

The Minnesota Land Use Planning Act and the Promotion of Low- and Moderate-Income Housing in Suburbia[†]

Edward G. Goetz, Karen Chapple & Barbara Lukermann*

Introduction

The rapid escalation in urban housing values across the country has outstripped wage and income growth, making both ownership and rental housing inside cities less affordable for a growing percentage of families.¹ Yet, the problems in urban housing markets transcend local municipal boundaries.² For

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* Edward G. Goetz, Associate Professor and Director of the Urban and Regional Planning Program, Humphrey Institute of Public Affairs, University of Minnesota; Karen Chapple, Department of City and Regional Planning, University of California, Berkeley; and Barbara Lukermann, Center for Urban and Regional Affairs, University of Minnesota.

1. See CTR. FOR HOUS. POL'Y OF THE NAT'L HOUS. CONFERENCE, *HOUSING AMERICA'S WORKING FAMILIES: A FURTHER EXPLORATION*, 3 *NEW CENTURY HOUS.* 7-8 (2002), available at <http://www.nhc.org/nhcimages/workingfam3final.pdf>; JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *THE STATE OF THE NATION'S HOUSING* (2002), available at <http://www.jchs.harvard.edu/publications/markets/Son2002.pdf>; NAT'L LOW INCOME HOUS. COALITION, *OUT OF REACH 2002: AMERICA'S GROWING WAGE-RENT DISPARITY*, at <http://www.nlihc.org/oor2002/preface.htm> (last visited Oct. 29, 2003).

2. See Yale Rabin, *The Roots of Segregation in the Eighties: The Role of Local Government Actions*, in *DIVIDED NEIGHBORHOODS: CHANGING PATTERNS OF RACIAL SEGREGATION* 208, 212-13 (Gary A. Tobin ed., 1987) (discussing the role of local public housing authorities in dealing with racial segregation issues). See also Robert Gray & Steven Tursky, *Location and Racial/Ethnic Occupancy Patterns for HUD-Subsidized Family Housing in Ten Metropolitan Areas*, in *HOUSING DESEGREGATION AND FEDERAL POLICY* 235, 237 (John M. Goering ed., 1986) (stating that the portion of HUD-subsidized housing in central cities exceeded the central cities' relative proportions of households in need); Sandra J. Newman & Ann B. Schnare, ". . . And a Suitable Living Environment": *The Failure of Housing Programs to Deliver on Neighborhood Quality*, 8 *HOUS. POLY DEBATE* 703, 709 (1997) (discussing the difference in housing types between central cities and suburbs in relation to need); Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1285 (1995) (providing evidence of the high concentration of subsidized housing in the central cities of metropolitan areas). There is ample

example, residents and politicians of all areas resist the development and funding of subsidized housing, which limits the availability of low-cost housing.³ State and local governments have concentrated new subsidized housing in central city neighborhoods, increasing the poverty levels of those areas.⁴ At the same time, suburban land use regulations limit the amount of low-cost housing that can be built outside of central cities.⁵

This concentration of poverty heightens a series of social problems ranging from drug use and criminal activity to high school dropout rates and teenage pregnancy.⁶ Centralized poverty also impacts the fiscal burden of local governments by increasing the need for public and social services in some geographic areas,

evidence that federally subsidized housing units are also concentrated in neighborhoods with high minority and low-income populations. See, e.g., Newman & Schare, *supra*, at 710-14.

3. See, e.g., ADVISORY COMM'N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., NOT IN MY BACKYARD, Part II (1991) (recommending improvements to federal, state, and local housing programs). See generally MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* (1976) (discussing barriers faced by advocates of housing projects and subsidies); Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58 J. AM. PLAN. ASS'N 288, 288-300 (1992) (focusing on community rejection of unpopular housing projects and its effect on program implementation).

4. See William H. Carter et al., *Polarization, Public Housing and Racial Minorities in U.S. Cities*, 35 URB. STUD. 1889, 1908 (1998); Steven R. Holloway et al., *Exploring the Effects of Public Housing on the Concentration of Poverty in Columbus, Ohio*, 33 URB. AFF. REV. 767, 782-85 (1998); Douglas S. Massey & Shawn M. Kanaiapuni, *Public Housing and the Concentration of Poverty*, 74 SOC. SCI. Q. 109, 120 (1993).

5. Anthony Downs, *Reducing Regulatory Barriers to Affordable Housing Erected by Local Governments*, in HOUSING MARKETS AND RESIDENTIAL MOBILITY 255, 268 (G. Thomas Kingsley & Margery Austin Turner eds., 1993). Zoning regulations that limit the availability of high-density residential land, increase minimum square footages or lot sizes, or introduce excessive garage or landscaping requirements are examples of techniques that drive up the per unit cost of housing. See RICHARD F. BABCOCK & FRED P. BOSSELMAN, *EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970S* 47 (1973).

6. See, e.g., Margaret Beal Spencer et al., *Neighborhood and Family Influences on Young Urban Adolescents' Behavior Problems: A Multisample, Multisite Analysis*, in NEIGHBORHOOD POVERTY: CONTEXT AND CONSEQUENCES FOR CHILDREN 200, 211-18 (Jeanne Brooks-Gunn et al. eds., 1997) (finding indirect effects on identity and coping for low and high risk adolescents); Jeanne Brooks-Gunn et al., *Do Neighborhoods Influence Child and Adolescent Development?*, 99 AM. J. SOC. 353, 369-74 (1993) (finding that family income is a predictor for dropout rates and teenage pregnancy); Jonathan Crane, *The Epidemic Theory of Ghettos and Neighborhood Effects on Dropping Out and Teenage Childbearing*, 96 AM. J. SOC. 1226, 1250 (1991) (finding an increase in dropout and teenage pregnancies for both Black and White adolescents in urban ghettos); Martha A. Gephart, *Neighborhoods and Communities as Contexts for Development*, in NEIGHBORHOOD POVERTY: CONTEXT AND CONSEQUENCES FOR CHILDREN 1, 38 (Jeanne Brooks-Gunn et al. eds., 1997) (noting that several studies have made a connection between neighborhood and community influences on delinquency and substance abuse).

while at the same time reducing the tax revenue potential of those areas.⁷

The barriers to housing affordability in suburban areas trap poorer, low-skilled workers in central city neighborhoods, away from the areas of greatest job growth.⁸ Central city schools are deprived of resources, creating dramatic inequities in the educational experiences of city and suburban children.⁹ The residential development produced by suburban zoning also contributes to patterns of urban sprawl, which generates its own set of costs.¹⁰

In response to these barriers and the growing need for affordable housing, state legislatures have pursued a range of regional approaches to housing policy.¹¹ This Article examines the twenty-five-year record of one such initiative, the Minnesota Land Use Planning Act (LUPA).¹² Part I examines four common regional housing initiatives enacted by state legislatures.¹³ Part II describes and analyzes LUPA's regional housing initiative, which combines two of those initiatives: comprehensive planning and fair

7. See MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* 62-64 (1997).

8. Downs, *supra* note 5, at 268-69 (arguing that members of middle- and upper-income suburbs fear low-income residents moving into their neighborhoods, and that zoning ordinances are constructed to restrict the access of low-income residents). See also Mark Alan Hughes, *Anti-Poverty Strategy Where the Rubber Meets the Road: Transporting Workers to Jobs*, in *HOUSING MARKETS AND RESIDENTIAL MOBILITY* 283, 291-92 (G. Thomas Kingsley & Margery Austin Turner eds., 1993) (discussing central city unemployment problems in Philadelphia).

9. See Justin D. Cummins, *Recasting Fair Share: Toward Effective Housing Law and Principled Social Policy*, 14 *LAW & INEQ.* 339, 342-51 (1996) (listing a series of negative outcomes ranging from education to health).

10. See generally MICHAEL DANIELSON & JAMESON W. DOIG, *NEW YORK: THE POLITICS OF URBAN REGIONAL DEVELOPMENT* (1982) (describing the incentives for "leapfrog" development and sprawled suburban landscapes, which reduce housing and employment opportunities for low-income families); WILLIAM H. LUCY & DAVID L. PHILLIPS, *CONFRONTING SUBURBAN DECLINE: STRATEGIC PLANNING FOR METROPOLITAN RENEWAL* 21-40 (2000) (addressing the "tyranny of easy development decisions" that results in sprawled metropolitan areas); Robert W. Burchell, *Economic and Fiscal Costs (and Benefits) of Sprawl*, 29 *URB. LAW.* 159, 165-70 (1997); Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 *URB. LAW.* 183, 184 (1997).

11. See *infra* notes 17-44 and accompanying text.

12. MINN. STAT. § 473.859 (2002). LUPA deals with the entire range of community comprehensive plan functions. Plans for the promotion of adequate low- and moderate-income housing are just one element of the comprehensive plans required of communities within the region's growth boundaries. See MINN. STAT. §§ 473.859-.871 (2002).

13. See *infra* Part I.

share strategies.¹⁴ Part III offers recommendations for improving the fair share elements of LUPA.¹⁵ This Article concludes with a summation of the obstacles that must be overcome in order to implement and achieve the fair share objectives of LUPA.¹⁶

I. Regional Approaches to Housing Policy

Regional housing initiatives enacted by state governments typically take one or more of the following forms: (1) override statutes that reduce local government autonomy in zoning matters, (2) inclusionary (or incentive) zoning programs that require or incentivize low-cost housing development as a condition of approval for market-rate projects, (3) fair share approaches that assign affordable housing goals to communities within a region, or (4) state regulation of local comprehensive planning efforts to address low-cost housing needs.¹⁷

14. See *infra* Part II.

15. See *infra* Part III.

16. See *infra* Conclusion.

17. It is important to note that regional approaches to housing policy are not limited to state legislatures. Federal "mobility" programs such as "Moving To Opportunity," "Regional Opportunity Counseling," and the portability provision of the Section 8 program are all attempts to enhance the dispersal of subsidized households throughout metropolitan areas. See EDWARD G. GOETZ, CLEARING THE WAY: DECONCENTRATING THE POOR IN URBAN AMERICA, 56-57 (2003) [hereinafter CLEARING THE WAY]. Court-ordered desegregation remedies also serve the same purpose, although they typically utilize a wider range of policy approaches. For example, the decision in *Hills v. Gautreaux* upheld a regional mobility program ordered by a district court. 425 U.S. 284, 306 (1976). Other decisions have ordered the dispersal of subsidized units through scattered site approaches. See, e.g., *Gautreaux v. Chicago Hous. Auth.*, 304 F. Supp. 736 (N.D. Ill. 1969) (outlining specific remedial steps to prevent implementation of unconstitutional steps by the Chicago Housing Authority), *enforcing Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969); *Walker v. HUD*, 912 F.2d 819 (1990) (holding constitutional the congressional withdrawal of federal funding to subsidize the demolition of a vacant public housing building); *Hollman v. Cisneros*, No. 4-92-712, (D. Minn. Mar. 8, 1995) (consent decree setting actions to promote equal housing, expand assisted housing, and encourage racial integration); *Sanders v. HUD*, No. 88-1261 (D. Pa. served May 20, 1994) (notice of filing of revised desegregation plan for Allegheny County). A third set of court actions limits the ability of suburban areas to zone in an exclusionary manner: courts in several states have struck down specific zoning requirements because of their exclusionary impact. See, e.g., *Britton v. Town of Chester*, 595 A.2d 492, 496 (N.H. 1991) (invalidating a local zoning ordinance for an exclusionary effect); *Berenson v. New Castle*, 341 N.E.2d 236, 242 (N.Y. 1975) (holding that local zoning should consider the general welfare of township residents and the effect on surrounding communities); *Surrick v. Zoning Bd.*, 382 A.2d 105, 111 (Pa. 1977) (invalidating a local zoning ordinance that limited multi-family residential uses); *Bd. of County Supervisors v. Carper*, 107 S.E.2d 390, 396-97 (Va. 1959) (holding that a county zoning amendment concentrating small lots in only one portion of the county was an unconstitutional

Override statutes allow for state or regional review of local zoning and permitting decisions.¹⁸ For example, state laws in Massachusetts, New Jersey, Connecticut, and Rhode Island provide for review of affordable housing development proposals that have been denied by local governments.¹⁹ The review process is typically structured to favor the developer.²⁰ These statutes essentially rely upon the initiative of the developer to work;²¹ in fact, they are commonly referred to as “builders’ remedies.”²² This approach is significant because it allows state governments to review land use plans that traditionally had been under the complete control of local governments.²³ On occasion, state courts have invalidated local zoning programs that were found to unreasonably exclude low-cost housing (referred to as “exclusionary zoning”), but this has only occurred on a case-by-

use of police power). See generally Timothy J. Choppin, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 GEO. L.J. 2039, 2077 (1994) (arguing for zoning regulation reforms to combat the affordable housing shortage); Jennifer Morgan, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359, 359-93 (1995) (describing judicial treatment of exclusionary and inclusionary zoning techniques).

18. See, e.g., Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381, 387 (2002) (describing Massachusetts’ override statute).

19. The Municipal Housing Finance Assistance Act of Connecticut, CONN. GEN. STAT. § 8-300 to -315 (2003); The Massachusetts Comprehensive Permit and Zoning Appeals Act, MASS. GEN. LAWS ANN. Ch. 40B, § 20 (Law. Co-Op. 1993); The New Jersey Fair Housing Act, N.J. STAT. ANN. § 52:27D-301 to -329 (West 2003); The Rhode Island Low and Moderate Income Housing Act, R.I. GEN. LAWS § 45-53-5 (1991).

20. See Krefetz, *supra* note 18, at 388. These statutes can shift the burden of proof from the developer to the local government when an appeal is made because of a zoning board decision based on economic reasons. See *id.* Specifically, a Massachusetts local zoning board must show that the initial decision to deny a building permit was based on local interests that outweigh the regional need for more affordable housing. *Id.* The statutes remove the ultimate decision from the local authorities and vest it in a state agency or court. *Id.* at 387. The Massachusetts statute requires a hearing within thirty days of the appeal and a decision within forty days of the hearing. *Id.* at 386 (citing MASS. GEN. LAWS Ch. 40B, § 21). In effect, the statutes have benefited developers in their attempts to build more affordable housing. In Massachusetts, for example, local denials have been overturned in 94 of 112 cases reviewed. *Id.* at 397-98.

21. *Id.* at 387.

22. See, e.g., *Britton v. Town of Chester*, 595 A.2d 492, 497-98 (N.H. 1991) (granting a “builders’ remedy” that allowed a builder to build low- and moderate-income housing because the builder’s proposed plan was reasonable).

23. See JOHN M. LEVY, *CONTEMPORARY URBAN PLANNING* 62-73 (6th ed., 2003).

case basis.²⁴ In contrast, override statutes provide for regular review of local zoning decisions regarding affordable housing by a state agency or court and, as a result, reduce the autonomy of local governments in zoning matters.²⁵

The inclusionary zoning strategy links the development of low-cost housing to the development of market-rate units.²⁶ Developers building market-rate residential units are either encouraged or obligated to set aside a certain number of the proposed units at more affordable levels.²⁷ Voluntary programs, such as those in parts of California and Virginia, offer developers a density bonus in exchange for including affordable units in their market-rate developments.²⁸ On the other hand, programs in New Jersey, Maryland's Montgomery County, and parts of California also incorporate density bonuses, but are mandatory for all developments over a certain size.²⁹ Both voluntary and mandatory inclusionary zoning programs can exist on a statewide or a local level, depending on the community.³⁰

Like override statutes, inclusionary zoning relies upon the initiative of developers for implementation and the overall impact is related to the degree to which developers act.³¹ Thus, low rates

24. See *Britton*, 595 A.2d at 498; *Berenson v. New Castle* 341 N.E.2d 236, 242-43 (N.Y. 1975); *Surrick v. Zoning Bd.*, 382 A.2d 105, 111-12 (Pa. 1977).

25. See Sam Stonefield, *Affordable Housing in Suburbia: The Importance But Limited Power and Effectiveness of the State Override Tool*, 22 W. NEW ENG. L. REV. 323, 327-28 (2002).

26. See ALAN MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES 2 (1984); Nico Calavita et al., *Inclusionary Housing in California and New Jersey: A Comparative Analysis*, 8 HOUS. POL'Y DEBATE 109, 110 (1997); INNOVATIVE HOUSING INSTITUTE, INCLUSIONARY ZONING, at <http://www.inhousing.org/InclusionaryZoning/izoning.htm> (last visited Oct. 29, 2003) [hereinafter INNOVATIVE HOUSING INSTITUTE].

27. See INNOVATIVE HOUSING INSTITUTE, *supra* note 26, at 4.

28. See CAL. GOV'T CODE § 65915 (West 1998); FAIRFAX, VA. COUNTY CODE art. I, § 2-804 (2003). A "density bonus" allows a developer to add more units to the development than would have otherwise been allowed under the zoning restrictions in exchange for making a small percentage of the units affordable. See CAL. GOV'T CODE § 65915 (West 1998).

29. See Calavita et al., *supra* note 26, at 123. For example, as of 1994, sixty-four California communities had adopted inclusionary housing programs, and the typical ordinance applied to developments from ten or more units in some communities, to developments with a minimum of 100 units in other communities. *Id.* Another example can be found in Montgomery County, Maryland, where the Moderately Priced Dwelling Unit ordinance applies to developments of fifty or more units. MONTGOMERY CO., MD. CODE ch. 25A-5 (2003).

30. See MALLACH, *supra* note 26, at 13.

31. See John M. Payne, *Fairly Sharing Affordable Housing Obligations: The*

of private development in communities with these programs will often result in little low-cost housing development. In rapidly growing areas, however, both override statutes and inclusionary zoning approaches can generate significant activity. The obligations imposed by both override statutes and inclusionary zoning programs often only apply to communities that have not met a threshold of housing affordability.³² In Massachusetts, Connecticut, and Rhode Island, for example, a town is exempt from state override requirements if more than ten percent of the housing stock is affordable.³³

Fair share approaches to meeting local affordable housing needs were particularly popular in the early 1970s.³⁴ During this time many communities and the United States Department of Housing and Urban Development (HUD) encouraged fair share program use,³⁵ but few fair share programs presently remain.³⁶ Fair share programs are designed to “improve the status quo by allocating units in a rational and equitable fashion. . . . [A]

Mount Laurel *Matrix*, 22 W. NEW ENG. L. REV. 365, 373-78 (2002); Paul K. Stockman, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535, 550-59 (1992).

32. See Stonefield, *supra* note 25, at 339.

33. *Id.*

34. W. DENNIS KEATING, *THE SUBURBAN RACIAL DILEMMA* 40 (1994).

35. *Id.* at 40-41. In the early 1970s, the federal government provided support and funds for the development of area-wide councils of government and briefly supported the metropolitan dispersal of assisted housing. *Id.* HUD's Open Communities program, for example, provided water, sewer, and infrastructure funds based on local governments' compliance with fair share housing concerns. In addition, Congress authorized metro-wide Councils of Governments (COGs) to review local applications for federal aid to ensure that proposed projects were consistent with regional development plans. The number of COGs nationwide grew dramatically in response to this new procedural requirement. Some COGs, notably the Metropolitan Council of the Twin Cities, used this authority to downgrade applications from communities that had not made progress in meeting affordable housing goals. This mechanism led to the creation of “fair share” housing programs in several metropolitan areas. CLEARING THE WAY, *supra* note 17, at 47.

36. The largest and best known is the New Jersey program. The New Jersey Fair Housing Act created the Council on Affordable Housing (COAH), which determines fair share requirements for all New Jersey communities. N.J. STAT. ANN. § 52:27D-301 to -329 (West 1986). Communities in New Jersey are assigned low-income housing obligations based on existing housing mix, present and projected employment, and amount of open land. See, Roland Anglin, *Searching for Justice: Court-Inspired Housing Policy as a Mechanism for Social and Economic Mobility*, 29 URB. AFF. Q. 432-53 (1994). COAH was also responsible for setting time limits for compliance and had the power to enforce its regulations. One study indicated that COAH had facilitated the development of 16,000 affordable housing units in New Jersey suburbs, or nine percent of new housing construction in the state. See Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives*, 27 SETON HALL L. REV. 1268 (1997).

primary impetus for and emphasis of fair share is expanding housing opportunity usually, but not exclusively, for low- and moderate-income families."³⁷

What distinguishes the fair share approach from the others is the means by which local needs are determined and the performance standards against which towns are measured. Fair share programs typically incorporate a number of factors into a formula, the results of which determine each community's local share of the regional need for low- and moderate-income housing (low-mod housing).³⁸ These shares constitute goals toward which each town must work. Fair share is typically a more proactive approach to regional housing problems and goes beyond the mere adjustment of development rules for private residential proposals.

Some states require local governments to include plans for meeting low-mod housing needs in comprehensive community plans.³⁹ California, Florida, Oregon, and Washington have instituted such approaches.⁴⁰ A "comprehensive planning statute prescribes the factors to be considered in determining a locality's housing needs; typical factors considered in making this determination include the locality's existing and projected population, current housing supply, and available buildable land."⁴¹ However, the comprehensive planning approach does not necessarily require a programmatic means of implementation and,

37. DAVID LISTOKIN, *FAIR SHARE HOUSING ALLOCATION 1* (1976). Because they require the cooperation of municipalities throughout a metropolitan area, fair share programs are typically operated by regional governments. The cities of Dayton, Chicago, San Francisco, Washington D.C., and others had brief experiments with fair share housing programs. See KEATING, *supra* note 34; Lois Craig, *The Dayton Area's 'Fair Share' Housing Plan Enters the Implementation Phase*, CITY, Jan.-Feb. 1972, at 50-56. As the federal government withdrew support, fair share became strictly a local initiative.

38. See LISTOKIN, *supra* note 37, at 27-86. The factors that are incorporated into the formulas can vary widely and depend upon the objectives of particular fair share approaches. See *id.* Allocation criteria can include "equal share" (all sub-areas within a region receive equal allocations or equal minimum shares), need (low-cost housing allocations are correlated with existing need for affordable housing), distribution (the inverse of need, allocations correlate with the lack of low-income population), and suitability (taking into account vacant land, infrastructure, and the environmental suitability of land). *Id.* at 53-58.

39. See ERIC DAMIAN KELLY, *MANAGING COMMUNITY GROWTH: POLICIES, TECHNIQUES, AND IMPACTS 101-27* (1993) (detailing the approaches used in Hawaii, Vermont, Florida, Oregon, and other states).

40. CAL. GOV'T CODE § 65300 (West 2001); FLA. STAT. Ch. 163.3161 (2001); OR. REV. STAT. § 197.295 (2001); WASH. REV. CODE § 36.70A.010 (2003).

41. Morgan, *supra* note 17, at 373.

in some cases, does not even contain effective compliance powers.⁴²

These four approaches to regional housing policy are not mutually exclusive. In New Jersey and California, for example, the fair share and inclusionary zoning approaches are used together.⁴³ Minnesota, on the other hand, combined the comprehensive planning approach with fair share housing requirements to create the Minnesota Land Use Planning Act (LUPA).⁴⁴

II. The Minnesota Land Use Planning Act

Minnesota's LUPA statute provides the basis for mandatory land use planning policy in the seven-county Minneapolis-St. Paul region.⁴⁵ Enacted in 1976, LUPA requires a comprehensive planning approach to metropolitan housing issues and requires individual communities to establish programs that meet their fair share of the regional need for low-mod housing.⁴⁶ The statute specifically requires that community comprehensive plans

include a housing element containing standards, plans and programs for providing adequate housing opportunities to meet existing and projected local and regional housing needs, including but not limited to the use of official controls and land use planning to promote the availability of land for the development of low and moderate income housing.⁴⁷

LUPA also requires that comprehensive plans include official land use controls "to implement the housing element of the land use plan, which will provide sufficient existing and new housing to meet the local unit's share of the metro area need for low and moderate income housing."⁴⁸

The Metropolitan Council of Minneapolis-St. Paul (Met Council) is responsible for interpreting and implementing the requirements of LUPA.⁴⁹ The following analysis is based on a

42. See Calavita et al., *supra* note 26, at 117 (indicating that the California Department of Housing and Development has review powers but that it "lacks the power to mandate changes").

43. See *id.* at 135.

44. MINN. STAT. §§ 473.851-.871 (2002).

45. MINN. STAT. §§ 473.851-.871. The seven Minnesota counties are: Anoka, Dakota, Hennepin, Ramsey, Carver, Scott, and Washington.

46. MINN. STAT. § 473.859, subds. 2, 4 (2002).

47. MINN. STAT. § 473.859, subd. 2 (2002).

48. MINN. STAT. § 473.859, subd. 4 (2002).

49. See MINN. STAT. §§ 473.854, 473.867 (1976). Met Council was created by the Minnesota Legislature in 1967 and was one of the first regional bodies in the United States to initiate a regional housing approach in the early 1970s. This

study that examined Met Council's role, as well as the role of individual suburban communities, in meeting the LUPA requirements (LUPA Study).⁵⁰

A. The LUPA Study

The LUPA Study examined the fifteen Twin Cities regional communities⁵¹ that experienced the largest population growth between 1970 and 1990.⁵² An additional ten communities were included in the Study due to their past growth and future projected growth.⁵³ This selection process produced a sample that included at least one community in each of the seven counties of the metropolitan area. However, since the Study focused on areas of greatest growth, the studied communities were typically second ring or developing suburbs of the Twin Cities metropolitan area, including suburban Hennepin County (the western suburbs of Minneapolis), Anoka County (north and west of Minneapolis), and Dakota County (south of St. Paul).⁵⁴

Over the period studied, these high-growth communities experienced an increase in median income relative to the metropolitan area as a whole.⁵⁵ In 1980, ten of the twenty-five sample communities had median incomes below the regional median.⁵⁶ By 1990, however, the sample communities had, on average, a median income twenty-five percent above the regional

approach was formalized in 1976 by the Minnesota Legislature when it enacted LUPA. CLEARING THE WAY, *supra* note 17, at 96.

50. EDWARD G. GOETZ, KAREN CHAPPLE & BARBARA LUKERMANN, THE AFFORDABLE HOUSING LEGACY OF THE 1976 LAND USE PLANNING ACT (2002) [hereinafter AFFORDABLE HOUSING LEGACY].

51. These high growth cities, by county, are: Andover, Blaine, Coon Rapids (Anoka County), Apple Valley, Burnsville, Eagan, Lakeville (Dakota County), Brooklyn Park, Champlin, Eden Prairie, Maple Grove, Minnetonka, Plymouth (Hennepin County), Shoreview (Ramsey County), and Woodbury (Washington County). *Id.* at 9-11.

52. The decades of 1970-1990 were selected because they covered the period of time before, during, and after the implementation of LUPA. *Id.* at 9-11.

53. "Community" was defined as one of the 144 municipal governments within the seven-county Twin Cities region. "Historic growth" was defined as population increase between 1970 and 1990. "Projected growth" was based on Met Council's population forecasts through the year 2020. The communities chosen in this step were Lino Lakes and Ramsey (Anoka County), Chanhassen and Chaska (Carver County), Inver Grove Heights and Rosemount (Dakota County), Prior Lake and Savage (Scott County), and Cottage Grove and Oakdale (Washington County). *Id.* at 7-11.

54. *Id.* at 9-12.

55. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 9.

56. *Id.*

figure.⁵⁷ This trend alone suggests that these high growth communities were able to become more affluent over time despite the low-mod housing provisions of LUPA.

B. Submission and Review of Plans

As part of Met Council's implementation strategy, the Council reviews each community's plan to determine whether it complies with LUPA requirements.⁵⁸ Council approval is necessary before a plan can take effect.⁵⁹ Many communities had no experience with comprehensive planning prior to LUPA, and Met Council expected that it would take several years for all communities within the region's growth boundaries (called the Metropolitan Urban Service Area, or MUSA) to complete the planning process.⁶⁰ Among the twenty-five communities included in the LUPA Study, the first round of planning produced Council-approved plans as early as 1979 and as late as 1982.⁶¹ Some communities that were originally outside of MUSA were responsible for submitting a plan only when the boundaries expanded to include them.⁶² Of the twenty-five sample communities, for example, Andover was initially exempt from the planning requirement, but submitted its first plan in 1990 when the MUSA line moved outward.⁶³

57. In 1980, the unweighted mean for median incomes of the twenty-five sample communities was \$25,577, compared to the regional median of \$25,503. In 1990, the unweighted mean for the communities was \$45,607, compared to the regional median of \$36,565. *Id.* at 10.

58. See MINN. STAT. §§ 473.854, 473.864 (1976); AFFORDABLE HOUSING LEGACY, *supra* note 50, at 12.

59. *Id.*

60. See Interview by Leigh Tomlinson with Richard Thompson, Senior Planner, Metropolitan Council of the Twin Cities (May 11, 2001) (on file with author) [hereinafter Thompson Interview]. See also AFFORDABLE HOUSING LEGACY, *supra* note 50, at 12. MUSA represents the land area within which the new residential growth is to occur. The MUSA line, as it is referred to, demarcates areas to which infrastructure systems (such as sewers) will be extended in order to facilitate land development. The MUSA line limits growth by limiting the provision of development infrastructure. *Id.* MUSA is the area including the two central cities, the fully developed suburban areas and areas of planned urbanization. Judith A. Martin, *In Fits and Starts: The Twin Cities Metropolitan Framework*, in METROPOLITAN GOVERNANCE: AMERICAN/CANADIAN INTERGOVERNMENTAL PERSPECTIVES 218 (Donald N. Rothblatt & Andrew Sanction eds., 1993) (citing JOANNE VAIL & ROSANNE ZIMBRO, SUBSIDIZED HOUSING IN THE TWIN CITIES METRO. AREA (1986)).

61. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 12.

62. *Id.*

63. See Thompson Interview, *supra* note 60.

The initial Met Council compliance guidelines did not indicate how frequently the community plans had to be updated.⁶⁴ The Minnesota Legislature addressed the issue in 1996 when it required another round of comprehensive planning to be completed by the end of 1998.⁶⁵ The Legislature also required that all plans be updated every ten years thereafter.⁶⁶ As a matter of practice, however, rapidly growing communities have submitted plan amendments more frequently than every ten years.⁶⁷ In addition, the Council may trigger a round of amendments by changing its own regional development policies.⁶⁸ These changes often mean communities must revise plans to bring them into compliance with the new Met Council policies.⁶⁹

Once community proposals are received and reviewed, Met Council ordinarily sends the plans back to communities with requests for changes.⁷⁰ For example, if a community fails to meet its housing goals, Met Council will typically write a report suggesting a plan modification.⁷¹ If a plan is too far off course, the Council will actively assist the community in bringing its plan into compliance.⁷²

Currently, Met Council acts with no formal authority to require communities to build a specific amount of low-mod housing.⁷³ As one Council staff member indicated, “[w]e can’t say . . . you have to provide affordable housing. What we can say is that

64. *See id.*

65. *See* MINN. STAT. § 473.864 (2) (1976); AFFORDABLE HOUSING LEGACY, *supra* note 50, at 13-14.

66. *See* MINN. STAT. § 473.864 (2) (1976); Thompson Interview, *supra* note 60.

67. *See* Thompson Interview, *supra* note 60. Met Council receives up to one hundred plan amendment requests each year. *Id.*

68. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 14.

69. Thompson Interview, *supra* note 60.

70. Interview by Leigh Tomlinson with Guy Peterson, Planning Analyst, Metropolitan Council of the Twin Cities, (April 17, 2001) (on file with author) [hereinafter Peterson Interview]; Thompson Interview, *supra* note 60.

71. *See* Thompson Interview, *supra* note 60.

72. At that point, communities often “get very serious about talking with [Met Council] about what they need to do to fix their plans.” Thompson Interview, *supra* note 60.

73. *Id.* Met Council establishes regional plans for each of four “systems.” These systems are transportation (highways and transit), sewers, parks and open space, and airports. The Council requires all local comprehensive plans to be in conformance with the regional plans for these systems. Because housing is currently not treated as a regional system, Met Council feels it has no authority to force local compliance with any regional housing objectives. This interpretation is currently being challenged. *See* Complaint, Alliance for Metro. Stability v. Metro. Council, City of Eagan (Minn. 2d filed Aug. 15, 2002) (No. C7-02-7774).

you have to provide the opportunity to not discriminate against affordable housing.”⁷⁴ Met Council ensures that communities provide this “opportunity to not discriminate” by determining whether the local community has designated enough land for high-density development to accommodate its low-mod housing goals, and whether the plan has an implementation strategy that identifies methods of promoting the desired development.⁷⁵ The Council operates under the assumption that high-density development is the type most likely to produce affordable units, primarily because high-density development reduces per-unit land and infrastructure costs.⁷⁶ Furthermore, the Council believes that high-density development is the most likely setting for rental housing, which is the tenure form of most subsidized low-mod housing.⁷⁷

C. Implementation of LUPA

In order to evaluate LUPA’s housing element, it is useful to break down its twenty-five-year history into three waves. Such a breakdown highlights Met Council’s policy changes that have profoundly affected the quality of housing plans submitted and approved pursuant to LUPA.

1. First Wave: 1976-1982

Met Council’s Housing Allocation Plan (Allocation Plan) framed the first wave of housing plans under LUPA.⁷⁸ The Allocation Plan, first created in 1972 (prior to passage of LUPA), was a formula-based system that provided numerical goals for low-mod housing in the region.⁷⁹ Initially, these goals were not broken down for individual communities; instead, they were aggregated for nine separate subsectors of the metropolitan area.⁸⁰ When

74. Thompson Interview, *supra* note 60.

75. Peterson Interview, *supra* note 70; AFFORDABLE HOUSING LEGACY, *supra* note 50, at 16.

76. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 16.

77. *Id.*

78. METRO. COUNCIL OF THE TWIN CITIES, METROPOLITAN DEVELOPMENT GUIDE 75-83 (Metro. Council ed. 1977) [hereinafter METRO. DEV. GUIDE].

79. *See id.* at 75.

80. *See* LISTOKIN, *supra* note 37, at 187-88 (citing METRO. COUNCIL OF THE TWIN CITIES, HOUSING POLICY PLAN, PROGRAM (Metro. Council ed. 1973)). The original Allocation Plan assigned communities (or sometimes parts of communities) to one of four priority areas for low-mod housing. Priority areas were defined by the availability of public services, such as transit and highways, and the level of economic opportunities, such as jobs and shopping areas. Areas with high levels of

LUPA was adopted by the state legislature in 1976, Met Council revised the Allocation Plan to provide specific numerical goals for all communities within the MUSA line and for "free-standing growth centers" outside the MUSA line.⁸¹ The new Allocation Plan accounted for the number and projected growth of households and jobs, as well as the number of non-subsidized low-mod housing units for each community.⁸²

Met Council also influenced housing policy when it included housing performance evaluations as a part of its review of local government grant applications during the 1970s.⁸³ In 1971, the Council started to review local governments' funding applications to the federal government for park, sewer, water, and road facilities.⁸⁴ During this process, Met Council explicitly considered the local government's performance on affordable housing issues when making its recommendations to the federal government.⁸⁵ The Council received direct authority to review these grant applications in 1973, which gave it even more leverage over local governments.⁸⁶

In 1977, the Council adopted a set of development guidelines aimed, in part, at producing more affordable housing opportunities.⁸⁷ These guidelines included suggestions related to

services were the highest priority areas for low-mod housing. Both central cities, Minneapolis and St. Paul, had separate allocation shares, as did the rural part of the metropolitan area. The suburban areas were divided into six more subsectors by geography. *Id.*

81. See METRO. DEV. GUIDE, *supra* note 78, at 77-78. A "free standing growth area" is a community wholly outside of the MUSA boundaries that nevertheless is identified as a growth node. This designation takes into account the existence of smaller towns in rural areas on the periphery of the metropolitan area. *Id.*

82. See *id.* at 79-80. The formula was a simple average of five items. The first four items related to existing and projected population and employment. They were the existing population as a percentage of regional population, forecasted population growth as a percentage of forecasted regional growth, existing number of jobs as a percentage of the regional total, and the forecasted job growth as a percentage of the regional total. The formula also included an attempt to take into account the amount of existing low-cost housing in a community. The fifth item was the number of low-cost housing units minus the number of subsidized units in the community as a percentage of the regional total. *Id.*

83. CLEARING THE WAY, *supra* note 17, at 96.

84. WILLIAM C. JOHNSON, CTR. FOR URB. AND REG'L AFF., GROWTH MANAGEMENT IN THE TWIN CITIES REGION: THE POLITICS AND PERFORMANCE OF THE METROPOLITAN COUNCIL 77 (1998).

85. *Id.* at 77-78.

86. *Id.* For example, in 1974 Met Council rejected an application for a park grant from west-suburban Golden Valley because of its poor housing record. *Id.*

87. METRO. COUNCIL OF THE TWIN CITIES, ADVISORY STANDARDS FOR LAND USE REGULATION TO PROMOTE HOUSING DIVERSITY IN THE TWIN CITIES METROPOLITAN

lot size, garages, living area square footage, and other items that have a direct impact on housing prices.⁸⁸ In addition, the development guidelines established standards for land-use policies that promoted lower-cost housing and gave communities a sense of best practices.⁸⁹ With this set of tools, Met Council was able to change the spatial distribution of subsidized housing in the region.⁹⁰ For example, in 1971, Minneapolis and St. Paul had ninety percent of the region's subsidized housing.⁹¹ Fifteen years later, their share was down to sixty percent.⁹²

2. Second Wave: 1983-1994

Implementation of LUPA's housing elements changed drastically when Congress slashed federal housing subsidies in the early 1980s.⁹³ The HUD budget reductions, in particular, were devastating to the region's fair share approach.⁹⁴ As a result, Met Council changed the Allocation Plan from a distribution of housing unit goals among regional communities to an allocation of anticipated federal housing funds.⁹⁵ For communities making comprehensive plan updates, or for communities new to the process, there was no statement from Met Council about individual community shares of regional need.⁹⁶

Along with the federal housing subsidy cuts, the volume of federal infrastructure grants also declined, which reduced the number of opportunities for Met Council to control local housing performance.⁹⁷ In response, Met Council no longer accounted for the low-mod housing performance of local governments when it

AREA (Metro. Council ed. 1977); METRO. COUNCIL OF THE TWIN CITIES, ADVISORY LAND USE STANDARDS FOR MULTI-FAMILY HOUSING TO PROMOTE HOUSING DIVERSITY IN THE TWIN CITIES METROPOLITAN AREA (Metro. Council ed. 1978).

88. *See id.*

89. *See id.*

90. *See* Martin, *supra* note 60, at 230.

91. *Id.*

92. *Id.*

93. *See* CLEARING THE WAY, *supra* note 17, at 98. For example, HUD's share of federal budget authority fell from over seven percent in 1978 to less than one percent ten years later. New budget authority for housing assistance fell by twenty-four billion dollars, or more than eighty percent between 1978 and 1988. *See* PAUL A. LEONARD ET AL., A PLACE TO CALL HOME: THE CRISIS IN HOUSING FOR THE POOR 28 (1989).

94. CLEARING THE WAY, *supra* note 17, at 98.

95. METRO. COUNCIL, AMENDMENTS TO 1977 HOUSING CHAPTER OF METROPOLITAN DEVELOPMENT GUIDE 2 (1980).

96. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 17.

97. *Id.*

evaluated grant applications.⁹⁸ Met Council withdrew its development guidelines during the 1980s, which dismantled yet another piece of the fair share infrastructure that had been operating just a decade earlier.⁹⁹

Two important changes in the socio-political environment of the Twin Cities region also undermined the state's commitment to fair share housing during the second wave. The first change was a reduction in gubernatorial support for an interventionist Met Council. Democrat Rudy Perpich and his successor, Republican Arne Carlson, both expressed little interest in metropolitan planning, especially in the area of low-mod housing, and neither advanced policies to strengthen Met Council.¹⁰⁰ The second change was a demographic shift in the region. At the same as more people of color moved to the area, greater concentrations of poverty and attendant social problems emerged in core neighborhoods.¹⁰¹ The social and economic homogeneity that had been the foundation of almost two decades of regional problem-solving began to disappear.¹⁰² With it went the language of regional commitment to low-cost housing needs under the fair share method.¹⁰³

3. Third Wave: 1995-Present

The most recent wave of regional housing plans began in 1995 and continues today. This third wave coincides with the Minnesota Legislature's creation of the Metropolitan Livable Communities Act (LCA).¹⁰⁴ LCA is a voluntary program that

98. *Id.*

99. *Id.* Expressing the philosophy of Met Council during the 1980s and 1990s, one source indicated that the Council backed away from the guidelines because the development had "evolved away from the necessity to be prescriptive." Because development today is often done through Planned Urban Developments (PUDs), "it's really about the negotiations between the cities and the developers, and the developers know the specifics to build to and how to deliver the product they're after—the marketplace knows what it needs." Peterson Interview, *supra* note 70.

100. See JOHNSON, *supra* note 84, at 42 (stating Perpich "had less interest in metropolitan planning than . . . his predecessor," tended to ignore the Council on important decisions, and appointed Council members who shared his disinterest in regional planning); CLEARING THE WAY, *supra* note 17, at 98.

101. See generally METRO. COUNCIL, TROUBLE AT THE CORE: THE TWIN CITIES UNDER STRESS (1992).

102. CLEARING THE WAY, *supra* note 17, at 98. See also Myron Orfield, *Politics and Regionalism*, in URBAN SPRAWL: CAUSES, CONSEQUENCES AND POLICY RESPONSES 244-45 (Gregory D. Squires ed., 2002).

103. CLEARING THE WAY, *supra* note 17, at 98.

104. MINN. STAT. §§ 473.25-.255 (2002).

provides funds for “cleaning up polluted land; revitalizing communities and promoting efficient development;” and providing affordable housing throughout the metropolitan area.¹⁰⁵ To qualify for LCA funds, communities develop specific goals for affordable housing in cooperation with Met Council, as well as a plan to reach those goals.¹⁰⁶

Met Council encourages communities to use their LCA housing plans as a substitute for the implementation section of their LUPA housing elements.¹⁰⁷ Such a substitution has two implications for compliance with LUPA fair share directives. First, LCA does not contain the “low-mod housing” language used in LUPA, but instead refers to “affordable housing.”¹⁰⁸ In practice, “affordable housing” appears to target households with a higher income than those targeted by the phrase “low-mod housing.”¹⁰⁹ Second, Met Council’s benchmarks for setting LCA housing goals are not based on need; rather, they reflect the existing level of affordability in subsectors of the region.¹¹⁰ Consequently, community goals established pursuant to LCA do not meet the plain directive of LUPA, which states unambiguously that plans must address the low-mod housing “need” in that area.¹¹¹

D. The Record of Planning for Low-Mod Housing under

105. METRO. COUNCIL, THE FACTS ABOUT THE METROPOLITAN LIVABLE COMMUNITIES ACT 1 (1996).

106. MINN. STAT. § 473.254, subsd. 2, 6.

107. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 18. The Council’s *Local Planning Handbook* states that “a community’s Housing Action Plan developed under Livable Communities Act criteria may meet the requirements for the housing implementation program required by statute, if it includes adequate programs, fiscal devices and other official controls to meet the community’s goals, as required by the Land Planning Act.” The Handbook’s section on housing demand also identifies that “communities participating in the Metropolitan Livable Communities Act’s Local Housing Incentives Account have negotiated housing goals through the year 2010. Those negotiated goals may be included in this part of the plan unless the community wishes to renegotiate its LCA housing goals.” *Id.*

108. MINN. STAT. § 473.254, subd. 2.

109. CLEARING THE WAY, *supra* note 17, at 26. *See also infra* text accompanying notes 153-158.

110. METRO. COUNCIL, METROPOLITAN LIVABLE COMMUNITIES ACT NEGOTIATED AFFORDABLE AND LIFE-CYCLE HOUSING GOALS - 1996 1 (1996); METRO. DEV. GUIDE, *supra* note 78, at 68-72; AFFORDABLE HOUSING LEGACY, *supra* note 50, at 68-72.

111. MINN. STAT. § 473.859, subd. 4(3) (requiring “a housing implementation program, including official controls to implement the housing element of the land use plan, which will provide sufficient existing and new housing to meet the local unit’s share of the metropolitan area *need* for low and moderate income housing”) (emphasis added).

LUPA

1. Decline in Quality of LUPA Housing Elements

LUPA's statutory language indicates that the housing element should include standards, plans, and programs to meet both local and regional housing needs.¹¹² The first round of plans addressed both the local and regional needs by referencing the fair share allocation established by Met Council.¹¹³ Third-wave plans, however, do not meet this requirement.¹¹⁴ Not a single plan submitted later than 1990 reviewed in the LUPA Study identified the local share of regional low-mod housing needs.¹¹⁵ With the exception of two communities, none of the later plans identified existing or projected low-mod housing needs at all.¹¹⁶

LUPA also calls for an implementation section that outlines the programs and practices designed to promote low-mod housing.¹¹⁷ The LUPA Study examined the implementation section for assessments of two distinct elements.¹¹⁸ First, the Study asked whether the plans identified and planned for local and non-local sources of subsidies.¹¹⁹ Second, the Study asked whether other policies (primarily local zoning and development controls) were identified that might be modified to promote low-mod housing.¹²⁰

2. Identification of Housing Needs

a. Variation Across Waves

Most of the first wave plans make direct reference to the fair share allocations recommended by Met Council, both for low-mod housing and for modest-cost housing.¹²¹ Some plans even indicated that the regional allocation system was the best way to

112. MINN. STAT. §§ 473.851, 473.859, subd. 2(c) (2002).

113. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 23.

114. *Id.*

115. *Id.*

116. *Id.*

117. MINN. STAT. § 473.859, subd. 4.

118. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 24.

119. *Id.*

120. *Id.*

121. *Id.* It was standard practice for the communities to adopt the low end of the range provided to them by the Council. Nevertheless, the plans indicated an acceptance of the fair share methodology. *Id.*

determine local needs.¹²² For example, the Apple Valley, Inver Grove Heights, and Eagan plans each contain language stating that housing needs are best established on a regional basis.¹²³ By the third wave, such language is absent; in its place is language asserting each community's role in establishing housing goals.¹²⁴ The 1999 plan for Apple Valley, for example, states that "[t]he City is in the best position to determine the most responsible option for meeting the future needs of Apple Valley rather than the Metropolitan Council, especially as it relates to residential densities."¹²⁵

The retreat from a commitment to regional housing solutions began during the second wave.¹²⁶ For the five communities that completed plans during that time (Andover, Burnsville, Champlin, Chanhassen, and Chaska), all references to fair share and regional needs for low-mod housing are missing.¹²⁷ In fact, there are virtually no references to low-mod housing at all.¹²⁸

This trend continued into the third wave.¹²⁹ Instead of referencing LUPA's requirement, third wave plans discussed low-mod housing in the context of the LCA.¹³⁰ As a result, local need played no role in most of the third wave plans.¹³¹ Most communities, in fact, adopted goals that are either at the low end or below Met Council's recommended LCA benchmark range.¹³² Under this rubric, the goals for many communities represent a reduction in the percentage of affordable units from the already existing percentage.¹³³

122. *Id.*

123. See CITY OF APPLE VALLEY, COMPREHENSIVE GUIDE PLAN VIII-10 to -11 (1979); CITY OF EAGAN, COMPREHENSIVE GUIDE PLAN VIII-13 (1980); CITY OF INVER GROVE HEIGHTS, COMPREHENSIVE GUIDE PLAN VIII-13 (1980) [hereinafter INVER GROVE HEIGHTS 1980 PLAN].

124. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 24-25.

125. CITY OF APPLE VALLEY, COMPREHENSIVE PLAN UPDATE DRAFT 60 (1999).

126. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 24.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Edward G. Goetz, *Fair Share or Status Quo? The Twin Cities Livable Communities Act*, 20 J. PLAN. EDUC. & RES. 37, 44 (2000).

133. *Id.* at 42-44. LCA goals are expressed as a percentage of new housing units created between 1995 and 2010. *Id.* Most communities participating in the program have negotiated goals with Met Council that, over the next fifteen years, commit them to producing a smaller percentage of affordable units than they currently have in their housing stocks. *Id.* Thus, another implication of the switch

When asked how their communities determined low-mod housing needs as required by LUPA, planners from one-half of the sample communities indicated that they regard the LCA goals as the statement of housing needs in their cities.¹³⁴ Five others indicated that they do not calculate low-mod housing need in any way.¹³⁵ One city planner said her community does not calculate need because it “is a factor of the marketplace and changes periodically and regularly with the market.”¹³⁶ In another community, the planner indicated, somewhat paradoxically, that they do not calculate need because they have determined that it is zero.¹³⁷ A different planner responded that the records show only three percent of their population was low-income in 1997, and nine percent of the housing stock was low-income in 1995.¹³⁸

For those who wish to calculate local need for low-mod housing, there is uncertainty as to how to proceed. As one city planner said, “to get at the need for affordable housing the City conducted a survey of residents. It found that people who live [here] generally do not work here, and the people who work [here] generally do not live [here].”¹³⁹ This is typical of most suburban communities in which housing markets extend far beyond municipal boundaries.¹⁴⁰ Another city planner indicated that the quantification of need “is not done by surveying the economic

to LCA standards is a built-in retrenchment on affordable housing in the region and among the participating communities. *Id.* For the region as a whole, Goetz finds that if all communities reach their LCA goals there would be twelve percent fewer affordable housing units than would be the case if all communities simply maintained their current percentage of affordable units. *Id.* at 44.

134. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 25.

135. *Id.*

136. Interview by Leigh Tomlinson with Pam Dudziak, City Planner, City of Eagan, in Eagan, Minn. (June 29, 2001) (on file with author).

137. Interview by Jill Mazullo and Mudia Ouzzi with Howard Blin, Planning Director, and Stacie Kvilvang, Economic Development and Housing Planner, City of Brooklyn Park, in Brooklyn Park, Minn. (Dec. 11, 2000) (on file with author) [hereinafter Blin and Kvilvang Interview].

138. Interview by Julie Morrison and Li Luan with Ron Mullenbach, Associate Planner, City of Lakeville, in Lakeville, Minn. (Feb. 19, 2001) (on file with author) [hereinafter Mullenbach Interview].

139. Interview by Julie Morrison and Li Luan with Barbara Sennes, Director of Housing and Redevelopment Agency, and Edward Goldsmith, Planner, City of Plymouth, in Plymouth, Minn. (Feb. 16, 2001) (on file with author) [hereinafter Goldsmith and Sennes Interview].

140. See U.S. CENSUS BUREAU, CENSUS OF POPULATION AND HOUSING (Census 2000 Summary File 3 DVD, disc 1 at P27, Jan. 2003). According to 2000 census data, seventy percent of employed persons over the age of sixteen in the Minneapolis-St. Paul metropolitan area work in a community other than the one in which they live. *Id.*

make-up of [the community], because when it comes to affordable housing, municipal boundaries don't mean much."¹⁴¹

b. The Fading Awareness of LUPA

Interviews with suburban planners suggest that LUPA has become virtually irrelevant, in practice, to most regional planning for low-mod housing.¹⁴² When asked about the concept of fair share housing, one city planner simply said, "the [Land Use] Planning Act doesn't have much to do with it, we signed off on the affordability goals for LCA."¹⁴³ In all likelihood, LUPA has been replaced by LCA in the minds of city planners to such a degree that they either do not think about it anymore, or are even unaware of LUPA's requirements.¹⁴⁴ As one planner stated, "LUPA has been and gone. Now we're talking LCA, LUPA was superceded by LCA."¹⁴⁵

The shift to LCA as a framework for low-mod housing efforts has led many city planners to think that they have met their fair share requirements according to LCA benchmarks.¹⁴⁶ In fact, nine of the city planners (thirty-six percent) indicated that their community has already done their fair share in the area of affordable housing.¹⁴⁷ In many cases, these were based on the

141. Interview by Li Luan and Julie Morrison with Geoff Olson, Planning Director, and Bob Streetar, Community Development Director, City of Minnetonka, in Minnetonka, Minn. (Mar. 2, 2001) (on file with author) [hereinafter Olson and Streetar Interview].

142. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 25. .

143. Olson and Streetar Interview, *supra* note 141.

144. More than one of the city planners interviewed did not know anything about the housing requirements of LUPA and asked our interviewers to give them some background. See Mullenbach Interview, *supra* note 138; Interview with Dave Lindahl, Manager, Housing and Redevelopment Agency, City of Eden Prairie, in Eden Prairie, Minn. (on file with author).

145. Interview by Jill Mazullo with John Heald, Community Development Director, City of Savage, in Savage, Minn. (Nov. 29, 2000) (on file with author) [hereinafter Heald Interview].

146. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 26.

147. Interview by Beth Elliott and Kathy Ember with Bryan Schafer, Community Development Director, City of Blaine, in Blaine, Minn. (Feb. 12, 2001) (on file with author); Blin and Kvilvang Interview, *supra* note 137; Interview by Joanna Vossen and Kathy Ember with Chad Wohlers, Planning and Economic Development Specialist, City of Burnsville, in Burnsville, Minn. (Feb. 8, 2001) (on file with author) [hereinafter Wohlers Interview]; Interview by Michelle Lewis with Kevin Ringwald, Director of Planning and Development, City of Chaska, in Chaska, Minn. (Nov. 17, 2000) (on file with author); Interview by Beth Elliott and Kathy Ember with Lee Starr, Director of Community Development, City of Coon Rapids, in Coon Rapids, Minn. (Feb. 16, 2001) (on file with author) [hereinafter; Interview by Joey Vossen with John McCool, Senior Planner, City of Cottage Grove, in

generous definitions of affordability in the LCA and Met Council's data showing that many communities are at or above those benchmarks.¹⁴⁸

Some city planners use the LCA to support the notion that their community has met its fair share of low-mod housing needs, while others use it to retreat entirely from the goal of regional fair share. As one city planner said, "[t]he advantage of LCA is that it is community based, and that is much easier for [City] Councils to understand than their place in the region"¹⁴⁹

City planners in more than two-thirds of the twenty-five communities also indicate that the vocabulary about low-cost housing has shifted from "low-mod," which is typically used in reference to subsidized housing, to "affordable," which is the term used in LCA.¹⁵⁰ The substitution of the LCA affordable housing definition for the "low-mod" definition used in federal and state programs has the effect of retargeting housing away from lower-income families and toward middle-income households.¹⁵¹ Additionally, LCA guidelines result in much higher rents for most households because they are based on families of four, and no adjustments are made for family or unit size.¹⁵²

City planners are well aware of the retargeting effect of LCA and, as a result, most current plans shift housing needs away from low- and moderate-income people as required by LUPA.¹⁵³ The

Cottage Grove, Minn. (Dec. 1, 2000) (on file with author) [hereinafter McCool interview]; Interview by Julie Morrison and Kathy Ember with Mary Kay Wyland, Planning Coordinator, City of Lino Lakes, in Lino Lakes, Minn. (Feb. 21, 2001) (on file with author) [hereinafter Wyland Interview]; Interview with Brent Brommer, Community Development Director, City of Oakdale, in Oakdale, Minn. (on file with author); Interview by Gia Pionek with Richard Pearson, City Planner, City of Rosemount, in Rosemount, Minn. (Dec. 10, 2000) (on file with author) [hereinafter Pearson Interview].

148. Goetz, *supra* note 132, at 42. Two-thirds of the communities in the region participating in LCA have existing levels of affordability above their benchmarks. *Id.* McCool Interview, *supra* note 147; Wyland Interview, *supra* note 147.

149. Goldsmith and Sennes Interview, *supra* note 139.

150. See AFFORDABLE HOUSING LEGACY, *supra* note 50, at 25-26 (compiling interview data collected by the authors from individuals associated with each community's urban development or planning commissions and evaluating the data).

151. See *id.* at 2, 26.

152. *Id.* at 26.

153. For instance, one city planner called the LCA affordability guidelines "a joke" because they are so high. Interview by Michelle Lewis with Robert Generous, City of Chanhassen Senior Planner, Chanhassen, Minn. (Nov. 17, 2000) (on file with author) [hereinafter Generous Interview]. Another indicated that his community adopted the LCA guidelines precisely because they are so much higher than the low-mod requirements. See AFFORDABLE HOUSING LEGACY, *supra* note 50,

1998 plan for Inver Grove Heights provides an example of this shift.¹⁵⁴ The 1998 plan does not calculate existing low-mod housing needs, nor the City's share of the region's need.¹⁵⁵ There is nothing in the plan about housing affordability needs.¹⁵⁶ The plan provides LCA goals, but does not regard the LCA housing goals as applying to low- and moderate-income families at all.¹⁵⁷ The plan states that the city's negotiated LCA goals "will assist the City in maintaining the broadest base of housing affordable to *middle-income* households."¹⁵⁸

Many city planners believe their communities have already met their regional obligations regarding affordable housing because of the low benchmarks provided to them by Met Council and the inflated affordability guidelines used by Met Council in the LCA program.¹⁵⁹ The result is the idea that some communities no longer need to make a special effort to promote low-mod housing.¹⁶⁰

Even though LCA benchmarks are low, many communities negotiate with Met Council to lower their goals even further.¹⁶¹ The 1998 plan for Lino Lakes, for example, provides no

at 26.

154. CITY OF INVER GROVE HEIGHTS, INVER GROVE HEIGHTS COMPREHENSIVE PLAN-DRAFT (1998) [hereinafter INVER GROVE HEIGHTS 1998 PLAN].

155. *Id.* at Housing Guide Plan-1 to -10.

156. *Id.*

157. *Id.* at Housing Guide Plan-8.

158. *Id.* (emphasis added).

159. See AFFORDABLE HOUSING LEGACY, *supra* note 50, at 26. Met Council's own figures show that, despite the existence of a technically sufficient number of affordable housing units in the area, some of the units were being used by people who could afford more expensive housing and the affordable options were not sufficiently dispersed throughout the region. See METROPOLITAN COUNCIL, OPENING THE DOORS TO AFFORDABLE/LIFE CYCLE HOUSING: BASELINE DATA 14 (1995). As a result, sixty percent of the households with income below \$20,000 were paying more than thirty percent of their income for housing. See *id.* The LCA program is established in such a way that seventy-four percent of the participating suburban communities have ownership benchmarks that are equal to or less than the current level of affordability. See Goetz, *supra* note 132, at 42-43.

160. See AFFORDABLE HOUSING LEGACY, *supra* note 50, at 26. For example, the third-wave Burnsville plan includes as one of its housing goals: "Considering all rezoning requests for residential development in light of the City's Housing Goals Agreement under the LCA, and therefore not considering rezoning requests which would facilitate new rental, multi-family or affordable rental housing units." CITY OF BURNSVILLE, COMPREHENSIVE PLAN FOR THE CITY OF BURNSVILLE 5-24 (2000) (emphasis added) [hereinafter BURNSVILLE COMPREHENSIVE PLAN].

161. Twenty-nine percent of participating communities negotiated LCA goals for homeownership that were below their benchmarks, and twenty-five percent of participating communities negotiated rental goals below benchmarks. Goetz, *supra* note 132, at 43-44.

calculations of existing or projected need for low-mod housing, nor the City's share of the regional need for such housing.¹⁶² The plan references LCA goals, and notes that the goals for homeownership are to slightly reduce the rate at which affordable housing is produced in the City, and to slightly increase the rate at which affordable rental housing is developed.¹⁶³ Even with the increase in affordable rental housing, Lino Lakes has adopted a goal that is ten to twenty-three percentage points below the benchmark provided to them by Met Council.¹⁶⁴

Oakdale, Shoreview, and Prior Lake have also adopted goals below the provided benchmarks.¹⁶⁵ According to Met Council, Prior Lake's goal for ownership affordability is fifty percent between 1995 and 2010.¹⁶⁶ This is fifteen to twenty percentage points below their benchmark and twenty-one percentage points below the existing level of affordability.¹⁶⁷ Similarly, for rental housing the affordability goal of thirty-two percent is below the thirty-nine percent that the City had achieved prior to the LCA program.¹⁶⁸ The 2000 plan for Prior Lake provides no calculation of existing or projected low- and moderate-income housing needs, nor a statement of the City's share of regional needs.¹⁶⁹ The 2000 plan refers only to LCA goals and benchmarks.¹⁷⁰

3. Implementation Plans

LUPA requires that the housing elements of comprehensive plans include a program of implementation detailing steps to be taken for a community to meet its share of regional housing needs.¹⁷¹ The LUPA implementation programs may range from a list of subsidy programs to a set of steps intended to reduce regulatory barriers to lower-cost housing development. The quantity and variety of specific steps listed by local communities

162. CITY OF LINO LAKES, DEVELOPMENT FRAMEWORK 173-77 (1998).

163. *See id.* at 173.

164. *Id.*, METRO. COUNCIL, REPORT TO THE MINNESOTA LEGISLATURE ON AFFORDABLE AND LIFE-CYCLE HOUSING IN THE TWIN CITIES METROPOLITAN AREA app. 2 (2000) [hereinafter METRO. COUNCIL 2000 REPORT].

165. *See* METRO. COUNCIL 2000 REPORT, *supra* note 164.

166. *Id.*

167. *Id.*

168. *Id.*

169. *See* CITY OF PRIOR LAKE, COMPREHENSIVE PLAN FOR THE CITY OF PRIOR LAKE 71-122 (2000) [hereinafter PRIOR LAKE COMPREHENSIVE PLAN].

170. *See id.* at 107-15.

171. MINN. STAT. § 473.859, subd. 4 (2002).

in their implementation plans have diminished over the three waves. First wave plans typically listed a variety of federal, state, and local subsidy programs.¹⁷² Third wave plans, on the other hand, generally mention fewer subsidy sources and often exclude entire levels of government support.¹⁷³

There is an even greater disparity between first wave and third wave plans when local initiatives are examined.¹⁷⁴ First wave plans routinely acknowledge the local regulatory options to overcoming barriers to low-cost housing development.¹⁷⁵ The 1981 Lino Lakes plan, for example, states: "In particular, zoning law with its minimum lot sizes, minimum building sizes, garage requirements and development review procedures can significantly affect the cost of housing in a community."¹⁷⁶

The second and third wave plans are generally bereft of specific statements outlining regulatory steps or, in some cases, any steps that would increase low-mod housing.¹⁷⁷ These plans are either silent on the issue of low-mod housing or contain vague references to existing sources of subsidy without a quantified

172. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 27.

173. *Id.* at 23. It is likely that there is a greater range of programs available at different levels of government than was the case in 1981. Since the dramatic reduction of subsidized housing programs at the federal level during the 1980s, state and local governments across the country increased their activities in affordable housing efforts. See EDWARD G. GOETZ, SHELTER BURDEN: LOCAL POLITICS AND PROGRESSIVE HOUSING POLICY 19, 37-44 (1993).

174. See AFFORDABLE HOUSING LEGACY, *supra* note 50, at 27 (calculating data gathered from each city's comprehensive plan).

175. *Id.*

176. CITY OF LINO LAKES, DRAFT COMPREHENSIVE PLAN 64 (1981).

177. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 26. Some plans provide rationales for the difficulty of building low- and moderate-income housing. The Woodbury Plan for 2000, for example, offers a range of reasons why affordable housing will be difficult to achieve. See CITY OF WOODBURY, COMPREHENSIVE PLAN 6-24 to -26 (2000). It cites the reluctance of developers to comply with initiatives to promote affordability, "the lack of a functioning Housing and Redevelopment Authority in Washington County," the end of the Section 8 new construction program (which occurred in 1982), and the lack of unplatted residential land left in the community. *Id.* at 6-24 to -25. Finally, the plan states:

Economic goals and strategies strive to locate business and industry in the City. A key component in that strategy is to provide executive housing for middle managers and estate housing for upper management. Other areas of this chapter describe the City's efforts to provide a wide range of housing stock for employees on a low economic scale . . . Private sector market forces have a significant impact upon the ability of the City to provide for affordable housing. . . [T]he jump in market values of the city's existing housing stock has moved properties out of the affordable range.

Id. at 6-26.

commitment to utilizing those resources.¹⁷⁸ The Burnsville 1998 plan, for example, does not directly address low-mod housing. Without completely specifying what these steps mean for affordable housing, the plan says the City will:

- Develop vacant land through zoning;¹⁷⁹
- Remove barriers that inhibit parcel development;¹⁸⁰
- Participate in LCA;¹⁸¹
- “Consider” amending zoning ordinances to provide for special design guidelines for seniors, disabled and other special populations;¹⁸² and
- Work with Dakota County Housing and Redevelopment Authority to use Community Development Block Grant (CDBG) funds and convert rental units to owner-occupied units.¹⁸³

Similarly, the 1998 plan for Lino Lakes notes that the City will “provide housing options” and “promote housing” for empty-nesters and “consider special needs housing” for people with disabilities, but does not specifically mention low-mod housing.¹⁸⁴ In fact, the plan lists three different “residential goals,” sixteen different “residential policies,” and three different “residential strategies;” only one of these twenty-two policy statements mentions affordability and not a single one mentions low-mod housing.¹⁸⁵

The mention of specific regulatory steps that would promote low-mod housing was increasingly rare during the second and third wave of plans.¹⁸⁶ For example, increasing allowable densities as a means of facilitating low-mod housing was mentioned in

178. See, e.g., CITY OF WOODBURY COMPREHENSIVE PLAN at 30-1.

179. See BURNSVILLE COMPREHENSIVE PLAN, *supra* note 160, at 107-08.

180. See *id.* at 108-09.

181. See *id.* at 108.

182. See *id.* at 115.

183. See *id.*

184. CITY OF LINO LAKES, *supra* note 162, at 174-75.

185. *Id.* The Lino Lakes 1998 plan offers no specific steps for producing low-mod housing. See *id.* at 173-77. Mention is made, however, of Anoka County Community Action Program (ACCAP), Elim Rental Assistance, Habitat for Humanity, Minnesota Housing Finance Agency (MHFA), Section 8 through Met Council Housing and Redevelopment Authority (HRA), and CDBG and HOME funds, all sources of low- and moderate-income housing assistance. *Id.* at 176-77.

186. See AFFORDABLE HOUSING LEGACY, *supra* note 50, at 28; Edward G. Goetz, Karen Chapple, and Barbara Lukermann, *Enabling Exclusion: The Retreat from Regional Fair Share Housing in the Implementation of the Minnesota Land Use Planning Act*, 22 J. PLAN. EDUC. & RES. 218 (2003) [hereinafter *Enabling Exclusion*].

fourteen (58%) of the community plans reviewed from the first wave but only three plans (18%) from the third wave.¹⁸⁷ Planned Use Developments (PUDs)¹⁸⁸ were mentioned in eighteen (75%) first wave plans but only nine (56%) third wave plans.¹⁸⁹ Decreasing square footage requirements for residential development was mentioned in fourteen (58%) first wave plans but only two (12%) third wave plans.¹⁹⁰ Specific regulatory steps, on the whole, were twice as likely to appear in first wave plans than in the current plans.¹⁹¹

The community of Inver Grove Heights provides an excellent example of the decreased commitment to regulatory reform over the twenty-five-year history of LUPA. The City's first wave plan indicated that the City "may consider a reduction in the more rigid zoning ordinance requirements set forth in the Zoning Ordinance in order to promote the development of housing for low and moderate income persons." This plan also created an ongoing "housing subcommittee" that would periodically review subsidized housing proposals for consistency with the City's Housing Plan.¹⁹² The subcommittee would also revise the Housing Plan when necessary.¹⁹³ The most recent plan, however, does little more than promise that the City will not make things worse than it has to. Specifically, the plan states: "To the degree possible, the City will work to ensure that local actions do not unduly increase the cost of raw land."¹⁹⁴ Not only is this quite a bit less aggressive than the City's stance in 1981, but it is a far cry from a detailed program of steps to promote low-mod housing as called for in LUPA.

187. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 27.

188. A Planned Unit Development is a zoning designation that allows higher density development of properties and smaller lots in agreements negotiated between developers and city staff. *Id.* at 3.

189. *Id.* at 27.

190. *Id.*

191. *Id.* at 28. The City of Burnsville, for example, listed seven of these techniques in its 1978 plan, but only one of them in the 1998 plan. Apple Valley listed four in 1979 and one in 1999. Lino Lakes listed five in 1981, but none in 1998. Shoreview went from five to one and Rosemount from six to one. Lakeville, Savage, and Prior Lake actually increased the number of specific local regulatory actions listed in their plans. *Id.*

192. See INVER GROVE HEIGHTS 1980 PLAN, *supra* note 123, at VIII-27 to -28.

193. *Id.* at VIII-28.

194. INVER GROVE HEIGHTS 1998 PLAN, *supra* note 154, at Planning Framework-7.

4. Addressing Impediments to Low-Mod Housing

The city planners in the twenty-five sample communities were asked whether, and to what extent, each of eight potential obstacles to low-mod housing existed in their communities.¹⁹⁵ Some of the city planners from these communities indicated that none of the listed regulations were obstacles to low-mod housing development in their communities.¹⁹⁶ Thus, the analysis was restricted to fifteen cities. Table 1 shows the answers given by those city planners.

Table 1. Regulations Limiting Low-Mod Development¹⁹⁷

Regulation	Limits low-mod housing SOMEWHAT	Limits low-mod housing VERY MUCH	Total & Percentage	n
Lot size requirements	10	5	15 (68)	22
Amount of land zoned for high-density	5	6	11 (48)	23
Prohibition on accessory units	2	5	7 (33)	21
Limits on manufactured housing	5	2	7 (33)	21
Subdivision regulations	4	2	6 (26)	23
Local building material requirements	6	0	6 (26)	23
Requirement for code enforcement with rehab	4	1	5 (26)	19
Permit process	3	0	3 (13)	22

195. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 29.

196. See Blin and Kvilvang Interview, *supra* note 137; Interview by Beth Elliott and Li Luan with Bob Waibel, Director of Community Development, and Dick Edwards, City Planner, City of Maple Grove (Oct. 26, 2001) (on file with author); Pearson Interview, *supra* note 147.

197. See AFFORDABLE HOUSING LEGACY, *supra* note 50, at 85.

The most recent comprehensive plans were reviewed to determine whether their strategies addressed the specific obstacles identified by the city planners.¹⁹⁸ The city planners identified, in the aggregate, thirty-four specific obstacles.¹⁹⁹ The comprehensive plans, however, included specific implementation strategies for only six (11.5%).²⁰⁰ In Prior Lake, for example, where the planner indicated that a restricted amount of land zoned for high-density and subdivision requirements were impediments to low-mod housing there were implementation steps in the current comprehensive plan that addressed both.²⁰¹ In Chanhassen, the plan called for relaxation of lot size requirements and for greater density allowances in some circumstances.²⁰² Both steps addressed a potential obstacle to low-mod housing development identified by the community's planner.²⁰³ However, in eighty-eight percent of the cases, the obstacles identified by city planners were not addressed by their own communities' comprehensive plans.²⁰⁴

Though these obstacles do not make up the full inventory of potential impediments to low-mod housing, they are quite common.²⁰⁵ Yet, the number of times that current plans address these impediments is extremely low.²⁰⁶ Thus, the third wave plans reviewed in the LUPA Study are deficient even using standards established by planners in the communities studied.

E. From Planning to Action

1. The Disconnect Between Planning and Practice

For comprehensive planning exercises to have any impact on the development of low-mod housing, there needs to be

198. *Id.* at 29.

199. *Id.*

200. *Id.*

201. See PRIOR LAKE COMPREHENSIVE PLAN, *supra* note 169, at 109, 112-13; Interview by Gia Pionek with Don Rye, Planning Director, City of Prior Lake (Dec. 8, 2000) (on file with author) [hereinafter Rye Interview].

202. CITY OF CHANHASSEN, COMPREHENSIVE PLAN FOR THE CITY OF CHANHASSEN 21-25 (1998) [hereinafter CHANHASSEN COMPREHENSIVE PLAN].

203. See Generous Interview, *supra* note 153.

204. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 29.

205. See Downs, *supra* note 5, at 257-60 (listing regulations that increase the cost of developing housing).

206. See AFFORDABLE HOUSING LEGACY, *supra* note 50, at 29.

implementation of the steps laid out in the plans. Comprehensive plans must be more than mere compliance with state law; they must provide the framework for local action from zoning ordinances to development and permitting policy.²⁰⁷ However, in the area of low-mod housing in the Twin Cities metropolitan region, this has not generally been the case.

a. The Match Between Plan Content and Local Practices

City planners were asked questions about the types of regulatory steps their communities were taking to promote low-mod housing.²⁰⁸ The answers they gave were compared with information from their community's comprehensive plans.²⁰⁹ The data reported below indicate the degree to which the content of plans matched actual practices in the twenty-five sample communities.²¹⁰

There is a close match for two items, in particular: "expediting permit approval" and "reducing fees for low-mod housing development."²¹¹ Expediting permit approval is not listed in any of the current plans and none of the city planners indicated that their community is currently doing this as a means of cutting housing development costs.²¹² Similarly, there is agreement between the comprehensive plans and interviewees for thirteen of the sixteen current plans related to the reduction in fees as a means of promoting low-mod housing.²¹³

Four other items, however, present a great discrepancy between what the planners say their communities do and what is contained in the implementation section of the comprehensive plans.²¹⁴ When it comes to reducing minimum square footage and lot size to cut costs, there are discrepancies between city planner responses and comprehensive plans in eight out of fourteen

207. See generally LEVY, *supra* note 23, at 103-13 (describing the process of comprehensive planning, including research, formation of community goals and comprehensive plans, and implementation).

208. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 76.

209. *Id.* at 77.

210. See *infra* notes 211-222 and accompanying text.

211. AFFORDABLE HOUSING LEGACY, *supra* note 50, at 77.

212. *Id.*

213. See *id.* (showing that two city planners indicated that their communities reduce development fees for affordable housing even though this technique is not listed in their comprehensive plans. Another community lists the reduction of fees in its plan, but the city planner indicated that they do not do so).

214. *Id.*

cases.²¹⁵ The rezoning of land to accommodate low-mod housing presents discrepancies in six out of sixteen cases.²¹⁶ Even the use of PUDs has a mismatch in six out of fifteen cases.²¹⁷

There are a couple of reasons why such discrepancies may occur. First, the comprehensive plans may not have provided enough detail about what the community is doing in the area of affordable housing.²¹⁸ Second, changes in policy may have occurred between the time the plan was written and the time of the interviews.²¹⁹

Another potential explanation is that city planners are simply unfamiliar with the housing element of their comprehensive plans.²²⁰ On several occasions, city planners were unaware of what the plans said about promoting low-mod housing.²²¹ For example, one city planner, after mentioning that set asides were a bad policy and one that he would not pursue, was surprised to hear that his city's current comprehensive plan called for the use of set asides.²²²

b. Follow-up on Promises Made in Comprehensive Plans

The interviews with city planners in the twenty-five sample communities also examined whether particular promises made in the comprehensive plans were kept subsequent years.²²³ The LUPA Study found several examples of communities that carried out the promises made in their comprehensive plans.²²⁴ In other cases, the passage of time and the turnover in staff made it difficult for city planners to determine whether specific steps had ever been taken.²²⁵ Finally, there were numerous examples of implementation steps listed in comprehensive plans that had never been carried out.²²⁶

215. *Id.*

216. *See id.* at 76.

217. *Id.* at 77.

218. *Id.*

219. *Id.*

220. *Id.* at 78.

221. *Id.*

222. *See* Heald Interview, *supra* note 145, at 37 (referring to the practice of ensuring that a portion of newly developed housing is sold or rented at affordable levels; that is, that some units are set aside for low- and moderate-income occupancy).

223. *See* AFFORDABLE HOUSING LEGACY, *supra* note 50, at 78-82.

224. *See id.*

225. *See id.* at 77-78.

226. *See id.*

The items that were carried out least often were those that related to specific zoning changes intended to facilitate lower cost housing.²²⁷ For example, the 1978 Burnsville Plan mentioned the possibility of reducing minimum lot size requirements, increasing density requirements for single-family housing, and adjusting the garage and minimum floor area requirements.²²⁸ Of these proposed changes, only lot size adjustments were utilized in the third wave.²²⁹ The 1998 Burnsville Plan, on the other hand, mentioned that the City would “[consider] the amendment of the Zoning Ordinance to establish special requirements for housing that is designed for seniors, persons with disabilities, and other special needs populations.”²³⁰ This has yet to occur.²³¹ Likewise, Chanhassen has failed to explore methods to lower land cost²³² and to develop a more streamlined review process for low-cost residential projects.²³³ Inver Grove Heights, in 1980, stated that an ongoing subcommittee would be established to make periodic (at least every three years) reviews of the City’s housing program and to make recommendations for change as necessary to the City Council and Planning Commission.²³⁴ The committee was never established.²³⁵

The experiences of the twenty-five communities in the Study indicate the important difference between passive reduction of barriers and the active encouragement of low-mod housing development.²³⁶ Several communities passed PUD ordinances as their plans suggested they would, but the city planners indicated

227. *See id.*

228. *See* CITY OF BURNSVILLE, COMPREHENSIVE PLAN 94-110 (1978).

229. *See* Wohlers Interview, *supra* note 147.

230. BURNSVILLE COMPREHENSIVE PLAN, *supra* note 160, at 115.

231. *See* Wohlers Interview, *supra* note 147.

232. *See* Generous Interview, *supra* note 153 (stating that “[t]he city doesn’t own land so it can’t control the market”).

233. *See* CHANHASSEN COMPREHENSIVE PLAN, *supra* note 202, at 19.

234. INVER GROVE HEIGHTS 1980 PLAN, *supra* note 123, at VIII-28.

235. Interview with Tom Link, City Planner, and Dan Rogness, Manager, Dakota County Housing and Redevelopment Agency, in Inver Grove Heights, Minn. (Jan. 9, 2001) (on file with author) [hereinafter Link and Rogness Interview] (“I couldn’t have told you that was in the plan. Sounds like one of those great consultant ideas.”).

236. *See* Payne, *supra* note 31, at 372-73 (arguing that governments employ both regulatory means of reducing barriers to low-cost housing as well as subsidies to produce low-cost housing). As Payne argues, this broadens the consideration of fair share housing to include the entire range of government actions possible to promote low-cost housing. *Id.* Regulatory reform allows for more affordable housing but does not ensure that it is produced. *Id.* Direct government subsidy in development projects is a more proactive way of promoting low-mod housing. *Id.*

that these laws had little or no impact on low-mod housing development.²³⁷ Similarly, city planners pointed to changes in local housing policies and in local zoning regimes that had an impact on the market for housing development, but not necessarily an impact on low-mod housing.²³⁸

One explanation for the lack of follow-up is the changing political environment in communities over time. One city planner explained that it was typical for the city council to participate in workshops to help develop the community's comprehensive plan.²³⁹ However, "the problem is that the council members that may have worked on these things are not necessarily the same ones as we have today."²⁴⁰ As a result, staff proposals that are consistent with the plan can be killed by a city council that no longer supports specific elements of the plan.

2. The High-Density Standard

To what extent has the comprehensive planning undertaken in the Minneapolis-St. Paul region over the past twenty-five years resulted in the development of low-mod housing in suburban areas? The evidence suggests a small impact.

Met Council has always judged the adequacy of plans, in part, based on the amount of high-density residential land set aside by communities.²⁴¹ Met Council reasoned that this land was the most likely to yield low-mod housing, and in fact this appears to be the case. Only one percent of the total land in the twenty-five sample communities is currently designated for high-density residential use, but it contains just under one-half (forty-eight percent) of the low-mod housing in those communities.²⁴² Thus, Met Council seems justified in judging the adequacy of plans by this measure. The experience of these twenty-five high growth communities suggests, however, that very little of the high density set aside actually results in low-mod housing. For every one

237. See Blin and Kvilvang Interview, *supra* note 137 (indicating that PUDs had "little impact" on low-mod development). See also Wyland Interview, *supra* note 147; Olson and Streetar Interview, *supra* note 141; Interview by Michelle Lewis with Sylvia Frolik, Community Development Director, in Ramsey, Minn. (Dec. 5, 2000) (on file with author).

238. See Link and Rogness Interview, *supra* note 235. See also Mullenbach Interview, *supra* note 138; Rye Interview, *supra* note 201.

239. See Rye Interview, *supra* note 201.

240. *Id.*

241. See Peterson interview, *supra* note 70.

242. See AFFORDABLE HOUSING LEGACY, *supra* note 50, at 96.

hundred acres set aside during the first wave plans, only five yielded new, low-mod housing after twenty years (see Figure 1).²⁴³

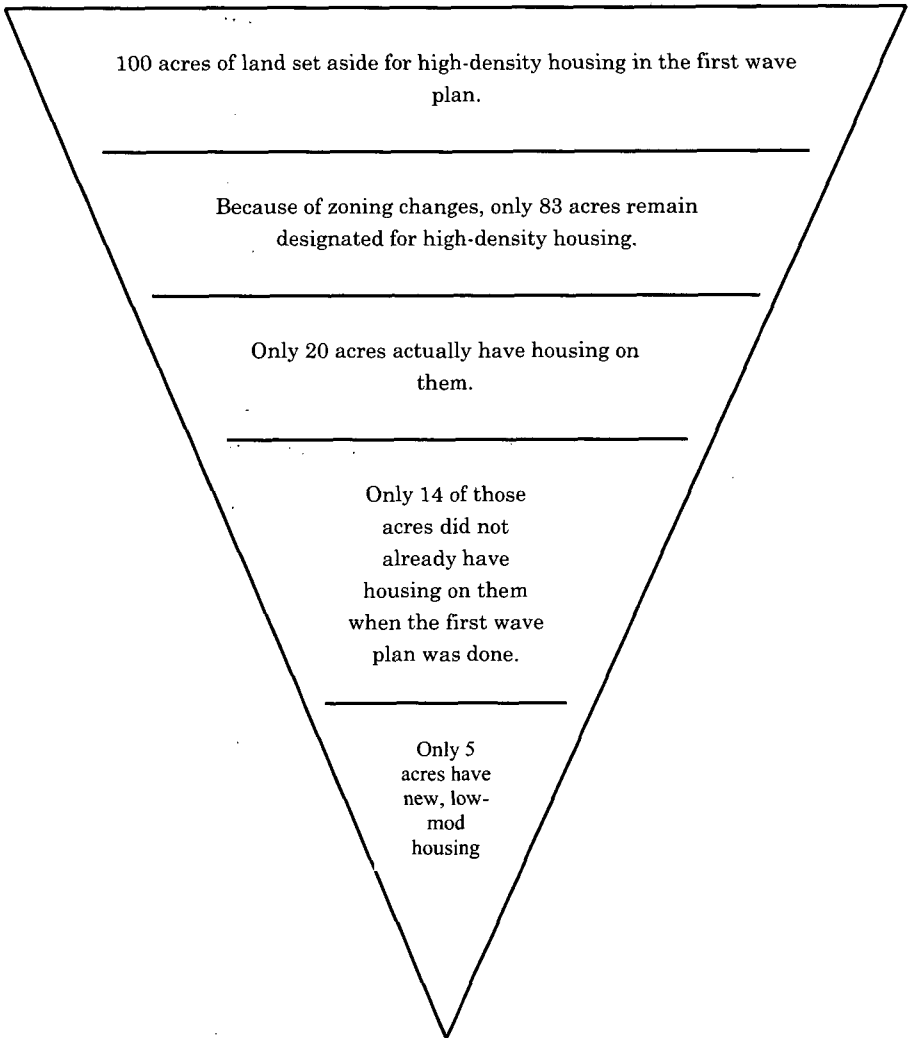


Figure 1. From High-Density Set-Asides to Low-Mod Housing: The Impact of Planning Over 20 Years²⁴⁴

243. See *Enabling Exclusion*, *supra* note 186, at 223.

244. *Id.*

3. Lack of Enforcement and Monitoring

LUPA does not explicitly require Met Council to monitor local housing practices, nor does it provide Met Council with any additional authority to enforce the compliance of local governments with the housing requirements of the statute.²⁴⁵ In certain circumstances, however, LUPA authorizes Met Council to take action.²⁴⁶ It is clear that without regular monitoring of local practices, there is little means by which Met Council, or anyone else, could assess the effectiveness of the statute. Nevertheless, Met Council has neither instituted a systematic form of monitoring, nor, for the most part, used any of its existing authority to enforce compliance with low-mod housing goals.²⁴⁷

Specifically, there is no system in place to determine whether:

- Local zoning conforms to the approved plan;
- The land set aside for high-density development in the plan was, in actuality, set aside as high-density;
- The housing built on land set aside as high density was actually affordable to families of low or moderate income;
- Communities have in place other practices that impede the achievement of low- and moderate-income housing goals; or
- The amount of low- and moderate-income housing built met the goals set out in the fair share allocation for those years when the Council was providing allocation numbers.²⁴⁸

As a result, Met Council “really [has] no systematic way of knowing that a plan was being followed or how it was being followed.”²⁴⁹

In 1995, the Legislature amended LUPA to require that local zoning comply with comprehensive plans.²⁵⁰ Met Council,

245. See MINN. STAT. § 473.859.

246. See *id.* See also MINN. STAT. § 473.175 (indicating that Met Council has the authority to reject local plans that do not conform to the regional plans related to any of the so-called regional systems). Regional systems include (a) parks and open space, (b) airports, (c) transit and highways, and (d) sewers and solid waste, and to initiate civil proceedings to enforce the comprehensive plan requirements. See MINN. STAT. § 473.852 subd. 8.

247. See AFFORDABLE HOUSING LEGACY, *supra* note 50, at 18.

248. *Id.*

249. Thompson Interview, *supra* note 60.

250. See Act of May 17, 1994, Minn. Laws ch. 176, sec. 5 (deleting the

however, has not established a system for monitoring whether local zoning conforms to comprehensive plans.²⁵¹ The Council did create an LCA report card that describes the development of affordable housing pursuant to that law,²⁵² but charting progress toward LCA goals falls considerably short of monitoring compliance with LUPA.

In response to greater activism on the affordable housing issue in recent years, Met Council has created "Housing Performance Scores" to use in reviewing transportation funding requests.²⁵³ These scores take into account the amount of affordable housing a community has, the amount it has added since LCA, and the number and variety of local initiatives being used to reduce costs or add subsidized housing.²⁵⁴ In effect, these performance scores represent a tentative return to the Council's former policy of using its grant-making power as leverage to induce greater efforts in low-mod housing, a policy that had been abandoned for almost twenty years.²⁵⁵

Though it is too early to judge the impact of this policy shift, at least one community in the region supposes that the impact will be minimal.²⁵⁶ Eagan has publicly flouted Met Council's authority in the area of land use planning oversight.²⁵⁷ Eagan's 2000 draft plan only allocated a total of seven acres of vacant and underutilized land for high-density residential development.²⁵⁸ In December 2000, Met Council labeled the plan unacceptable because this amount was not enough to meet affordable housing needs.²⁵⁹ Eagan refused to amend its plan to achieve Met Council approval, and the Mayor suggested that Met Council is not an important enough source of grants, for transportation or other projects, to make them change their minds.²⁶⁰

requirement that zoning plans supercede comprehensive plans).

251. See AFFORDABLE HOUSING LEGACY, *supra* note 50, at 18.

252. METRO. COUNCIL 2000 REPORT, *supra* note 164.

253. METRO. COUNCIL, GUIDELINES FOR PRIORITY FUNDING FOR HOUSING PERFORMANCE 3 (Jan. 2003).

254. *Id.* See also *supra* note 213 and accompanying text.

255. See *Enabling Exclusion*, *supra* note 186, at 216-17.

256. See David Peterson, *Met Council takes Eagan to task on affordable housing*, MINNEAPOLIS STAR-TRIB., Dec. 14, 2000, at B3.

257. See *id.*

258. See *id.*

259. *Id.*

260. See G. R. Anderson, Jr., *Ted's excellent adventure*, CITY PAGES, May 23, 2001, at 15. Met Council, calling the City of Eagan irresponsible for developing at such low densities, indicated that Eagan would not receive regional infrastructure

III. RECOMMENDATIONS

A. Lessons from LUPA

The Minnesota experience with state-mandated planning for low-mod housing suggests a number of policy implications. The weakness of LUPA in promoting low-mod housing is apparent both in the scope of the statute and in Met Council's chosen methods of implementation. First, the law does not provide Met Council with the authority to reject a comprehensive plan if it does not address low-mod housing needs.²⁶¹ Second, the ability of Met Council to influence local governments is limited by the scope of the law to planning for low-mod housing and not the actual development of low-mod units.²⁶² Third, Met Council has chosen a hands-off administrative approach on the issue of LUPA's low-mod housing requirements: it does not voluntarily monitor low-mod housing production, does not monitor whether local zoning conforms to the comprehensive plans they approve, does not assist communities in quantifying their share of the regional need for low-mod housing, and does not monitor whether local communities follow through with the implementation steps outlined in their plans.²⁶³ The LUPA Study shows that Met Council should refine the process by which it determines whether there is enough land set aside to accommodate low-mod housing needs, because the Council's

grants and other financial aid from the Council if it did not produce more affordable housing. *Id.* The Mayor responded by saying the city had not benefited from Met Council funding in the past and did not need it now. *Id.* She claimed that people "move here from the inner city because they want to live on a safe cul-de-sac." *Id.* at 13. Furthermore, she claimed that Eagan had enough low-cost rental housing. Naming one development, she stated, "This is where all of our crime is. It's mostly African-Americans fighting with African immigrants. It's everything-drugs, assaults, knife fights. We had to have a police presence here . . . This is what you get," she concluded, "when you build high-density housing. Density breeds problems." *Id.* at 13.

261. MINN. STAT. § 473.175, subd. 1. The statute states that Met Council has approval authority only as the comprehensive plans relate to regional "system" plans. *Id.* The Council may recommend revision of the plans and negotiate with the communities to change language related to low-mod housing needs, but they cannot force the community to conform on the issue of housing. Housing is not one of the systems. MINN. STAT. § 473.852, subd. 8.

262. MINN. STAT. § 473.859 (indicating that Met Council is given no responsibility to monitor the rate of low-mod housing development in communities or any authority to ensure the development of such units).

263. See Thompson Interview, *supra* note 60. See also Peterson Interview, *supra* note 70 (indicating that the Council also does not monitor whether the land set aside for high-density housing is, in fact, developable or whether the community's development practices are compatible with comprehensive plan goals).

reliance on high-density set asides as a measure of low-mod housing potential is grossly inadequate.

The Minnesota model for fair share housing lacks several important attributes found in other approaches. First, as a planning-only approach, it offers local or regional governments no subsidies or regulatory means of producing low-mod housing. As described in Part I, programs in New Jersey, Massachusetts, Maryland, and elsewhere combine fair share requirements with programmatic means of developing low-mod housing. LUPA does not offer private developers a means to challenge local development decisions, nor does it contain direct oversight of local zoning and development decisions, such as those contained in the override statutes of Massachusetts, Connecticut, and Rhode Island. LUPA does not require the computation of fair share allocations, as is done in New Jersey. LUPA offers no type of zoning incentive like those offered in New Jersey and Montgomery County, Maryland.

The record of affordable housing development in parts of New Jersey, Maryland, and Massachusetts shows that when these elements are present, significant progress can be made in producing low-mod housing on a more dispersed basis.²⁶⁴ In Massachusetts, approximately 18,000 units of low-mod housing have been built in almost half of the state's municipalities and most of the state's suburbs over a thirty-year period as a result of the state's override statute.²⁶⁵ The Massachusetts program has also been successful in spreading the low-mod housing to areas that did not previously have such housing.²⁶⁶ In New Jersey, the state's fair share housing approach has resulted in close to 16,000

264. See Terry J. Tondro, *Connecticut's Affordable Housing Appeals Statute: After Ten Years of Hope, Why Only Middling Results?*, 23 W. NEW ENG. L. REV. 115, 125-26 (2001) (discussing how existing programs that lack these features have had more disappointing results); see also Gerrit Knaap, *State Land Use Planning and Inclusionary Zoning: Evidence from Oregon*, 10 J. PLANNING EDUC. & RES. 39, 39-46 (1990) (showing Oregon's Land Conservation and Development Commission (LCDC), the statewide agency that reviews local comprehensive plans for conformance with the state's growth management statute, allows, but does not require, inclusionary zoning by local governments to meet housing needs). This passive administration of inclusionary zoning has led some communities to adopt inclusionary zoning programs but there is no evidence that the programs have led to a significant amount of low-mod housing. *Id.*

265. Krefetz, *supra* note 20, at 392-93.

266. See *id.*, at 73 (indicating that nearly half of all municipalities in the state had no affordable housing when the Massachusetts law went into effect, and that by 1997, fifteen percent were without affordable housing).

units.²⁶⁷ Montgomery County, Maryland's inclusionary housing program has created nearly 10,000 units of low-mod housing in a single county since the ordinance was enacted in 1974.²⁶⁸

B. Policy Implications

Though one could expect a regional body such as Met Council to monitor local actions on its own, and to even create incentives of its own for local communities to produce low-mod housing, the Minnesota experience indicates that the existence of an appropriate institution by itself is no guarantee that such actions will take place. Thus, several policy changes present themselves.

First, in the context of Met Council's authority in Minnesota, housing should be established as a regional system. The empirical rationale for treating housing markets as regional in scope is not difficult to establish because the interconnectedness of urban and suburban housing markets is a fundamental precept of urban economics. Such a move would require the Council to develop an explicit regional plan for housing, including low-mod housing. It would also give the Council the acknowledged authority to ensure that local comprehensive plans conform to regional goals related to low-mod housing.

Second, several monitoring tasks should be required in the statute, including the monitoring of local zoning to ensure conformance with comprehensive plans, and the monitoring of local development practices and specific implementation steps listed in the housing elements of comprehensive plans.

Third, the Legislature should identify or create subsidy programs or regulatory mechanisms to accomplish fair share goals. This could include, but is not limited to, (a) state or regional override capabilities in cases where local zoning decisions preclude the development of low-mod housing, (b) a means of appealing adverse zoning decisions, (c) authority to provide density bonuses to housing developers in exchange for low-mod housing development (or other incentives for income mixing in all housing developments), (d) dedicated subsidy funds for developing low-mod units to meet fair share requirements, and (e) minimum density mandates rather than maximums.

The means for achieving fair share goals should be as wide-ranging as possible. Narrowly equating fair share goals with

267. See Wish & Eisdorfer, *supra* note 36.

268. See INNOVATIVE HOUSING INSTITUTE, *supra* note 26.

subsidized housing is unnecessarily restrictive and creates two problems. One problem is that it makes programs extremely vulnerable to the changing political fortunes of subsidized housing programs. Public subsidies will have to play an important role in fair share programs, and local and state sources of such funds should accompany fair share requirements. The second problem is an exclusive reliance on public subsidies neglects other means of promoting low-cost housing.²⁶⁹ The most important additional means of promoting low-cost housing is regulatory reform. Real regulatory relief at the local level can result in significant cost savings, and when combined with income mixing, can produce true low-mod housing.²⁷⁰

Fourth, once the means for producing low-mod housing are established alongside the requirement to plan for such housing, Met Council should be given the responsibility to monitor and publicize the actual rate of development of low-mod housing. The mere act of monitoring compliance and publicizing the degree to which communities are meeting low-mod housing needs could make local governments more responsive to their obligations under LUPA. Met Council routinely publicizes compliance with LCA housing agreements because the Legislature requires it.²⁷¹ The same approach should be taken with regard to LUPA requirements.

Fifth, incentives for meeting fair share goals should be granted. Specifically, the incentives should provide access to state and regional funds (related to transportation, or infrastructure development) when goals are met and restrict access to funds when not met. This was the method used to induce low-mod housing development during the late 1970s when the greatest progress was made in spreading low-mod housing throughout the region.

269. See Payne, *supra* note 31, at 49-58.

270. See Steve Brandt, *Chaska Tossed the Status Quo Aside*, MINNEAPOLIS STAR-TRIB., Jan. 20, 2002, at B1; Mike Kazsuba, *Project Tests Affordable Housing Tag*, MINNEAPOLIS STAR-TRIB., Mar. 19, 2001, at B1. Two suburban communities of the Twin Cities have, on their own, demonstrated this in the past two years. The Clover Ridge development in Chaska and the Arboretum Village project in Chanhassen both provide a mix of market rate units and homes affordable to low- and moderate-income families. See Brant, *supra*; Kazsuba *supra*.

271. See MINN. STAT. § 473.25(e) (2002).

CONCLUSION

Planning in the first five years after LUPA was passed was more attuned to regional and local need for low-mod housing than is the current wave of planning. First wave plans adopted a regional framework, and generally included more detail related to implementation strategies than do current plans. First wave plans, in fact, used the terminology outlined by LUPA and focused on low-mod housing and need. The current round of planning does neither. In the place of “low-mod” housing, communities now refer to “affordable” housing, referencing LCA guidelines on affordability that are typically higher than low-mod levels. The current round of planning also ignores the concept of need, and instead incorporates LCA housing goals as a substitute. Only two communities of the twenty-five studied even made an effort to document local need. Not one referred to regional need, or the community’s own local share of that need.

The implementation strategies for the current round of plans also compare unfavorably to those of the first wave. Many communities include very few or no specific steps that will be taken to facilitate low-mod housing. The plans, almost without exception, fail to address the impediments to low-mod housing identified by the city planners interviewed in those same communities.

The retreat from a more meaningful planning approach to regional housing needs in these communities is structured by the actions of Met Council. During the first wave of comprehensive planning, regional needs and local shares were provided to communities by Met Council. When Met Council ended the fair share allocation process, references to regional needs in the comprehensive plans of suburban communities also ended. Met Council’s development guidelines are also no longer offered. The guidelines were never binding on any community, and no sanctions ever existed for deviating from the guidelines. Yet, they did provide a standard against which local actions could be judged.

Developers are well aware of the receptivity of communities to accept affordable housing, and few will direct their energies to cities that make it difficult from a regulatory standpoint, or that have exhibited hostility toward low-cost housing in the past. This has the potential to shrink the pool of eligible and willing suburban communities, narrowing affordable housing options even

more.²⁷²

LUPA, as a framework for guiding regional planning for low-income housing, has become virtually irrelevant. As a consequence, the degree to which suburban communities have planned for and met the regional need for low-mod housing has suffered. Minnesota can and should borrow from techniques in place in other states to resuscitate a fair share approach to low-mod housing in the Minneapolis-St. Paul metropolitan area.

272. See *Enabling Exclusion*, *supra* note 186, at 220-21.