraged to cooperate with other government agencies in order to reach its goals. ALASKA STAT. § 18.56.700 (2008).

70. City of Temecula, *Senior Home Repair Grant*, <http://www.cityoftemecula.org/Temecula/Government/Redevelopment/SeniorGrant/> (last visited Oct. 11, 2008).

71. Press Release, Redwood City, Cal., *City Offers Home Repair Assistance to Low Income Seniors*, Jul. 15, 2004, [http://rwcpd.com/manager/news/2004/pr\\_homerepair.html](http://rwcpd.com/manager/news/2004/pr_homerepair.html) (last visited Oct. 11, 2008).

72. City of Detroit, *Senior Emergency Home Repair*, <http://www.ci.detroit.mi.us/Departments/PlanningDevelopmentDepartment/HousingServices/SeniorEmergencyHomeRepair/tabid/1950/Default.aspx> (last visited Oct. 11, 2008).

73. See, e.g., City of Plymouth, Minn., *Senior Home Repair Grants*, [http://www2.ci.plymouth.mn.us/servlet/page?\\_pageid=131&\\_dad=cop&\\_schema=PORTAL30&\\_type=site&\\_fsiteid=85&\\_fid=230853&\\_fnavbarid=10695&\\_fnavbarsiteid=85&\\_fedit=0&\\_fmode=2&\\_fdisplaymode=1&\\_fcalldedfrom=1&\\_fdisplayurl](http://www2.ci.plymouth.mn.us/servlet/page?_pageid=131&_dad=cop&_schema=PORTAL30&_type=site&_fsiteid=85&_fid=230853&_fnavbarid=10695&_fnavbarsiteid=85&_fedit=0&_fmode=2&_fdisplaymode=1&_fcalldedfrom=1&_fdisplayurl) (last visited Oct. 11, 2008); Wichita, Kan., *Senior Citizens*, <http://www.wichita.gov/Residents/Links/SeniorCitizens.htm> (providing and exterior repair program and an emergency home repair program) (last visited Oct. 11, 2008); Press Release, Union County, N.J., *Union County to Once Again Offer Senior Home Improvement Program* (2006), <http://www.ucnj.org/news/2006/0604senhome.html> (last visited Oct. 11, 2008).

From a market-driven perspective, and the natural interest of the private sector in providing for this segment of the population, senior housing glamorized in ads and in the media may suit the wealthier, younger seniors, but there is a hidden senior segment whose needs are not being addressed by the states. This reality suggests that like the federal government, the state governments are not going to be the leaders in ensuring affordable housing for all seniors.

### III. MUNICIPAL PLANNING AND LAND USE REGULATIONS OFFER OPPORTUNITIES TO ADDRESS THE QUIET CRISIS

Local governments hold the key to most immediately addressing the affordable senior housing crisis through the implementation of land use planning and regulatory controls that can ensure that seniors will be able to access affordable housing at all income levels. State governments already provide broad statutory authorization for local governments to engage in planning and land use controls in furtherance of their police power to provide for the public health, safety and welfare. From the use of comprehensive plans to zoning and building codes that permit alternative housing options such as accessory apartments, elder cottages and shared living arrangements, municipalities can plan for senior housing and provide development incentives for the construction of low-income senior housing units.<sup>74</sup> New York has recently recognized this with a mandate in 2007 directing the State Office for Aging, in cooperation with the Department of State, to prepare guidelines for cities, towns and villages that promote senior housing options at the local level.<sup>75</sup> At the public meeting that rolled out the implementa-

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74. See, e.g., Deborah A. Howe et al., *Planning for an Aging Society*, AMERICAN PLANNING ASSOCIATION, PAS Report 451 (1994); see also Salkin, *supra* note 2, at 181; Patricia E. Salkin, *Municipalities Must Plan to Meet the Demands of an Aging Population*, EMPIRE STATE REPORT MAGAZINE (Mar. 2002), available at [http://www.governmentlaw.org/files/municipalities\\_must\\_plan\\_to\\_meet\\_march\\_2002.pdf](http://www.governmentlaw.org/files/municipalities_must_plan_to_meet_march_2002.pdf) (last visited Oct. 2008); Cori Menkin, *Senior Citizen Overlay Districts and Assisted Living Facilities: Different but the Same*, 21 PACE L. REV. 481 (2001); Victoria M. de Lisle, *Senior Housing: Zoning for the Future*, 12 APR. PROB. PROP. 33 (Mar./Apr. 1998); Devinder Brar & Bridget E. Holohan, *Housing Alternatives for an Aging Population: Options for Reform*, GOV'T LAWCTR. (May 1999), available at [http://www.governmentlaw.org/files/Housing\\_Alternatives\\_For\\_An\\_Aging\\_Population.pdf](http://www.governmentlaw.org/files/Housing_Alternatives_For_An_Aging_Population.pdf) (last visited Oct. 2008).

75. See 2007 N.Y. Laws 58 (The language, contained in a Budget Bill reads in part as follows: "14. TO, IN COOPERATION WITH THE DEPARTMENT OF STATE: (A) PREPARE OR CAUSE TO BE PREPARED AND MADE AVAILABLE TO CITIES, TOWNS AND VILLAGES MODEL ZONING AND PLANNING GUIDELINES THAT FOSTER AGE-INTEGRATED COMMUNITIES INCLUDING MIXED-USE AGE-INTEGRATED COMMUNITIES; AND (B) MAKE RECOMMENDATIONS, IN CONSULTATION WITH THE DIVISION OF HOUSING AND COMMUNITY RENEWAL, TO THE GOVERNOR AND LEGISLATURE FOR ASSISTING MIXED-USE AGE-INTEGRATED HOUSING DEVELOPMENT OR REDEVELOPMENT DEMONSTRATION PROJECTS IN URBAN, SUBURBAN AND RURAL AREAS OF THE STATE. THE DIRECTOR OF THE OFFICE FOR THE AGING AND SECRETARY OF STATE SHALL ESTABLISH AN ADVISORY COMMITTEE FOR PURPOSES OF THIS SUBDIVISION. SUCH COMMITTEE SHALL INCLUDE, BUT NOT BE LIMITED TO, TOP REPRESENTATIVES OF LOCAL GOVERNMENT, SENIOR CITIZEN ORGANIZATIONS, DEVELOPERS, SENIOR SERVICE PROVIDERS AND PLANNERS." Although the language addresses senior housing generally and not specifically housing for low-income seniors, this is an example, at least, of state recognition of the need for local governments to use their

tion of this initiative, the sponsors reported: a belief that “[m]ost communities are unprepared for the growth of [the] older population”; that “[b]est practices and trends in planning, zoning, [and] aging in place exist” but that there is no clearinghouse for this information; that “[s]ystems [are] not in place to foster aging in place”; and that trends indicate a movement away from institutionalized housing settings for older adults and a preference for better integration in communities.<sup>76</sup> Initial proposals mentioned include: “[i]ncreas[ing] the supply of accessible/universally designed housing units”;<sup>77</sup> [c]onsider[ing] non-traditional housing opportunities”;<sup>78</sup> providing incentives for the development of new senior housing;<sup>79</sup> [p]romot[ing] elder friendly community housing;<sup>80</sup> permitting housing collaborations to create among other things, co-housing and “grandfamilies houses”,<sup>81</sup> “Abbeyfield houses”,<sup>82</sup> and elder cottages.<sup>83</sup>

The remainder of this article focuses on some creative ways in which local

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land use authority to deal with the housing challenges of all seniors. On September 4, 2008, the first invitational meeting to fulfill the mandate was sponsored by the State Office for Aging and the Department of State, with four additional state agencies/authorities and the USDA Rural Development State Office joining in as affiliate sponsors.). See Press Release, N.Y. State Office for the Aging, *New York State Agencies kick off Innovative Planning and Housing Initiative for older New Yorkers*, Sept. 3, 2008, <http://www.aging.ny.gov/News/PressReleases/2008/HousingInitiative.cfm> (last visited Oct. 11, 2008).

76. Greg Olsen, Deputy Dir., Div. of Policy, Research & Legislative Affairs, N.Y. State Office for the Aging, Sept. 4, 2008, <http://www.aging.ny.gov/ReportsAndData/PlanningZoningInitiative/PlanningandZoningInitiative04GregOlsen.ppt> (last visited Oct. 11, 2008). In addition, Olsen reported that there is a “[l]ack of safe, affordable housing—not only for those living in poverty and low income, but also those considered middle class and moderate income.” *Id.* at 10.

77. Specifically it was recommended the communities “[d]evelop new housing or rehab existing housing requiring set-aside of specified number of units that are accessible/universal design for older adults when public funds/tax incentives are part of project. When public funds/tax incentives are part of a senior housing project, develop all units to be universally designed.” *Id.*

78. *Id.* (noting that this might include “utilizing abandoned space and property, closed businesses and so forth for rehabilitation”).

79. *Id.* (noting that the idea would be to leverage federal and private sector investment to achieve the desired housing goals).

80. This recommendation includes developing and publicizing “model projects that support both the housing/living environment preferences of older people and the aims of public policy, as well as use the models for showcasing the use of universal design features, energy-saving features, and the concepts of walkability and visitability, all of which extend *successful* aging in place.” *Id.*

81. Co-housing is described as “age-integrated, could be mix of incomes, mutual help and community-identity built into the development, mix of homeownership and rental, can incorporate mix of housing types/integration of services, resident decision-making, a model that builds on “community” and maximizes the benefits of strong social capital.” *Id.* at 11. Grandfamilies Housing would require “work[ing] with public housing authorities, in collaboration with local aging services and children’s services organizations, to creatively replicate the Grandfamilies House concept within their multifamily developments.” *Id.*

82. This housing is described as, “a shared housing model for up to ten residents that provides non-licensed supportive services and other activities for older people. Houses may be rehabbed older, single-family homes, or newly constructed and designed to blend into a residential setting. *Id.* at 12. The model differs from shared housing models in the United States in that community leaders and voluntary organizations initiate development and ownership and remain actively involved (together with an active volunteer base of community individuals) in managing the House and providing services and companionship. There is direct, active resident involvement in overall decision-making.” *Id.*

83. With respect to elder cottages, it was described as “an affordable strategy for supporting the caregiving efforts of family members while addressing the housing preferences of older people.” *Id.*

governments across the country can play a significant role in making housing for low-income seniors more available through local land use controls.

### A. Comprehensive Plans

Local governments engaging in land use regulatory controls typically adopt a comprehensive land use plan, which is in essence an articulation of a community's shared vision for the future growth and development that can influence patterns of development.<sup>84</sup> This is the first place where the need for affordable housing should be assessed and discussed. Approximately twenty-five states require that local comprehensive plans contain a general housing element,<sup>85</sup> providing an appropriate opportunity to discuss affordability and senior housing as one aspect of satisfying this mandate. Since the comprehensive plan is used as a basis to support the adoption and implementation of local land use regulations, where such goals are clearly articulated in the plan and where proposals for affordable senior housing developments are later opposed by neighbors, the fact that the local government included a senior housing goal in its comprehensive plan can serve to support the legality of its actions.<sup>86</sup>

While state enabling statutes addressing the required content of the comprehensive plan tend to be broadly worded and do not specifically reference affordable senior housing, the statutes often provide the guidance necessary to suggest to local governments that this is an appropriate topic for consideration.<sup>87</sup> Using the statutory guidance, the comprehensive plans of a growing number of local governments are beginning to identify the need for affordable senior housing. For example, the comprehensive plan of the City of Woodinville, Washington, states

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84. See generally, Mandelker, *Land Use Law*, § 3.02 (5<sup>th</sup> ed., LexisNexis 2003) (explaining that "[t]he rational planning process begins with a survey and analysis of the data that provide the basis for the plan's policies.").

85. Meck, ed., *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change* (American Planning Association, 2002) at 7-120 and Table 7-5.

86. See generally Mandelker, *Land Use Law*, 5<sup>th</sup> ed. (Lexis Nexis 2003) Chapter 3; see also Tyrone Beason, *Senior Housing Plan Hits Snags Over Land Use—Foes Say Officials Leaped Before Looking*, SEATTLE TIMES, May 22, 1997, available at <http://community.seattletimes.nwsources.com/archive/?date=19970522&slug=2540585> (in a conflict over the siting of an affordable senior apartment building, noting that "[t]he city's comprehensive plan calls for specially designed housing for about 800 seniors over the next 15 years, and it points to the neighborhood around the senior center as a good place for many of those homes.").

87. See e.g., N.Y. Town Law sec. 272a (provides that a town comprehensive plan may include a range of topics at the level of detail required to meet the specific needs of the town). Among the topics mentioned in the statute are: "Consideration of population, demographic and socio-economic trends and future projections." *Id.* at 272-a(3)(e). "Existing housing resources and future housing needs, including affordable housing." *Id.* at 272-a(3)(h). In California, the Government Code requires that all local governments adopt a housing element as part of their comprehensive land use plan that assesses current and projected housing needs for all economic segments of the community and region. See GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, CALIFORNIA PLANNING GUIDE: AN INTRODUCTION TO PLANNING IN CALIFORNIA (2005), available at [http://www.opr.ca.gov/planning/publications/California\\_Planning\\_Guide\\_2005.pdf](http://www.opr.ca.gov/planning/publications/California_Planning_Guide_2005.pdf) (last visited Oct. 2008).



that the municipality will “[p]romote the development of housing for seniors of all incomes.”<sup>88</sup> Some comprehensive plans emphasize having a diverse stock of senior housing, with units available in mixed use districts where seniors can walk to stores and services.<sup>89</sup> The comprehensive plan of Chesapeake, Virginia, includes a detailed analysis of the city’s senior housing needs.<sup>90</sup> Among its strategies for meeting the demand for affordable senior housing, the plan recommends that “[h]ousing options for seniors will be located throughout the City and will include all types of existing and new housing units” and that “[h]ousing options for seniors will include a wide array of housing and tenure types.”<sup>91</sup>

States can make a policy statement by specifically encouraging the inclusion of affordable senior housing goals in local comprehensive plans by amending enabling statutes that make senior housing either a mandatory or optional part of comprehensive plans’ housing elements. But local governments need not wait for such state action, as senior housing is impliedly an appropriate topic for comprehensive plans.

### *B. Age-Restricted Zoning Districts*

Zoning is a legal tool that organizes all of the land of a municipality into various zoning districts, providing for uses allowed and prohibited in each of the various districts. While zoning districts typically address housing through the delineation of single family residential districts, multi-family residential districts, mixed-use districts, one approach employed to address the challenge of providing adequate senior housing has been the designation of age-restricted housing

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88. CITY OF WOODINVILLE, WASHINGTON, COMPREHENSIVE PLAN, H-1.11 (“Promote the development of housing for seniors of all incomes.”), *available at* <http://www.ci.woodinville.wa.us/Documents/Work/MasterPlans/CompPlan/CP040-Housing.pdf>; *see also* Boulder County Comprehensive Plan, HO 1.04, at 78, *available at* [http://www.bouldercounty.org/lu/bccp/pdf/bccp\\_with\\_maps\\_bookmarks.pdf](http://www.bouldercounty.org/lu/bccp/pdf/bccp_with_maps_bookmarks.pdf) (“Special attention should be directed to providing for dispersal of housing for low and moderate income families and low income senior citizens throughout the residential areas of the county.”).

89. *See, e.g.*, TOWN OF BETHLEHEM, NEW YORK, COMPREHENSIVE PLAN AND GENERIC ENVIRONMENTAL IMPACT STATEMENT, Aug. 2005, *available at* <http://www.townofbethlehem.org/images/pageImages/EcoDevAndPlan/Comprehensive%20Plan%20FGEIS%20082405%20Per%20Saratoga.pdf> (“As the Town’s population ages, it is critical to consider housing options for seniors. The In-Town Residential Area (as well as the hamlets) is appropriate for such housing due to its location close to services. In some instances seniors may no longer be able to drive, but may be able to walk to a doctor’s office or take the bus to the pharmacy. In addition, low-moderate income housing options are needed in the town. Accessory apartments, carriage houses, and well-designed duplexes are options that would be appropriate in at least some portions of the in-town residential area.”); TOWN OF COLONIE, NEW YORK, COMPREHENSIVE PLAN, Aug. 2005, *available at* <http://www.colonie.org/pedd/compplan/Adopted%20Plan%2008-25-05.pdf> (“Providing housing in areas where services can be accessed by transit or by walking provides seniors with the opportunity to continue independent living”).

90. CHESAPEAKE 2026 COMPREHENSIVE PLAN 170, *available at* [http://www.chesapeake.va.us/SERVICES/depart/planning/complan/Section\\_3\\_Housing.pdf](http://www.chesapeake.va.us/SERVICES/depart/planning/complan/Section_3_Housing.pdf) (last visited Sep. 2008).

91. *Id.*

districts.<sup>92</sup> Such districts ensure that land will be preserved for facilities suitable for seniors, and such districts may be especially important in built up, strong market cities where land is scarce and expensive. Age-restricted housing is an attractive option for seniors because of its social amenities, and municipalities often favor age-restricted developments because they tend to have a positive effect on municipal finances.<sup>93</sup> However, municipalities should be careful to ensure that age-restricted housing is affordable<sup>94</sup> and that excessive amounts of land are not set off limits to younger families.<sup>95</sup>

### 1. Validity

Although the federal Fair Housing Act (FHA) has long prohibited discrimination in housing, including discrimination based on familial status, the Fair Housing Amendments Act of 1988 (FHAA) expressly exempted “housing for older persons” from the prohibition against discrimination.<sup>96</sup> Many states, including California, Delaware, Florida, New Hampshire, and Virginia, have enacted their own “fair housing acts” that prohibit age discrimination in housing but provide an exception for “housing for older persons.”<sup>97</sup>

Even prior to the 1988 amendments to the Fair Housing Act, courts found age-restricted zoning to be constitutionally permissible. For example, in the 1975

92. See e.g. Age Restricted Active Adult Housing, *supra* note 6.

93. See generally *id.* at 43 (“The belief that age restricted development will be revenue positive, or at least revenue neutral, is one of the primary reasons it is accorded preferential zoning treatment by many municipalities”).

94. See *id.* Claiming that although local officials may assume that “age restricted housing will benefit the entire spectrum of seniors . . . this is rarely the case.” *Id.* at 8. The report also notes that among the reasons that Massachusetts communities articulate for promoting age restricted housing is that it encourages affordable housing for seniors with low and moderate incomes. *Id.* at 40.

95. See generally Mark Jewell, *U.S. Seeing a Boom in Age-Restricted Housing*, DESERT NEWS (Salt Lake City), Jan. 16, 2009, available at [http://findarticles.com/p/articles/mi\\_qn4188/is\\_20051030/ai\\_n15817016/pg\\_1?tag=artBody;col1](http://findarticles.com/p/articles/mi_qn4188/is_20051030/ai_n15817016/pg_1?tag=artBody;col1); <http://www.capecodcommission.org/housing/AgeRestrictHousingMA2005.pdf> (raising the issues of overbuilding senior housing and decreasing the amount of housing available for young families). See also Age Restricted Active Adult Housing, *supra* note 6, at 5 (Reporting that while “over 60 percent of the communities in eastern Massachusetts have permitted age restricted housing in locations, or at densities, not otherwise allowed . . .” this has resulted in significantly less affordable housing production for younger families).

96. 42 U.S.C. § 3607(b)(1)-(3) (2000). The statute defines “housing for older persons” as housing “(A) provided under any State or Federal program . . . specifically designed and operated to assist elderly persons . . . ; or (B) intended for, and solely occupied by, persons 62 years of age or older; or (C) intended and operated for occupancy by persons 55 years of age or older, and—(i) at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older; (ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and (iii) the housing facility or community complies with rules issued by the Secretary for verification of occupancy . . . .” See also 24 CFR § 100.306.

97. See ARIZ. REV. STAT. ANN. §§ 41-1491.14, 41-1491.04, 33-1317(C) (2008); CAL. CIV. CODE §§ 51.2-51.3 (2008); DEL. CODE ANN. tit. 6, § 4607(c) (2008); FLA. STAT. ANN. § 760.29(4)(a) (2008); MASS. GEN. LAWS ch. 151B, § 4(6) (2006); N.H. REV. STAT. ANN. §§ 354-A:8, 354-A:15 (2008); and VA. CODE ANN. § 36-96.7(A) (2008).

case *Maldini v. Ambro*, the New York Court of Appeals considered whether a town board's amendment of a zoning ordinance to create a "Retirement Community District" was a valid exercise of its zoning power.<sup>98</sup> The court upheld the validity of the ordinance, stating that "'age' considerations are appropriately made if rationally related to the achievement of a proper governmental objective[.]"<sup>99</sup> The court went on to find that providing "suitable housing" to meet a portion of the populations' "special needs" was a proper objective.<sup>100</sup> Additionally, the court noted that the "needs of potential 'users' cannot be disassociated from sensible community planning based upon the 'use' to which property is to be put."<sup>101</sup> Other courts have reached similar conclusions.<sup>102</sup>

While age-restricted housing districts may be permissible, the courts have refused to enforce age restrictions that are not intended to promote the general public welfare or that are otherwise arbitrary and unreasonable. For example, in the 1971 case *Molino v. Mayor and Council of Glassboro*, a New Jersey court held that an ordinance that excluded families with children in order to obtain favorable tax results for the municipality violated principles of equal protection.<sup>103</sup> Additionally, developments that do not meet the FHA's definition of "housing for older persons" will not be exempted from the Act's prohibition on discrimination. *Gibson v. County of Riverside* provides an example of this type of case.<sup>104</sup> Because the county failed to prove that it had met the requirements of "housing for older persons," the federal district court held that its age-restrictive zoning provisions constituted discrimination based on familial status in violation of the FHA.<sup>105</sup>

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98. *Maldini v. Ambro*, 36 N.Y.2d 481, 483 (N.Y. 1975).

99. *Id.* at 487.

100. *Id.*

101. *Id.* at 488; see also *Campbell v. Barraud*, 394 N.Y.S.2d 909 (N.Y. 1977) (holding that an ordinance restricting occupancy in a Planned Retirement Community residence district was both constitutional and within the town's zoning authority).

102. *White Egret Condominium, Inc. v. Franklin*, 379 So.2d 346, 352 (Fla. 1979) (holding that "age limitations and restrictions may be enforced if reasonably related to a lawful objective and not applied in an arbitrary or discriminatory manner" but concluding that the challenged restrictions were, in fact, applied arbitrarily and selectively); *Pomerantz v. Woodlands Section 8 Assoc., Inc.*, 479 So.2d 794 (Fla. App. 4 Dist. 1985) (upholding an age restriction in the homeowners' deed); *Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp.*, 80 N.J. 6 (1975) (upholding a zoning regulation that prohibited mobile homes except as housing for the elderly); *Town of Northborough v. Collins*, 38 Mass. App. Ct. 978 (1995) (enjoining underage people from living in senior-restricted housing); *Colony Cove Assoc. v. Brown*, 220 Cal. App.3d 195 (1990) (upholding an age restriction imposed by the owner of a mobile home park).

103. *Molino v. Mayor and Council of Glassboro*, 281 A.2d 401 (N.J. Super. 1971). See also *Hinman v. Planning & Zoning Comm.*, 214 A.2d 131, 134 (Com. Pl. Conn. 1965) (upholding the denial of a zoning amendment to create a senior community where the amendment was designed to further the financial interests of individuals, and not the public welfare).

104. *Gibson v. County of Riverside*, 181 F.Supp.2d 1057 (C.D.Cal. 2002).

105. *Id.*



## 2. Examples of Age Restricted Zoning

The City of Snellville, Georgia has implemented a detailed plan for senior housing in its zoning ordinance by designating R-HOP (Housing for Older Persons) Districts.<sup>106</sup> The purpose of the district is to “serve the housing needs of adults who are 55 years of age or older” and the ordinance recommends that the district “be located in areas that facilitate pedestrian access to nearby commercial goods and services, and/or amenities/cultural facilities.”<sup>107</sup> The ordinance also sets forth requirements for all senior districts, including site design standards and building standards that lay out specific criteria to make the housing accessible to seniors. For example, dwellings in R-HOP districts must have at least one step-free entrance, wide doorways, step-free access to kitchen, dining and other interior rooms, and bathrooms must be constructed so as to allow for the installation of grab bars.<sup>108</sup>

The Township of Moorestown, New Jersey has both Senior Citizen Residence Districts and Age-Qualified Residence Districts in its zoning ordinance.<sup>109</sup> The Moorestown ordinance requires that homes in the Senior Citizen Residence District be affordable to low and moderate income households.<sup>110</sup> The Age-Qualified Residence District is not subject to this requirement, but “is intended to provide for age-qualified development consisting of townhouses for active adults with ancillary social, cultural and recreational amenities in a comprehensively planned development with significant open space.”<sup>111</sup>

The City of Santa Barbara, California, also provides for affordable housing in its age restricted Senior Housing Zone, the purpose of which is to provide housing for low to moderate income individuals age 62 and older.<sup>112</sup> In order to ensure that housing is appropriate for this population, the regulations require developers to “submit evidence satisfactory to the Planning Commission that an enforceable regulatory agreement exists to assure the continued operation of the facility for its intended use for not less than thirty years.”<sup>113</sup>

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106. Zoning Ordinance, City of Snellville, Ga., Code App. B Zoning Ord. Art. IX, secs. 9:18-9:22 (2007), available at <http://www.municode.com/Resources/gateway.asp?pid=13356&sid=10> (last visited Sept. 2008).

107. *Id.* at § 9:18.

108. *Id.*

109. MOORESTOWN, N.J. CODE § 180-27 (2001); MOORESTOWN, N.J. CODE § 180-30 (2002), available at [http://www.e-codes.generalcode.com/codebook\\_frameset.asp?t=tc&p=1116%2D180%2Ehtm&cn=893&n=\[1\]\[150\]](http://www.e-codes.generalcode.com/codebook_frameset.asp?t=tc&p=1116%2D180%2Ehtm&cn=893&n=[1][150]) (last visited Sept. 2008).

110. MOORESTOWN, N.J., CODE § 180-27 (2001).

111. MOORESTOWN, N.J., CODE § 180-30 (2002).

112. SANTA BARBARA, CAL., ZONING ORDINANCE § 28.42 (2007), available at [http://www.santabarbaraca.gov/Documents/Municipal\\_Code/03\\_Individual\\_Titles/SBMC\\_TITLE\\_28\\_The\\_Zoning\\_Ordinance.pdf](http://www.santabarbaraca.gov/Documents/Municipal_Code/03_Individual_Titles/SBMC_TITLE_28_The_Zoning_Ordinance.pdf) (last visited Oct., 2008).

113. SANTA BARBARA, CAL., ZONING ORDINANCE § 28.42.013 (2007), available at [http://www.santabarbaraca.gov/Documents/Municipal\\_Code/03\\_Individual\\_Titles/SBMC\\_TITLE\\_28\\_The\\_Zoning\\_Ordinance.pdf](http://www.santabarbaraca.gov/Documents/Municipal_Code/03_Individual_Titles/SBMC_TITLE_28_The_Zoning_Ordinance.pdf) (last visited Oct., 2008).

### C. Using Zoning to Permit Accessory Apartments

Senior “accessory apartments,” or complete living spaces that have been built into single-family homes, may be attractive options for seniors on fixed budgets. An older adult who owns a home, but cannot afford to maintain it, could receive additional income by renting an accessory apartment. Renting such an apartment could be an affordable option for seniors who do not own their own homes. Additionally, accessory apartments may allow seniors to live with friends or family while still maintaining a degree of independence.<sup>114</sup>

While municipalities may permit accessory apartments through zoning ordinances, they often present planning concerns related to design, density, neighborhood character, and health and safety issues. Local governments can address these issues and ensure that accessory apartments are consistent with planning goals by subjecting the units to an additional layer of review through the use of special use permit requirements.<sup>115</sup> For example, Northampton, Massachusetts, allows the addition of an accessory “in-law apartment” to a single-family home so long as: the apartment contains a separate kitchen and bath; the owners occupy either the primary or accessory unit; additional entrances are not built on the front of the house; the apartment is less than 900 square feet in size; and no more than three people live in the accessory unit.<sup>116</sup> The Town of Huntington, New York, has similar requirements for accessory apartment permits, and also requires a minimum lot size of 7,500 square feet and a minimum lot frontage of 75 feet.<sup>117</sup> The Town of Ellington, Connecticut allows for accessory apartments to be occupied by individuals who are at least 60 years old or handicapped. The units must also be less than 800 square feet, have only one bedroom, and be connected to the primary dwelling space through an interior door.<sup>118</sup> The city of Royal Oak, Michigan allows for accessory apartments for seniors, with the requirements that they be inhabited by an “elderly related person” and that

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114. See Minnesota Programs Offers Low-interest Loans for Accessory Apartments (1984), [http://findarticles.com/p/articles/mi\\_m1000/is\\_ai\\_3285380](http://findarticles.com/p/articles/mi_m1000/is_ai_3285380); N.J. DEPT. OF HEALTH & HUMAN SERVICES, HOUSING OPTIONS FOR SENIOR CITIZENS (1996-2009), <http://www.state.nj.us/health/senior/housing/glossary-shtml>; Andree Brooks, *Wide Appeal for 'Accessory Apartments'*, N.Y. TIMES, available at <http://query.nytimes.com/gst/fullpage.html?res=9E01EFDA1338F930A35752C0A964948260>. (last visited Oct., 2008).

115. SANTA CRUZ, CAL., ZONING ORDINANCE tit. 24, ch. 24 §16 (2007), available at [http://www.ci.santa-cruz.ca.us/pl/hcd/ADU/PDF/ADU\\_Zoning\\_Regulations.pdf](http://www.ci.santa-cruz.ca.us/pl/hcd/ADU/PDF/ADU_Zoning_Regulations.pdf) (last visited Oct., 2008) (Example of special use permit regulations where the ordinance sets forth eleven standards for review as well as design and development standards, deed restrictions, zoning incentives and eligibility for certain fee waivers).

116. NORTHAMPTON, MASS., CODE § 350-10.10 (1975) (allowing accessory apartments by special permit), available at [http://www.e-codes.generalcode.com/codebook\\_frameset.asp?t=tc&p=2226%2D350%2Ehtm&cn=1262&n=\[1\]\[473\]](http://www.e-codes.generalcode.com/codebook_frameset.asp?t=tc&p=2226%2D350%2Ehtm&cn=1262&n=[1][473]) (last visited Oct. 2008).

117. HUNTINGTON, N.Y., CODE Ch. 198, Art. XX, sec. 198-134 (listing permit requirements for accessory apartments). —

118. ELLINGTON, CONN., CODE § 7.1, available at [http://www.ellington-ct.gov/docs/ellington/Town\\_Planner/ZONING%20regs%20eff%201-7-08.pdf](http://www.ellington-ct.gov/docs/ellington/Town_Planner/ZONING%20regs%20eff%201-7-08.pdf). (last visited Sept. 2008)

permits be renewed every two years.<sup>119</sup>

Some state laws also encourage the use of accessory apartments. A Vermont statute, for example, bars local governments from prohibiting accessory units, so long as the units have separate sleeping quarters, kitchens and baths, take up no more than 30% of the entire dwelling, and the property has sufficient wastewater capacity.<sup>120</sup> The State of Massachusetts also supports the use of accessory apartments by offering a model ordinance for accessory dwelling units (ADUs).<sup>121</sup> The model bylaw is complete with comments and “recommended positions” that address some of the common concerns that municipalities may have when implementing ordinances for ADUs.<sup>122</sup> In Florida, state enabling statutes specifically acknowledge that accessory dwelling units should be used as a form of affordable housing in residential districts for low income individuals, and requires, that where local governments authorize their use for this purpose, that the applicant for a building permit to construct one or more of these units must provide an affidavit attesting that they will rent only to people of low, very low, extremely low, or moderate income.<sup>123</sup>

#### *D. Zoning to Permit Elder Cottages*

Elder cottages (also known as “granny flats”) are self-contained “houses” that are designed so that seniors may affordably live near family while still maintaining their independence and privacy. Although similar to accessory apartments, elder cottages are generally detached, prefabricated units. Many elder cottages are removable, and in some areas the units may be leased from elder cottage manufacturers or bought used from previous owners, thereby lowering costs. For seniors who own their own homes, installing an elder cottage for a friend can bring in rent payments to help pay the bills. Elder cottages can also be an affordable way for younger families to provide support and care for their aging family members. However, because new elder cottages can cost from \$25,000 to \$100,000, they may not be an option for the very low income seniors who may lack sufficient savings or access to capital.<sup>124</sup>

Elder cottages present many of the same planning concerns as accessory apartments, but because they are detached structures, many local governments

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119. ROYAL OAK, MICH., CODE § 770-71 (2007).

120. VT. STAT. ANN. tit. 24, § 4412(E) (2008).

121. Model Bylaw for Accessory Dwelling Units, [http://www.mass.gov/envir/smart\\_growth\\_toolkit/bylaws/ADU-Bylaw.pdf](http://www.mass.gov/envir/smart_growth_toolkit/bylaws/ADU-Bylaw.pdf) (last visited Oct. 2008).

122. *Id.*

123. F.S.A. § 163.31771 (2006) (Florida statute defining affordable for rental purposes as, “that monthly rent and utilities do not exceed 30 percent of that amount which represents the percentage of the median adjusted gross annual income for extremely-low-income, very-low-income, low-income, or moderate-income persons”).

124. See Lisa Trottier, *ECHO (elder housing cottage opportunity): A Backyard Solution for Senior Housing* (2008), <http://www.caring.com/articles/echo-housing-backyard-cottages>

impose additional restrictions on their use. Some municipalities, for example, require that the occupant of an elder cottage be either handicapped or meet a minimum age requirement.<sup>125</sup> Additionally, some elder cottage ordinances require the occupant of the cottage be a relative of the residents in the principal dwelling.<sup>126</sup> Other elder cottage zoning regulations include specific design and location requirements. For example, the Town of Ithaca, New York, prohibits elder cottages from being placed in front yards.<sup>127</sup> The Township of New London, Pennsylvania, requires a minimum lot size of two acres for elder cottages, and it provides that permits terminate upon the death of the occupant or the conveyance of the property to new owners. Following termination of an elder cottage permit, the owners have 120 days to remove the structure or convert it to another legal use.<sup>128</sup>

Accessory apartments and accessory dwelling units are also attractive because they can be used to promote intergenerational housing arrangements that may benefit not only seniors who need a form of affordable housing, but they can also benefit young families newer to the workforce who also face housing affordability challenges.<sup>129</sup>

#### *E. Zoning to Encourage Manufactured Housing As a Form of Affordable Senior Housing*

In addition to elder cottages, other types of permanent manufactured housing may present an affordable and comfortable housing option for elderly adults. The Commission on Affordable Housing and Health Facility Needs for Seniors in the 21<sup>st</sup> Century found, “[m]ore than 2.5 million senior households live in manufactured housing. That represents significantly more seniors than all of HUD’s

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125. See e.g. FORT KENT, MAINE, ZONING ORDINANCE § 7.3(B)(3) (2007), available at <http://www.forkent.org/fkzoneord.php> (last visited Oct. 2008).

126. *Id.*

127. ITHACA, N.Y., ZONING ORDINANCE no. 5, “To Amend the Zoning Ordinance to Permit the Placement of Elder Cottages in Residential Districts” (1994).

128. See NEW LONDON, PA., ZONING ORDINANCE, ch. 1 § 1-1818 (2003), available at <http://keystatepub.com/keystate-pdf/PA/Chester/New%20London%20Township%20Compilation%20of%20Land%20Use%20Ordinances/Chapter%201%20Zoning.pdf> (last visited Oct. 2008); see also WEST AMWELL, N.J., CODE § 109-123 (1990) (requiring removal of elder cottages within 90 days of the death of the occupant or the permanent change of the occupant’s residence).

129. See Patricia Salkin, *Act Now: Accessory Dwelling Units Can Aid in Intergenerational Housing Crisis*, CAPITOL COMMONS QUARTERLY 13 (2007) (explaining, “An intergenerational approach to housing though accessory dwelling units for family members may enable any one generation to ‘host’ another generation, enabling al to enjoy the independence of homeownership. For example, a young couple unable to afford their single-family home, could provide an accessory dwelling unit for their grandparent. The grandchildren would earn some income towards the mortgage and property expense and provide a support network for aging grandparents. Likewise, the grandparents could provide the accessory dwelling unit on their property for their grandchildren, providing them with the extra income needed to meet expenses while enabling the younger generation to achieve greater independence”), available at <http://www.albanyguardiansociety.org/PDF/1-CCQ-4-07-web2.pdf> (last visited Oct. 2008).



assisted housing programs[.]”<sup>130</sup> AARP has also recognized the importance of manufactured housing to low-income seniors. In a 2007 report it found that nearly half of the residents of manufactured housing units are over the age of 50. It also pointed out that manufactured housing is significantly less expensive than traditional site-built homes: in 2005 the average price of a manufactured home was just over \$60,000, while the average single-family site-built home was nearly \$300,000.<sup>131</sup>

Manufactured housing has long been subject to significant state and local regulation. In particular, municipalities have often prohibited manufactured units from single-family residential zones and confined them to particular “trailer park districts,” generally on the presumption that they lower property values.<sup>132</sup> However, the appearance of manufactured housing has greatly improved since HUD enacted regulations for it in 1976, and many have called for the repeal of manufactured housing exclusions. As the American Planning Association recommends, “[m]anufactured homes should be allowed as a type of housing accommodated in residential zoning districts . . . . Issues of design and compatibility arising from manufactured housing zoning parity should be addressed for all forms of housing and should be addressed through generally accepted standards of planning practice.”<sup>133</sup> A number of states have adopted legislation requiring the inclusion of manufactured housing in single-family zoning districts as a permitted use.<sup>134</sup> Even in states where parity is not required, municipalities should amend their zoning regulations to permit manufactured housing in residential districts.

In addition to permitting manufactured housing in residential districts, state and local governments should have comprehensive regulations concerning manufactured home parks. Residents of these parks often either own their units but rent their lots, or rent both their units and lots. Because manufactured housing is not easily moveable, and because alternative sites can be difficult to find, adequate safeguards need to be in place to prevent “unfair landlord practices” and to protect homeowners if their landlords decide to sell the property. Recognizing that low-income seniors may be particularly harmed by sudden rent increases, lease terminations and deceptive practices, AARP has produced a model state

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130. COMM’N ON AFFORDABLE HOUS., *supra* note 2, at 69.

131. Jean C. Accius, *Issues in Manufactured Housing* (Oct. 2007), available at [http://www.aarp.org/research/housing-mobility/affordability/fs16r\\_housing.html](http://www.aarp.org/research/housing-mobility/affordability/fs16r_housing.html) (last visited Oct. 2008).

132. See, e.g., *Texas Manufactured Housing Association v. City of Nederland*, 101 F.3d 1095 (5th Cir. 1996) (upholding the city’s trailer park zoning because it prevented decreases in property values due to “haphazard placement of such housing”).

133. American Planning Association, *Policy Guide on Factory Built Housing* (2001), <http://www.planning.org/policyguides/guides/factoryhousing.htm> (last visited Oct. 2008).

134. See, e.g., CAL. GOV. CODE §§ 65852.3, 65852.4; IDAHO CODE § 67-6509B; IOWA CODE §§ 335.30, 414.28; 30-A M.R.S. § 4358; N.M. STAT. ANN. § 3-21A-3; TENN. CODE ANN. § 13-24-201; REV. CODE WASH. § 35.21.684; see also MONT. CODE ANN. § 76-2-202 (3) (“In a proceeding for a permit or variance to place manufactured housing within a residential zoning district, there is a rebuttable presumption that placement of a manufactured home will not adversely affect property values of conventional housing”).

statute covering these issues.<sup>135</sup>

### *F. Zoning to Permit Shared Living Residences*

In a shared living residence, several unrelated persons live together in the same dwelling unit. The group shares the living expenses and common facilities (e.g. kitchen, dining and living rooms), but each resident has her own bedroom and runs the household cooperatively.<sup>136</sup> Shared living residences may be owned and managed by a community organization, or a senior who owns her own home may choose to let rooms to other seniors in order to offset the costs of home maintenance. Rents may be market rate or subsidized, but they will typically be less than the cost of renting full apartments.<sup>137</sup>

The definition of the term “family,” as used in most zoning ordinances, could have the effect of prohibiting shared living facilities, since the type of “family” that can live in a home zoned for single-family use is generally limited to related persons and a small number of unrelated individuals.<sup>138</sup> However, the FHAA prohibits the exclusion of group homes from a municipality, and may require local governments to allow shared living arrangements for seniors.<sup>139</sup> Some courts have also found restrictive definitions of the term “family” to be impermissible on substantive due process and equal protection grounds.<sup>140</sup> For

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135. See AARP, MANUFACTURED HOUSING COMMUNITY TENANTS: SHIFTING THE BALANCE OF POWER 1 (2004), [http://assets.aarp.org/rgcenter/consume/d18138\\_housing.pdf](http://assets.aarp.org/rgcenter/consume/d18138_housing.pdf); see also AARP BULL. TODAY, *There Goes the Neighborhood*, Feb. 2, 2006 (discussing problems relating to displacement from manufactured housing communities), available at <http://www.aarp.org/family/housing/articles/neighborhood.html> (last visited Oct. 2008).

136. New York State Office for the Aging, *Housing Alternatives for Seniors in New York State*, available at <http://seniorhousing.state.ny.us/questions/housalt1.htm#page6> (last visited Oct. 2008).

137. See Tongue, *When it Comes to Housing Options Seniors Have a Multitude of Choices*, 9 Fall Experience 18 (American Bar Association, Fall 1998) (“Home sharing, cooperative group housing, and intergenerational communities now offer seniors a multitude of new, nontraditional options.” The author discusses a number of nonprofit organizations that have been formed for the purpose of matching seniors wishing to enter into these types of housing arrangements).

138. See *Belle Terre v. Boraas*, 416 U.S. 1 (1974); ROBERT M. ANDERSON, *American Law of Zoning* § 9:30 (4th ed. 1990).

139. See generally, ANDERSON, *supra* note 139, § 9:31A; *Elderhaven, Inc. v. City of Lubbock*, 98 F.3d 175 (5th Cir. 1996) (“a municipality may violate the Fair Housing Act by placing unduly burdensome conditions upon a proposed residence for the disabled”).

140. See, e.g., *Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980) (“We do not here address the question, How many people should be allowed to live in one house? . . . We merely hold invalid the distinction effected by the ordinance between (1) an individual or two or more persons related by blood, marriage, or adoption, and (2) groups of more than five other persons”); *Berger v. State*, 364 A.2d 993 (N.J. 1976) (holding that a group home could be located in a single-family residential district because the group home functioned as a single “housekeeping unit”); *Charter Township of Delta v. Dinolfo*, 351 N.W.2d 831 (Mich. 1984) (finding that a restriction on the number of unrelated adults who could cohabit in a single-family dwelling was arbitrary and capricious); *Fayetteville v. Taylor*, 353 S.E.2d 28 (Ga. 1987) (holding that a group home with 13 elderly residents was not a “boarding house” and did not violate the requirement that single-family homes be occupied by persons “living as a single housekeeping unit”).

example, in *Baer v. Brookhaven*, New York's highest court held that an ordinance limiting "families" to related persons or up to four unrelated individuals living as a "single housekeeping unit" was unconstitutional as applied to a group of five elderly women living in a single-family home.<sup>141</sup>

Although shared living arrangements for seniors accordingly may be permissible in single-family districts without a permit, some local governments have enacted specific regulations for elder care group homes. The City of Chandler, Arizona, for example, regulates "adult care homes," which are defined as licensed residential care facilities that provide supervisory care to between six and ten residents.<sup>142</sup> Adult care homes are allowed subject to certain conditions, and additional requirements are prescribed for senior care housing, such as housekeeping services and safety features such as grab bars and non-skid tubs.<sup>143</sup> The Township of Warren, New Jersey allows shared housing for seniors as a conditional use in particular districts.<sup>144</sup> The ordinance defines "shared housing for senior citizens" as "[a] structure containing no more than six (6) bedrooms for occupancy by low and moderate income individuals of sixty-two (62) years of age or greater."<sup>145</sup> The housing must conform to all bulk regulations for the district, and no more than one or two occupants are permitted per bedroom.<sup>146</sup> Additionally, the owner of the dwelling must be a nonprofit entity, and the dwelling's exterior must have the appearance of a single family dwelling.<sup>147</sup>

Somewhat related to shared housing is the concept of senior co-ops, reported to be growing in popularity.<sup>148</sup> Located primarily in the upper Midwest, this type of senior housing arrangement is touted for providing seniors a lower cost alternative to homeownership while still allowing ownership interest in the co-op unit, and for providing for communal facilities such as washers and driers, as well as staff to make needed repairs when things break in individual units.<sup>149</sup> Similar to traditional condominium and cooperative housing arrangements, with age restrictions, zoning ordinances must allow for the higher density living arrangements outright, subject to special use permits or floating zones.<sup>150</sup>

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141. *Baer v. Brookhaven*, 537 N.E.2d 619 (N.Y. 1989).

142. CHANDLER, ARIZ. CODE § 35-200 (2008), available at <http://www.municode.com/Resources/gateway.asp?pid=13987&sid=45> (last visited Oct. 2008).

143. *Id.*

144. TOWNSHIP OF WARREN, N.J., ZONING ORDINANCE § 16-6.18 (2007), available at [http://70.168.205.112/Warren\\_nj/lpext.dll?f=templates&fn=site\\_main-j.htm&2.0](http://70.168.205.112/Warren_nj/lpext.dll?f=templates&fn=site_main-j.htm&2.0) (last visited Oct. 2008).

145. *Id.* at § 16-4.2 (2007).

146. *Id.* at § 16-6.18 (2007) (the planning board may, however, allow up to 8 bedrooms if it may be provided within the bulk regulations of the district).

147. *Id.* at § 16-6.18 (2007).

148. Chad Koenen, *Number of Senior Coops Continues to Rise*, POPE COUNTY PRESS, Sept. 30, 2008, <http://www.starbucktimes.com/main.asp?SectionID=22&SubSectionID=103&ArticleID=5991>.

149. *Id.*

150. A floating zone is basically an unmapped district in the zoning ordinance with detailed requirements that may be located/placed once the requisite requirements are met by a proposal. See JULIAN C. JUERGENSEMEYER AND THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW, sec. 4.16 (West Group 1998). Floating zones have also been used to describe senior citizen overlay districts. See



### G. Zoning Incentives for Senior Housing

Another way for local governments to encourage the development of affordable senior housing is through incentive zoning. Authorized by statute in a number of states, including California,<sup>151</sup> Connecticut,<sup>152</sup> Florida,<sup>153</sup> Maryland,<sup>154</sup> Massachusetts,<sup>155</sup> Oregon,<sup>156</sup> and New York,<sup>157</sup> local governments are given specific authority to provide incentives—usually increases in the maximum density or expedited permitting procedures—for developers that agree to provide certain amenities specified in the local ordinance.<sup>158</sup> Municipalities in California and Connecticut have used incentive zoning to encourage construction of affordable housing generally.<sup>159</sup>

Incentive zoning has been used sporadically in some municipalities to invite affordable housing for seniors. For example, the City of Chandler, Arizona, allows increased density for “elderly care housing” due to the decreased impact that this type of use has on infrastructure.<sup>160</sup> The City of Suffolk, Virginia, also provides a density bonus for developments that are age-restricted or that provide special facilities for elderly persons.<sup>161</sup> Massachusetts incentivizes the construction of affordable and senior housing through a streamlined approval process,<sup>162</sup> and more than half of all the housing units built under the law since 1969 have been senior housing units.<sup>163</sup>

State governments can add specific enabling language to the planning and

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Cori Menkin, *Senior Citizen Overlay Districts and Assisted Living Facilities: Different But the Same*, 21 PACE L. REV. 481 (2001) (explaining that “a municipality may locate a senior citizen overlay district within a residential district already established in the town. The new district is ‘overlaid’ on top of the district already in place.”).

151. CAL. GOV. CODE § 65460.2 (2008).

152. CONN. GEN. STAT. § 8-2g(a) (2008).

153. FLA. STAT. § 163.3202 (2005); FLA. STAT. § 163.3177(7), (13)(c) (2005).

154. MD. ANN. CODE art. 66B, § 10.01(a)(9) (2006).

155. MASS. ANN. LAWS ch. 40A, § 9 (2005).

156. OR. REV. STAT. § 197.296(7), (9) (2005); OR. REV. STAT. § 227.090(1)(E)(b) (2005).

157. N.Y. TOWN LAW § 261-B (2005); N.Y. VILLAGE LAW § 7-703 (2005); N.Y. GEN. CITY LAW § 81-D (2005). The New York statutes specially list “elder care” in the list of potential community amenities. However, affordable housing for seniors would also be an appropriate community amenity.

158. See generally Patrick Rohan, *Zoning and Land Use Controls*, Volume II at Ch. 8 (1997).

159. Marya Morris, *Part 1: Historical Perspective and Statutory Overview*, INCENTIVE ZONING: MEETING URBAN DESIGN AND AFFORDABLE HOUSING OBJECTIVES, PAS Report 494 (2000), available at <http://www.planning.org/affordablereader/pasreports/PAS494part1.pdf>. The American Planning Association’s model statute on incentive zoning also recommends that appropriate community amenities include affordable housing. See Stuart Meck, ed., *GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE*, AMERICAN PLANNING ASSOCIATION 9-101 (1999).

160. CHANDLER, ARIZ. CODE, *supra* note 143.

161. SUFFOLK, VA., ZONING ORDINANCE, Article 4 § 31-409, available at [http://www.suffolk.va.us/citygovt/udo/a4/section31409\\_zoning.pdf](http://www.suffolk.va.us/citygovt/udo/a4/section31409_zoning.pdf) (last visited Oct. 2008).

162. MASS. GEN. LAWS., ALM GL ch. 40B, secs. 20-23.

163. CITIZENS’ HOUSING AND PLANNING ASSOCIATION, AGE RESTRICTED ACTIVE ADULT HOUSING IN MASSACHUSETTS 44 (2005), available at <http://www.capecodcommission.org/housing/AgeRestrictHousingMA2005.pdf> (last visited Oct. 2008).

zoning statutes that authorize local governments to adopt incentive zoning programs, and the state-level authorization can specifically list affordable housing for seniors as a demonstration of the state's commitment to addressing this need. Local governments must also be encouraged to use the permissive enabling statutes for the purpose of inviting and promoting the production of affordable housing for seniors in the community.

#### CONCLUSION

There is no doubt that an affordable housing crisis for our seniors looms on the horizon. Absent more significant and immediate commitments by Congress and state legislatures to provide the necessary funding to enhance the current supply of public assisted housing for seniors, and absent substantial increases in financial support for low income housing trust funds that emphasize senior housing programs, both the burden and opportunity for the production and retention of affordable housing options for seniors rests with local governments and their land use control authority. The good news is that local governments possess a rich reservoir of zoning and other land use regulatory tools that can be employed to provide an appropriate range of housing alternatives suited to meet the demographic needs of the community. While state governments should be encouraged to modernize zoning enabling statutes to provide specific references to affordable senior housing—from comprehensive plan statutes to the authorization of incentive zoning and the inclusion of language referencing seniors in existing affordable housing requirements—the reality is that local governments can already provide an environment that fosters needed housing for relatively healthy seniors of lower income.