Productivity Commission: Inquiry into First Home Buyer Ownership

Affordable Housing in Public Private Partnership

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This submission is made as a result of my own research and through access to materials only accessible to members of the Affordable Housing and Community Development Law Forum of the American Bar Association. Any opinions in the submission are my own personal views and not those of my employer, my clients, the Forum or any organization of which I am a member. The sources of information and references used to help in this research and formulate my views are listed in the reference section at the end.

I acknowledge and thank Ms Susan Jones, George Washington University School of Law, Washington DC, Editor of the Journal of Affordable Housing and Community Development Law for sending me a complementary set of the conference papers from the 12th annual conference of the Forum, held in Washington on 22 and 23 May 2003. Thanks also go to Peter Salsich JR, McDonnell Professor of Justice, St Louis University School of Law for his insightful essays.

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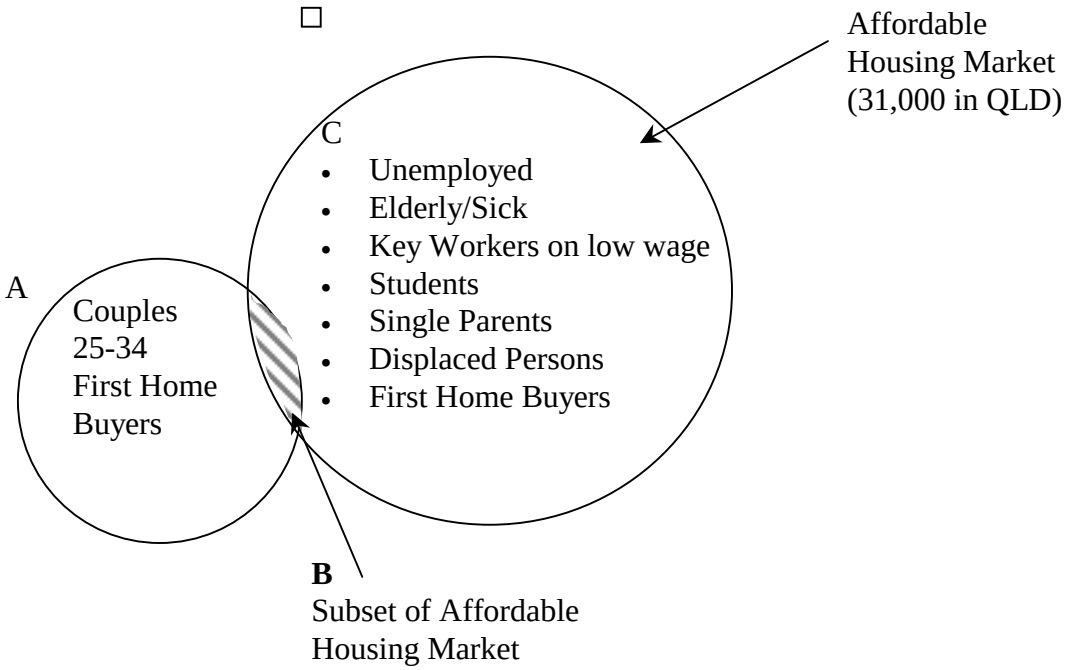
Scope of Inquiry and this Submission

1.1 The primary focus of the Terms of Reference for this Inquiry is evaluation of affordability and availability of housing for first homebuyers. First homebuyers are further identified as couples in the 25 to 34 year old age group. As a secondary issue, the Commission is asked to identify mechanisms to allow low-income households generally to own housing.

1.2 My submission was originally drafted as an article about affordable housing for low-income groups, being the traditional market for affordable housing. Segments within this market may include low income "key workers", low income couples, elderly people, the disabled, unemployed or sole parents. Diagram 1, on the next page, sets out the relationship of the first homebuyer couples to the broader affordable housing market.

1.3 In focussing on the needs of the broader sectors my research is probably directed more to the secondary issue for the inquiry, but the recommendation suggested may still apply to the narrower group of couples in the 25 to 34 year old age group.

Diagram 1



1.4 With a rate of divorce and separation approaching 40%, almost half the low income people identified as the primary focus of the Inquiry in segment A of Diagram 1 may enter sectors of the affordable housing market in segment C at an early stage of their life – single parents looking for homes following a separation. Various other life factors could put them into affordable housing sectors within segment C, such as redundancy, illness or natural disaster requiring sale of the first home, change of place of employment or death of the spouse. If any of those events occur, issues of affordability may arise again for persons who were once first home buyers, so my recommendations of how their needs might be addressed will apply to them, albeit at a later stage of their lives.

1.5 In researching this submission, I have relied heavily of my membership of the Affordable Housing and Community Development Law Forum of American Bar Association (ABA). Associate membership of the ABA is open to lawyers worldwide, and a variety of sections and forums within the ABA may be joined, once membership is

taken out. The Affordable Housing and Community Development Law Forum publishes quarterly journals of high quality and holds an annual conference in Washington DC to address current issues. Contributions are made to the journal and at conferences by government lawyers in the Department of Housing and Urban Development (HUD), specialist private lawyers, affordable housing developers and municipal and state officers involved in planning and design areas. I have loaned all of this material, not otherwise available in Australia, to the Commission for its use in completing this Inquiry.

1.6 I also undertook research in England and British Columbia, on which the Queensland automated titles system was modeled under the stewardship of a former Registrar of Titles from Victoria British Columbia, Mr. Loren Leader. Key provisions of the Qld *Land Titles Act 1994* allowing an important mechanism to secure affordable housing to be registered as an indefeasible interest on title were introduced while Mr. Leader was the Registrar, and were modeled on similar British Colombian provisions.

1.7 Merit can be had in focussing on overseas experiences – even though Australia does not have the population or land shortages of the United Sates, Canada or England, we are growing at a fast rate and can view these other countries as a window to our possible future. In examining how and why affordable housing issues developed overseas, we can see what was tried and tested, then craft solutions to suite our own environment, well in advance of problems arising.

2. Context of Affordable Housing

2.1 Land is a finite resource. Populations in urban areas are growing at increasing rates and require more new or recycled land for suitable urban housing. The tension between the supply and demand sides of this equation is an issue for governments to address. If they do nothing, the market economy will dictate that an increasing demand for a scarce resource will increase prices. Those unable to afford price increase will be unable to meet the basic human need for safe, secure and stable housing. Consequences of this are

social unrest, poverty and division in society between rich and poor. In this context, it is the right and duty of government to intervene in the market. English and American governments felt the tension between these pressures long before Australia, due to the sheer sizes of their populations, their rates of increase, their more limited supplies of suitable lands in urban areas.

Changing face of the affordable housing market

2.2 In London, where the physical boundaries of the city are pronounced the Mayor forecast a rise in city jobs of 450,000 in the next 14 years and population increases of 700,000. English administrations have identified "key workers" as a sub group of those in need of affordable housing. Key workers are employees who work in social services, essential for a city to function, such as nurses, police, teachers, transport workers and shop attendants. The cost of accommodation for key workers near their places of employment is such that many of them choose to live up to between 3 and 4 daily commutable hours from work.

2.3 As a result of the strain of distance, many key workers have abandoned their jobs in favor of employment in outlying areas. This leads to strain on already inadequate transport infrastructure and require new infrastructure development (such as water supply, sewerage, transport and power) in outlying areas where the key workers migrate.

2.4 As well as fragmenting the work force, the increased costs of enticing workers to stay leads to increased prices of products. Marks and Spencer are now working with the London administration to buy affordable housing developments close to the city in order to stem the loss of workers bearing the heavy burden of 3 to 4 hours daily commuting time.

2.5 In America, the incentives provided by Federal authorities recognize that affordable housing is maintained not just by traditional welfare dependent families, but to working

families on low to medium income levels. Again, these categories of families include key workers, those who provide social infrastructure necessary for a society to operate.

Social Infrastructure

2.6 Both England and America have identified that affordable housing must be provided to key workers who provide "social infrastructure". Town planning authorities have long been able to supply or require "hard infrastructure" as part of urban development. This includes items such as water, power, sewer and garbage removal - services essential to allow a city to function. It is apparent that farsighted administrations also recognize "social infrastructure" is essential to sustain and develop community. Without basic services such as postal delivery, policing, education and nursing, societies can't function. The migration of those who supply such services to places that are unrealistically far from their employment requires the planning authority to supply and maintain new infrastructure in out lying areas, often at great cost. Australia should recognize and validate this simple concept: "infrastructure" is soft and hard. Planning authorities must have the jurisdiction and power to cater for both forms in planning and development decisions. To do other wise is short sighted and detract from key principal that planning must be "sustainable" meaning not only for the short term , but for future generations.

2.7 Apart from a duty to support social infrastructure planning authorities are also obliged to cater for the traditional elements of the affordable housing population - those who are unemployed, sick, elderly, poor or sole parents. Many within this sector also need to live close to city centers, perhaps not to work, but to access the social services essential for their well being.

Issues for Queensland

2.8 With 31,000 Queensland households[1] on the waiting list for public housing, Commonwealth funding being reduced, and rising rentals, many low income

[1] Brisbane Courier Mail 29/9/2003

Queenslanders are renting in the private rental market and spend more than one third of their income on housing, despite Commonwealth rent assistance.

2.9 An overheated property market fueled by generous tax concessions for negatively geared rental properties and a generous first home buyer's grant means property prices and rentals can only rise, most often in areas close to employment, essential facilities and public transport. These services are necessary for all sectors within the affordable housing market to access.

2.10 It is estimated that only 10,000 houses were built by government, Australia wide, for the 300,000 on current waiting lists. Of those waiting, 90,000 experience extreme housing stress even after Commonwealth rent assistance. Housing is identified as one of the 4 key causes of child poverty in Australia - a condition that leads to many downstream social problems of social unrest. Commonwealth, state and local governments should, in this context, look to examples of creative and innovative solutions employed overseas to address future problems. While our markets are not as mature and population is much smaller, the overseas experience provides a window to the future for Australia, allowing us to see what might happen and how it can be avoided early on.

3. Different Styles of Delivery of Affordable Housing

3.1 There are essentially 2 styles employed by governments to provide affordable housing. The first is a traditional welfare state managerial model where the state either builds owns and operates the housing or funds registered providers, typically non profits, to do so, keeping tight controls over their activities through registration requirements.

3.2 The second more recent model developed, surprisingly, under a pro business Regan administration in the early 1980's. It is an entrepreneurial style where governments release controls over the development and management of housing and act as brokers of relationships that provide capital to the private sector to develop the housing, often in

partnership with non profits, which add their extensive social service ability to the mix. The entrepreneurial model grew out of 2 fundamental changes in America from the 1980's, a reduction in direct expenditure on housing and a move from the public to the private sector as an agent in formation and implementation of policy. Having developed over 20 years, there is now a solid body of evidence as to the outcomes of the entrepreneurial model, and much to be gained from a study of the tools that facilitate it.

12th Annual Conference of the American Bar Associations Affordable Housing and Community Development Law Forum, Washington 22 - 23 May 2003

3.3 The American Bar Association **(**ABA) is the peak body for lawyers in America. 13 years ago, the ABA real property section formed a specialist Forum to cater for public and private sector lawyers working in the field of affordable housing and community development law, which grew in common. The need arose as public outsourcing of housing provision is underpinned extensively by contracts, funding and real property covenants requiring private sector legal involvement. As well as advice about eligibility for tax incentives, grants and special federal bonds, developers need a variety of contracts drafted. These cover agreements with state housing accreditation agencies, charters for limited partnerships or companies set up to facilitate projects, statutory covenants on land and agreements with municipal councils granting planning incentives at the local level.

3.4 The papers from the 12th annual conference appeared to have a distinct tax focus, how to negotiate and achieve Low Income Housing Tax Credits (LIHTC), the most appropriate financing of projects, structuring, how to win a bid for selection by the state based Housing Agencies and compliance issues.

4. Current Mix of Tools for private delivery of public housing in the US.

4.1 Tools employed in the US to achieve affordable housing cut across 3 levels of government, Federal, State and Municipal. Of prime importance is the Federal Low Income Housing Tax Credit, which originated with the *Tax Reform Act 1986*. This is, in effect an indirect Federal subsidy of qualified low income housing administered by the Treasury Department under s 42 of the *Internal Revenue Code 1986.* States receive annual amounts of tax credits ($1.75 per person in their population) and must develop a "Qualified Allocation Plan" (QAP) to determine how the credits will be allocated to meet federal requirements.

4.2 State agencies develop selection criteria to meet the QAP based on their own affordable housing needs analysis. Once the QAP is approved, states develop selection criteria for projects and invite tenders. Developers bid for projects, competing in an open and transparent process. Once bids are selected, developers enter into contracts with the state housing agencies that employ policies to monitor and enforce the continued provision of affordable housing through out the life of the funding. Municipal government is involved at the level of providing development incentives, such as increased plot ratios, relaxation of car parking requirements and other monetary incentives. These provide the "budget style" accommodation and serve to justify receipt of lower rentals as there are tenants paying.

4.3 Section 42 of the *Inland Revenue Code* allows a LIHT of 10 years duration period, subject to recapture for non-compliance with stated conditions. In 2003 each state's allocation of $1.75 per person will be increased each year by the cost of living. Once allocated to a project each dollar of tax credit can be claimed by the developer over a 10-year period, so the allocation is worth 10 times the first annual amount. This results in developers' costs being subsidized, in addition to getting a higher volume of affordable sales or rentals per project, due to the higher density bonuses and car parking relaxation granted at municipal level.

4.4 Amendments introduced in 1990 (further explained later) have increased the commitment to affordability to 30 years, with special revocable agreements registered on title, but allowing owners to exit without penalty on finding a suitable replacement owner.

Assessment by State Housing Credit Agencies

4.5 Government cooperation in the selection and funding of projects that qualify for tax credits is under pinned at federal level by a Memorandum of Understanding between the federal departments of Housing and Urban Development (HUD), Treasury and Justice executed on 11 August 2001. MOU's are a common tool that facilitates cooperation among governments to achieve common outcomes where their jurisdictions overlap.

4.6 The Inland Revenue Service requires the state agencies QAP to meet minimum requirements in selecting projects each year. The QAP must set aside 10% of the total allocation for non profits, have project and sponsor characteristics for potential bidders approved and formulate policies to determine the maximum funding of each project. The funding approved may vary according to sources of other subsidies used for the project, responsibility for development and operational costs and whether locally identified housing needs are met.

4.7 Private developers most often syndicate to form limited partnerships or limited liability companies that elect to be treated as tax partnerships for projects. These entities acquire the land for projected development and enter agreements with state agencies to secure funding conditions. Parallel covenants are signed and registered on the land to make the affordable housing run with title to the land, to secure it through out the life of the covenants, regardless of ownership changes.

Eligibility for Low Income Housing Tax Credits

4.8 To be eligible for tax credits, buildings must satisfy 3 tests. There must be a "minimum set aside" of affordable housing within the building, the rent of affordable units must be restricted and the units must be suitably habitable.

4.9 The minimum set aside can be satisfied in of 2 ways: at least 20% of the units be occupied by tenants with incomes that are 50% or less of the median gross area income, or 40% of the units be occupied by tenants with incomes that are 60% or less of the median gross area income. Rent restrictions require that the gross rent payable by the affordable section of a development cannot exceed 30% of the 50% area medium income level 30% of the 60% area median income. Federal subsidies payable under S 8 of the *Internal Revenue Code* (like our Commonwealth rent assistance) are disregarded in determining rent levels.

4.10 An essential feature of the scheme is the "Area Median Income". This is calculated for areas in all states by local branches of the federal HUD. It is incorporated by reference into the covenants that secure affordable housing on land, similar to the way we incorporate by reference the Consumer Price Index, when used in lease formulas to increase rent to meet inflation.

4.11 In common with Australian authorities, it is recognized in America that once households are paying more than 30% of their income in rent, they are in housing stress. Guidelines have been developed about what comprises rent and what is a separate charge for services. Optional services (meaning a practical alternative exists for tenants and payment for the service is not required as a condition of occupancy) may be provided by project owners, such as use of a car park, pool, child care or spa facilities. Services that are an inherent part of the occupancy (such as use of kitchen facilities, sanitation or common rooms where the accommodation is not self contained) cannot be charged for

separately to the rent. The rental limits are enforced throughout the life of the covenant through self reporting and auditing mechanisms.

4.12 Suitability for residential habitation is not specifically defined in the Code, but under agreements between the federal and state governments, state legislation (environmental, real estate and residential services legislation) applies and the states monitor compliance through the life of the subsidy.

4.13 Many agencies retain private companies to monitor compliance, as the Federal Code specifically allows them to delegate functions, except the responsibility to notify breaches. Heads of power such as these are essential in outsourcing public functions to the private sector. Without an express power to delegate legislative functions to a non-government body, the body has no power to enforce or facilitate the function, and might even face actions for trespass if it attempted to exercise powers of entry or audit. Once an agency delegates its function under this head of power, it must use reasonable diligence to ensure the delegate properly performs the functions and is not, itself, released of its own obligations to notify of any non compliance it becomes aware of.

Continuity of Affordable Housing

4.14 In addition to satisfying the tests for immediate occupancy throughout the allocation period, project owners must enter into "extended low income housing commitment agreements" with the agency by the end of the first year. These secure a period of at least 30 years of affordable rental in the funded portion of the project, with the obligation legally enforceable by the tenants and the agency against the project owner. Throughout the extended use period, specified low-income occupancy must be maintained, but may be terminated if the agency is unable to find someone to buy the project at a stated minimum price. If a lender forecloses before the extended use period expires, it may also terminate the affordable housing covenant, but it must remain in place for 3 years after foreclosure, making the mortgage subordinate to the extended use.

Extent of tax credit

4.15 The actual amount of the tax credit depends on whether the project is taking advantage of other federal subsidies, is for a new building or for rehabilitation of an existing building, such as the Time Square redevelopment, which will be referred to later as an example of a highly successful redevelopment of affordable housing.
For redevelopment of existing buildings and where no other federal subsidies are used, owners can claim 9% of the qualified building basis as a tax credit on income for each of every 10 years of the life of the subsidy. If another federal subsidy is payable, the subsidy is reduced towards the minimum 4% of the qualified building basis.

4.16 The qualified building basis is an "applicable fraction" of the "eligible costs". The fraction is determined as either the ratio of the number of units or area of floor space of the affordable to market components, whichever is the smaller.

4.17 Eligible costs for a new building are the costs of construction and related costs. "Technical Advice Memoranda" (like the Public Rulings issued by our Commissioner of Taxation) clarify that these costs exclude land, certain soil correction and landscaping costs and particular parts of the developers' fee. Facilities that are functionally related to the project and available for exclusive use of the affordable owners(such as after care schoolrooms, community building) are included in the eligible costs. "Private Letter Rulings" (like our Tax Commissioners Private Rulings) can also be made upon application to determine eligibility of costs of particular projects before they are incurred.

Role of American states: selecting projects

4.18 Each state must determine its own priorities in the allocations of credits, the over riding requirement being that the projects meet locally identified housing needs. Developers must supply credible data to prove this. Affordable rental is struck according

a percentage of a statistical level of income determined by the HUD for distinct areas - no distinction is made as to the people who pay these rentals.

4.19 Affordable tenants can be classified into recognizable groups and prioritized for particular areas by the housing credit agency. For example, seniors on pensions, key workers in lower paid jobs (such as garbage workers, postal workers and public sector employees in police, education, nursing), students, sole parents or those with special needs. States have prioritized different sectors for relief in particular areas, such as key workers in areas close to places of their employment or public transport facilities, elderly people or those with special needs close to the health and social welfare facilities that cater to their needs. Whatever the particular requirements for categories of affordable tenants, the over riding federal requirements are that:

- the affordable units must be offered on a non transient basis with initial leases o at least 6 months;

- single room occupancy with shared facilities for sanitation or cooking, may be leased on a monthly basis without breaching the transient requirement;

- particular types of housing (such as hospitals and nursing homes that provide significant service other than affordable housing) are not eligible.

Recapture of subsidy

4.20 As a condition of allocation, the Federal government requires that project owners comply with allocation agreements and covenants on land that secures them for a period of at least 30 years. Non compliance is penalized by use of different at aim to recapture the tax credit already claimed, depending on the age of the project. In the first 11 years, one third of the whole subsidy is recaptured, but in the 10^{th} to 15 th years it reduces

substantially towards the lowest proportion, which is one fifteenth for breach in the final year. After 15 years the owner may exit without penalty if it finds another suitable buyer.

Financing Issues

4.21 A variety of federal subsidies, loans and grant products are available for astute investors in these projects and they all affect the amount of the tax credit payable under the LHITC program. Lawyers who specialize in these projects are highly skilled in advising upon the mix and match of subsidies as well as syndication and structuring issues. Different state requirements for community and non-profit corporation involvement to obtain eligibility, might need special advice on structuring the vehicle for building, owning and managing the project. Detailed provisions are required in these agreements to govern a relationship that will enhance smooth delivery of the affordable housing..

5. Local Government Issues

5.1 Successful delivery of affordable housing requires town planning laws and approval processes that recognize that the end product will not always be traditional detached single family houses. For residents with special needs, a combination of social services may be required on site and providers of such services usually deliver them more efficiently in mullet family or group home settings. In addressing these realities, planning authorities in the US confronted resistance in 2 key forms that we now seeing in Australia, so perhaps we can learn from how they were dealt with and over come.

5.2 First and foremost is “NIMBYISM” - which translates to “not in my back yard” and reflects the opposition of current residents of an area to the inclusion of different people, most often perceived as “inferior” and activities associated with them in their neighborhood. The second form of resistance grows from the first and is exclusionary zoning policies - the ability of planning authorities to exclude the types of development suited to those in the affordable housing market, which may require higher densities on

sites, shared facilities and limited car parking, with more use of public transport and local community services.

5.3 In addressing these twin issues there is a tension between opposing social forces: the desire for personal privacy as against the need for stable, peaceful and integrated environments for low income households so people with special needs are not institutionalized and people in higher income groups don't become isolated in gated communities or "golden cages" that can become targets of reprisal from the isolated poor.

5.4 There is no doubt that US administrations recognizes welcoming communities as better communities. In welcolming communities civil rights are protected, diversity is celebrated, neighbors collaborate for mutual support and their views are taken into account in planning decisions. These values are certainly ones we would appear to aspire to in Australia, which has a great history of egalitarianism and a "fair go" for all.

5.5 Three Americas states have developed different laws to address municipal planning for affordable housing. Montgomery County issued an inclusionary zoning ordinance. California has mandatory planning legislation at the state level and Sante Fe established a Community Housing Trust when the boom in Silicon Valley resulted in a corresponding boom in real estate, excluding many key workers from living near employment in essential services needed to support the Valley. It is worth looking at each of these as examples of how municipal authorities have planned for affordable housing.

Montgomery County, Maryland

5.6 When scarcity of affordable housing became apparent in this county, panel discussions and planning conference recognized that lower income households were missing out on job opportunities in new urban developments because planners did not require measures of affordable housing as a component of the new development. In 1974, Montgomery County enacted the Moderately Priced Development Unit Ordinance

(MPDU) to require minimum numbers of moderately priced units in all new developments. This occurred in an environment of strong private development, rapidly increasing population growth and growing long distance commuting for key workers.

5.7 An ordinance required that in all new subdivisions of 50 or more units, a number (between 12.5 and 15%) had to be moderately priced. In return for the artificial barrier on sale or rental, developers were allowed to increase the density of units on sites by up to 22% above allowable zoning densities. The ordinance continues to be implemented by way of MPDU agreements with developers and registered statutory covenants securing the land use. Until the MPDU agreements are signed and the covenants registered, county officials will not issue building permits.

5.8 Flexibility is given to developers at the planning level, in that they can satisfy the affordable requirements in alternative ways, or combinations of them, according to site conditions. They can offer to build the affordable components at an adjoining site in the same area, they ca convey land to the County "in lieu of", they can contribute to the County Housing Initiative Fund, that will develop MDPU's in other areas.

5.9 Planning lawyers may argue this ordinance is a breach of the fundamental requirement for existing residents that they know the densities generally in place will be preserved. They often perceive the affordable housing requirements bastardizing planning principles to implement social justice policies. As a rational proposition, where the requirements assist key workers to live and work to support the community, it does in fact arise from the existence of the community and its corresponding need for supporting social infrastructure. Key workers may not be infrastructure in the sense of gas mains, sewerage and water pipes, but the infrastructure they provide in operating these systems and providing social services that support the community, such as postal, nursing, policing and garbage services are just as essential.

5.10 Affordable housing may well result in higher densities of people on particular lots. However, foresight and well planned requirements of the governments that fund or allow such densities will require tenancy and site management to address these issues. Project owners may, for example, need to demonstrate they have formulated detailed site management rules to deal with dispute resolution and standards of behavior. In return for relaxation of car parking requirements, they may need to demonstrate what other measures they provide for residents to commute, such as subsidized public transport, or specially chartered transport linked to residential occupancy on site. Child care facilities may be specially provided at sites so that sole parents can work off site.
Returning to Montgomery County, more than 10,000 MPDU's were constructed in scattered sites throughout the county over 25 years. Price restrictions made them affordable to families whose incomes range from 65 to 85 % of the county median income. Most were townhouses and a cottage industry developed for builders with special expertise in design and construction of the affordable styles under contract with traditional developers who developed market priced units.

California

5.11 In California, state law (*Californian Code 65583*) requires local governments to engage in formal land use planning as a pre requisite to exercising their zoning powers. Local governments must undertake an affordable housing needs analysis to determine demand levels and supply of affordable housing to a range of low-income earners. The essence of this planning concept is that the counties land use regulations must remove barriers to the development of housing affordable to a wide range of economic levels.

5.12 The Code requires local government to approve affordable housing as a component of all new developments unless 1 of 6 specified findings are made. These findings have the effect of reversing the onus of proof in a traditional land use appeal process - the county must prove things such as that the affordable housing is not needed to meet "fair share" obligations in the jurisdiction, or that the development would concentrate low

income housing in the area. "Affordable housing" is defined as 20% of the total units sold or rented to "low income earners". Such earners are defined by another Code (S 50079.5 and 50093, *California Health and Safety Code*).

5.13 If the county was appealed on a decision not to provide affordable housing, it would have to produce credible evidence to show that it made findings in one of the 6 areas and also show that the affordable housing would either have a specific adverse impact on public health and safety and that there is no satisfactory method to mitigate or avoid that impact.

5.14 Californian lawyers report that while the statute provides a good frame of reference and political cover for local governments making "unpopular" affordable housing requirements, court challenges have not been as effective as thought, due to the loose drafting style. The reversed onus of proof has been successful in how counties respond to affordable housing development proposals.

Sante Fe

5.15 In New Mexico, home of Silicon Valley, scarcity of affordable housing increased markedly as a by-product of job growth in the information technology industry. Sante Fe County responded with an affordable housing strategy based on another American concept, the community land trust. This type of trust is run by a non-for profit company (usually of tax exempt status) which acquires title to land and enters into long term leases with developers and managers of affordable housing. Such managers are usually housing cooperatives, who select and manage letting to eligible tenants. In 1992, the Sante Fe Community Housing Trust used the land trust concept to establish 30 affordable homes in a development of 88 which have since been continually let to low income families. The families buy the home, not the land on which it is situated. The land is sub leased from the trust to an affordable housing provider. A covenant is also required from the family to give the trust first right of refusal to buy the land, if offered for sale.

5.16 The initiative of these and many other American states are encouraged by conferences such as “Building Better Communities”, which unequivocally concluded that local governments must integrate affordable housing into their planning decisions. There was also a strong call for neighborhood planning - not just for physical infrastructure as we know it, but for social infrastructure, which must be recognized as a legitimate municipal function.

5.17 It was absolutely essential to the effective implementation in each of the 3 states referred to above that an entity existed to make legally enforceable decisions about the proper location and quality of affordable housing. Faced with NYMBism, prejudice and hostility to change, it is a forgone conclusion that decisions such as these will be challenged. Whatever level of government is tasked to make them must therefor be equipped with the tools to stand by and defend its decisions.

5.18 Residents of communities affected by such decisions also need to feel they have full opportunity to be involved in the planning process. Community concerns must be recognized and validated. Education of new requirements for affordable housing and what such housing entails is also essential through neighborhood meetings, council hearings and focus group discussions.

5.19 The natural disadvantage and prejudice suffered by low-income groups’ demand that governments fulfill their traditional role of being spokes persons for them. This is what it means to live in a civil society: government should pro actively develop and implement policies to educate the more fortunate majority, reduce their fear of change and discrimination based on prejudice.

Particular Success: Times Square Redevelopment

5.20 Times Square, as featured in the Martin Scorses film “Taxi Driver” epitomized the urban decay and social breakdown of New York in the 1970’s. Throughout that period,

American development focused in the suburbs, cities tended to de industrialize and became inhabited by the poor and outcast, often blacks and Hispanics, leading to problems of poverty, neighborhood abandonment and crime. Modern rap music and hip-hop had its seeds in these areas of cities such as Los Angeles and Detroit.

5.21 In the early 1980's New York state and city officials joined to sponsor the redevelopment of 13 acres in the central Manhattan location surrounding Times Square. The plan was to develop a new mix of office, entertainment, hotel and shopping complexes. Using the acquisition power (known in America as the power of "eminent domain") government acquired land to displace dysfunctional porn shops and related businesses, but lacked the money to fund the redevelopment. To encourage private developers to buy the sites and fund their renewal, tax breaks valued initially at $650 m. were granted over 15 years, while site acquisitions costs were funded to $150 m., later ballooning to $400 m.

5.22 In return for this funded reconstruction the private sector was required to contribute $50 m. worth of public infrastructure including a subway construction, historic theater renovation and office towers (to be commenced before market was committed).

5.23 Mayor Koch and Governor Cuomo of New York city and state also agreed to each contribute $25m. to affordable housing development in the Clinton neighborhood, adjacent to the Time Square. They formed "Common Ground", a company designed the redevelop the derelict Time Square hotel that had been used for low-income single room occupancy. It contained 735 units, of which only 200 were occupied, the rest being uninhabitable, due to housing code violations. Most of the existing occupants were the elderly poor or chronically mentally ill.

5.24 Common Ground acquired the site for $9.5 m. and developed it at a total project cost of $36m., raising finance through a special loan fund for non profits established by the city, the newly developed LIHTC program and historic rehabilitation tax credit. In

addition, Common Ground forged partnerships with private corporations to lease store fronts on the 8th avenue side of the hotel to reputable businesses, such as Starbucks, not the adult bookstores or video parlors that once leased there.

5.25 For social policy reasons, Common Ground aimed for tenants at market rate and affordable rates, focusing on social needs homeless and low-income workers I the latter category. To cater for needs of the affordable tenants, it forged a partnership with the Center for Urban Community Services (CUCS), an offshoot of the Columbia School of Social Work. CUCS provides on site health and mental assessment, counseling, referrals and support services for independent living. Residents can access these essential services without leaving the building. 24-hour security is also provided on the premises. These services, apart from catering the needs of affordable tenants minimize their impact on the neighborhood, thus enhancing the amenity of the area.

5.26 The rehabilitation started in 1991 and was finished in 1994 with the redesign resulting in 650 units of 250 square feet each, having a small kitchenette and private bathroom each. 18,000 feet of community and shared space is set aside for the support services, which includes a 4,400 sq. foot lobby. Half the affordable units are currently occupied by low income workers and the other half by persons diagnosed with mental illness or AIDS. Strong on site management skills have created a vibrant comment within the hotel. Probably the greatest accolade for the development is that a luxury 800-room hotel, the Westin, has established, opening in 2002.

5.27 Times Square is a great case study of how 2 levels of government combined successfully in a non profit, adapted and partnered with the private sector, using and incentive based approach introduced by Regan and facilitated by the dogged determination of Mayor Koch and Governor Cuomo. The outstanding accomplishment is a lesson in how a shift in policy from a managerial to an entrepreneurial style succeeded with commitment from government. Facilitation and management of the project was underpinned by contracts, finance and covenants, rather than controlled by legislation.

6. Effect of affordable housing on neighborhood and surrounding values

6.1 A study by the British Columbian Housing department of 7 locations where affordable housing had been secured by covenants registered on land over a 5 year period found that the value of the covenant and surrounding land had increased at a higher rate than the "control" areas in the same neighborhoods. It is of importance to note that this was not just housing for a group of occupants that matched the guidelines for affordable housing, it was purpose built, well managed accommodation in terms of registered covenants and housing management plans.

6.2 This suggests that, in mature markets where covenants are well drafted and monitored, increases in the value of the covenanted and surrounding land can result. This is probably due to well designed and implemented housing management practices and premium payable for perceived advantages of covenanted land[2]. The market reaction is consistent with what occurred in Times Square in 2002, where the fully occupied, but well run affordable housing in 8th Avenue did not hinder a luxury hotel, the Westin, from establishing across the road 6 years after the affordable housing was occupied.

7. Australian Issues

7.1 Possibly the first test case on the legality of an affordable housing condition imposed in a planning framework arose in the New South Wales Land and Environment Court in 2000. In *Meriton Apartments Pty Ltd v Minister for Urban Affairs and Planning*[3], Cowdroy J considered the legality of the *South Sydney Local Environmental Plan 1998 (Amendment 2)*, under which the developer was required to provide affordable housing as a condition of a development. The LEP was subordinate legislation, having been made under the *Environmental Planning and Assessment Act 1997*. As such, it's purposes had to be squarely within the powers given to councils under the Act to impose development

[2] See "Impact of Non market Housing on Property Values" www.mcaws.goc.bc.ca/housing/00_Jan_propVal.html, for example of the effects of affordable housing covenants

conditions. A range of arguments as to why the affordable housing requirement was unlawful were raised, but the key issues, and one which proved fatal to the Council was whether it had power under its enabling legislation, as a legitimate planning function, to make the requirement.

7.2 Cowdroy J. held it did not, on the basis that the provisions of the LEP did not relate to a "planning purpose" authorized by the Act. Although an objective of the Act was to encourage the "management and development of natural resources including cities…for the purpose of promoting the social and economic welfare of the community…", he considered the community welfare aspect was not an object of the Act, but rather an I tended result of the developments with which the objects were concerned. Presumably then, provided that natural resources were developed, the result of the development was not something with which the planning authority had jurisdiction to deal. The interpretation seems unduly restrictive of an objects provisions, if the object is to approve developments that result in community welfare, the planning authority must have power to regulate aspects of the development that achieve that purpose. Although some commentators consider the decision has universal application, it is important that it be confined to the statute under consideration. In Queensland, for example, the Integrated Planning Act (IPA) objects are drafted in wider terms. "Ecological sustainability" is the key purpose of IPA (s1.2.1). It is defined as the "balance" integrating 3 things, one of which is the maintenance of the social well being of people and communities (s 1.3.3 (c). Such well being is explained as occurring when maintained through "affordable, efficient, safe and sustainable development" (s 1.3.6 (c) (i).

7.3 Local governments have power to make planning schemes to identify environmental outcomes to be achieved in the context of the objects of the Act. These outcomes are also defined in Schedule 10 to the Act to embrace outcomes that effect physical and natural resources as well as social, economic and cultural conditions. The cumulative effect of these provisions is to give the local authority in Queensland broader jurisdiction than

[3] (2000) NSWLEC 20

those in NSW. Consistent with this interpretation, the Brisbane City Council promulgated City Plan 2000 to include a number of provisions relating to housing affordability and how it night be achieve through higher densities and near public transport (S 4.2.2.2 and 4.2.2.3).

7.4 Under City Plan, Local Area Plans have been made for particular areas that drill down further into the detail of how affordable housing might be provided. For example, in the New Farm Tenerife Local Area Plans the affordable housing outcome might be measured by performance criteria that encourage development bonuses. Acceptable solutions to meet the criteria are suggested as development that meet the special needs of those housed for at least 10 years with administration by housing cooperatives or government agencies or height and car parking relaxations.

7.5 With the objects of IPA drafted in wide terms, encompassing social well being through affordability as a component of ecologically sustainable development, it is suggested planning schemes that permit or require affordable housing in Brisbane are within power.

Planning Possibilities

7.6 The process of imposing conditions as part of development approvals must be done within the framework of a valid town plan, but is also subject to s 3.5.30 IPA, which states that the condition must be a reasonable or relevant requirement of the development to be valid. Two alternative tests exist for the validity of conditions, in both cases they must fairly and reasonably relate to the permitted development, not ulterior objects[4]. The affordable housing requirement in the *Meriton* case was characterized as being an effective "surrender" of land by the owner to be controlled by a community housing provider without any compensation. The "relevance" of a condition is judged by the functions of local government, it is to assess and condition developments to as achieve

[4] *Pyx Granite Co. Ltd v Ministry of Housing and Local Government* [1958] 1 QB 544

"ecologically sustainable development" and rationality, in balancing the elements of the ESD concept. The reasonableness of a condition depends on how it relates to the purpose of the development: if a development itself seeks to provide affordable housing, through the density bonuses or other relaxations offered by Council for that purpose, it might be regulated by appropriate affordable housing conditions.

7.7 If local authorities need additional heads of power to provide for affordable housing in planning schemes or as conditions of development is deficient, legislation can be amended to expressly allow for such powers. This occurred in New South Wales following the *Meriton* case, and has occurred in the United States where affordable housing is a recognized area of municipal government responsibility. In Queensland, where affordable housing is encouraged under planning schemes by density bonuses or relaxations, and applications are made to build such housing, the imposition of conditions would appear to be within a local governments power.

7.8 The permission to build is quite distinct from the continued enforcement and monitoring of the affordable housing obligations. It is of prime importance that these obligations be secured on the land, so that when developers sell to investors, the obligations continue and can be enforced by state or local governments. Such enforcement is possible under the Torrens system of land registration.

Torrens Title Provisions

7.9 Australian land law is all state based, but essentially modeled on the Torrens tiles system. In 1997 and 2000, important amendments were made to the *Land Title Act 1994* by inclusion of divisions 8A and 4 A allowing statutory covenants to be registered on title.

7.10 Section 97A (3) sets out what kinds of provisions can be in covenants:

- Provisions about the use of the lot or part of the lot;

- Provisions about a building, or building proposed to be built, on the lot;

- Provisions about the conservation of a physical or natural feature of the lot, including soil, water, animals or plants;

- Provisions ensuring that the lot may only be transferred if another lot (freehold or leasehold) also subject to the covenant is transferred with it.

7.11 The covenant may be a positive or negative, but must not prevent a person from registering another interest, exercising rights under a registered interest, releasing or surrendering a registered interest.

7.12 The Act does not positively define "use", but says it excludes architectural or landscaping standards for a building. In his second reading speech to the Bill, by Minister Welford, clarified that statutory covenants were not intended to secure landscaping type restrictions, such as "red roof" personal covenants. Assistance may be obtained in understanding the aims intended for statutory covenants from reading the Ministerial speeches when the original and amending provisions were introduced. Such speeches may be used as an aid to interpretation[5], should the operation of the provisions be ambiguous, or their operation would lead to an absurd result in a particular context. Particular mention was made[6] of the part statutory covenants might play in securing a measure of "low or medium cost" housing, through the Department of Housing entering into a statutory covenant with a developer as part of a development approved under IPA.

7.13 IPA also contains provisions related to covenants, designed to restrict the scope of them interfering with traditional planning laws. These are not footnoted in the *Land Title Act* or *Land Act*, but must be read concurrently to fully understand the requirements for statutory covenants. As there is no cross-referencing in the authorizing provisions, there

[5] Acts Interpretation Act, S 14B

is potential for confusion. The provisions are set out below in their current form, for information:

2.1.25 Covenants not to conflict with planning schemes

Subject to section 3.5.37, a covenant under the Land Act 1994, section 373A(4) or the Land Title Act 1994, section 97A(3)(a) or (b) is of no effect to the extent it conflicts with a planning scheme—
(a) for the land subject to the covenant; and
(b) in effect when the document creating the covenant is registered.'.

7.14 An important change to this section, introduced by the Integrated Planning and Other Legislation Amendment Act (IPOLA) was passed on 16 October 2003. The test for consistency with a planning scheme was widened so that the covenant must be "in conflict" with the planning scheme to be ineffective, not just "inconsistent with the planning scheme" as the section previously provided.

3.5.37 Covenants not to be inconsistent with development approvals

(1) Subsection (2) applies if a covenant under the Land Act 1994, section 373A(4)62 or the Land Title Act 1994, section 97A(3)(a) or (b)63 is entered into in connection with a development application.
(2) The covenant is of no effect unless it is entered into—
(a) as a requirement of a condition of a development approval for the application; or
(b) under an infrastructure agreement'.

7.15 A useful illustration of how a statutory covenant would fit into the chronological sequence of a development approval and be registered on land is set out below.

[6] See Honorable Rod Welford MP. at page 5158 ff. Hansard, 23 November 1999.

Covenant as part of Development Approval and Registration Process

1. **Development Application**. Developer applies for dispensations or other concessions on the basis that covenant will be entered into.

2. **Development Condition**. Prior to issue of development approval, Council checks that covenant satisfies reasonable and relevant test and not in conflict with planning scheme. Condition requires Council to prepare covenant.

3. **Survey Plan** Survey plan to depict the covenant area.

4. **Request for Plan Sealing** Developer requests plan sealing

5. **Plan Sealing** Terms of covenant and any other documents to be agreed between Council and developer signed.

6. **Drawing Covenants** Council to draw the Covenant in accordance with the Development Condition. After developer agrees, signs covenant first presents to Council for execution. Once all other required documents and payments are returned by the Developer, Plan Sealing can occur.

7. **Plan Sealing** Once all conditions are met, the plan of survey is sealed. The Developer collects the sealed survey plan, covenant and any other documents executed by Council.

8. **Stamping and registration.** Developer attends to this, separate titles are issued after registration.

7.16 It therefore appears the use of land can be regulated by statutory covenant combined with planning approvals.

7.17 Most often, a covenant to secure ongoing management of land will be implemented by a management plan, not registered, but signed by the current owner. The management plan drills down into the fine detail of how the covenant outcomes will be achieved, and may be amended to suite changing conditions, provided it does not limit the main obligation of land use established by the covenants – affordable housing. Without detailed provisions in the Land Tile Act about enforcement and monitoring of covenants,

much of this detail will have to be negotiated and agreed between the parties and form parts of the management plan. Even though such plans represent a departure from traditional enforcement models, it is in keeping with a general modern trend towards self-assessment and audit regimes with non-court based solutions.

7.18 Over the last 10 years there has been a shift away from traditional statute and court based compliance by inspection and prosecution towards these regimes, with elf-assessment and audit regimes with non-court based enforcement. Much work on alternative methods of compliance was undertaken by Ayres and Braithwaite, academics at the Australian National University who were commissioned to research compliance issues for the Cash Economy Task Force within the Australian Taxation Office.

7.19 Examples of different compliance models at State and Federal levels include self-regulation via industry codes (e.g. telecommunication industry); the use of infringement notices rather than summonses (environmental offences), enforceable undertakings (ACCC) and continuous disclosure regimes (ASX for listed securities).

7.20 The trend against direct inspection and audit in favour reporting on pre determined performance criteria could be followed with a statutory covenant for affordable housing, with skilful drafting. Government reserve the right to audit the information supplied on a random basis, if irregularities are noticed or upon information supplied by a third party. Costs of the audit can be payable by the party audited, especially where the audit is conducted by an independent third party engaged by the government. In the United States, new businesses of "compliance auditing" have developed to cater for governments requirements that particular firms be accredited to conduct audits for departments, when compliance becomes an issue.

7.21 The monitoring, compliance and enforcement mechanisms must be negotiated and agreed between the parties. They might include the self-assessment / audit style described earlier. This regime is particularly apt where the agency seeks to save cost, the

land is well known and valued by the owner, and the agency builds strong incentives into the model, to make the landowner "want to comply".

7.22 Even though not underpinned by legislative provisions, a voluntary regime has the advantage that it is negotiated and agreed. The landowner may suggest a better method of compliance monitoring not considered by the agency. A landowner that has agreed to a regime is much more likely to cooperate in it, than one who is forced to comply with imposed rules over which they have no control or sense of ownership. Incentives offered to landowners to induce compliance could be monetary payments, tax deductions, rate remissions or reduced valuations leading to other benefits.

7.23 To further enhance the fact that the regime is voluntary, agencies could require land owners to sign a fresh management plan, either as the covenant is reviewed each 1 or 2 years, or when the land changes hands. This will allow a negotiation process to ensue with new owners so they are made fully aware of the regime and specifically agree to it or suggest changes. A powerful incentive for new owners to sign fresh management plans is to make the payment of incentives or benefits a term of the management plan, so they can't be claimed until the plan is signed.

7.24 When considering compliance issues, government agencies would have to be mindful of a line of superior Court decisions[7] about the potential liability of government for negligence in the exercise or non-exercise of its powers. Although these cases concern the non-exercise of statutory powers, they could, by analogy, be extended to cases where an agency negotiates for, and obtains, other enforcement powers, by way of statutory covenant.

Housing Legislation

[7] *Pyrenees Shire Council v Day* (1998) 192 CLR 330, *Puntoriero v Water Administration Corporation* (NSW) (1999) 165 ALR 337, *Crimmins v Stevedoring Industry Finance Committee* (1999) 167 ALR 1, *Barclay Oysters v Ryan (*2003) HCA

7.25 In 2003, Queensland introduced historic housing legislation that abolished the Housing Commission, established in 1945. A new regime was introduced whereby, in addition to limiting building owning and operating state housing, it would encourage non-government provision of housing. Housing providers who might be given funding assistance to provide housing services mat be registered under the Act Provider may only qualify for registration if they are non profits or similar organizations. If funded, the obligations to provide the housing can be secured by mortgage or covenant on the land. This allows the funded organization much greater scope in raising money on the land, having a freehold title subject only to a covenant, not a mortgage.

7.26 The Act does not envisage the state providing assistance to anyone other than a registered provider, but there is nothing to prevent the state entering into covenants to secure housing on land where no funding has been provided. Thus, if amendments were made to taxation legislation to allow deductions for affordable housing, and the Commonwealth wished to secure compliance monitoring, it could conceivably enter into arrangements with the state for that to be done, via the registered covenant.

7.27 The model would also require local government involvement via planning approvals and building specifications, but any local dispensations might also be secured through the state and local governments entering into a joint covenant over affected land.

8 "Be it ever so humble…"

8.1 "…there's no place like (your own) home." A constant and valid criticism of public housing programs is that they don't allow long term tenants any opportunity to purchase their homes. Tenants may rent for over 30 years and never achieve any equity sufficient to enable them to fund retirement. Throughout this time, the government accumulates substantial portfolios of properties that require maintenance and upkeep. There's no doubt home owners are far more motivated to upkeep their homes when they have that sense of pride in them that can only come from ownership. The same pride is

infectious in a neighborhood and encourages community development. Ownership of homes goes a long way towards encouraging ownership and pride in the local community.

8.2 Dissatisfaction of the American people with the lack of ownership rights of affordable tenants under the LIHTC programs led the Bush administration to amend the LIHTC legislation to secure a measure of "permanent affordable housing". The covenants that secure affordable housing with state agencies must now secure the use well after the tax credits have been paid. Owners must agree to retain the affordable housing for 30 years, with special allowances being made for owners to exit the covenant if they, or the housing credit agency, can't find another buyer. *The Low-Income Housing Preservation and Resident Homeownership Act of 1990* was also enacted to allow transfer of ownership of affordable housing from profit motivated entities to non-profits, to preserve the affordable status.

8.3 Other forms of title have developed in America to allow a greater sense of ownership in affordable housing. The Community Land Trust (CLT) allows a community to keep trust land for its residents and take it out of the speculative real estate market. Ownership of the land is retained by a non profit corporation trustee, cooperatively controlled by community members, residents who own land, and other interested parties (such as funding source representatives, church and municipal officials). The trust holds title to the land and grants long term (usually 99 year leases) to owners of buildings on the land, allowing the trust to control affordability while providing individual house owners the chance of long term security and pride of ownership.

8.4 Unlike an application for a loan to buy house and land, which most of the affordable CLT residents would fail, an applicant for finance to build a house on CLT land is first approved by the CLT, and assisted with the application process. Once approved, the CLT enters into long-term leases with the homeowners, but if they want to sell the home, they must first offer it to the CLT at a price which is pre determined in the lease. The price formula is structured so that the homeowner receives a fair return on any money invested

in the home (value of improvement they made with CLT approval). If the CLT exercise its option to purchase, it will then resell the house to an affordable owner, or it may be sold directly, but with the same price limitations applying.

8.5 Another increasingly popular mechanism is the limited equity cooperative, where a corporation is formed which provides residents with ownership rights in buildings. The cooperative arranges finance to purchase a building with grants and financing from socially responsible investors, such as churches and federal grants. Members of the cooperative have restrictions on resale of their shares to secure the continued use of homes for affordable housing, while at the same time giving them a flat or CPI percentage return on investment as well as the value of improvements made with approval of the board of the company. Contracts among the shareholders and company and covenants on land safeguard the log-term affordability of the building.

8.6 The Mutual Housing Association is another form of non-profit tax-exempt Corporation formed to develop own and manage housing. They encourage resident control by including residents as a majority on the board, with the remaining directors being local business, community and government representatives.

8.7 In England, resident control has also been encouraged through the Tenant Management Organization (TMO) developed in the early 1990's under a "Right to Manage" policy, adopted through the Office of the Deputy Prime Minister. TMO's took over the letting, rent collection, tenancy and property management functions typically undertaken by local authorities. They employ their own staff and are paid and operate under management agreements with local authorities. Currently there are 202 established, with 66% being in London and the average controlling 400 homes. The traditional manager of public housing was the local authorities, but a recent study conducted by the Office of the Deputy Prime Minister found the TMO was resulting in a greater sense of openness, inclusiveness and community development within the properties managed. They gave taken steps to actively combat crime in the communities

and have greatly reduced the time taken to re let properties in the estates. Tenants are far more satisfied with their operations and they are exceeding local authorities in terms of repairs, re letting and rent collection.

8.8 It seems clear that great benefits are to be had in allowing those within the affordable market a chance of long term residency with ownership and self management right. Where land is a scare resource subject to the volatility of the speculative real estate market, it makes sense to take the land on which affordable housing exists out of that market through the pricing restrictions imposed by the various resale mechanisms in covenants. In addition, sections of those needing affordable housing do not necessarily want or need the traditional detached stand alone dwelling aspired to by market buyers. For example, those who are mentally or physically ill and sole parents will benefit from sharing of resources such as common eating rooms and childcare sharing opportunities.

8.9 As the study of Times Square showed, half the affordable group included AIDS patients who needed to access the social services provided by University of Columbia Social Work Department on the premises. Another interesting form of shared services is developing in Mississippi, a variation of the affordable housing themes discussed so far. Elderly residents, who no longer work but live in wholly owned large houses with grounds to upkeep, have opted to register with a "Co housing" program. Under this, families in affordable categories are matched with elderly, and share the house, on the basis that they provide cleaning and maintenance services, in exchange for resident rights. This is a variation on the ownership theme, but still has great merit as an idea, especially when the benefits to elderly people are also apparent, such as less loneliness and sense of isolation and greater security of knowing that basic services will be supplied to them.

9. Taxation Possibilities: Income Tax, Stamp Duty, Land Tax and Rates

9.1 Whatever style of affordable housing is considered, and for whatever sector of the affordable housing sector, it is crucial to address the supply as well as the demand side of

the equation. Unless the government reverts to policies of by gone years, whereby it owned built and operated assets, it musty encourage private sector involvement and this cannot realistically be achieved without a cost subsidy.

9.2 Currently, such subsidies are provided to encourage growth of the film and wine industries, there is no technical reason why they could not be extended to the market for affordable housing.

9.3 In addition to income tax deductions, tax concessions could be offered at state and local government levels. Stamp duty could be exempt on the transfer of land subject to affordable housing covenants and the value whole or part of that land attributable to affordable housing could be ignored when calculating land tax.

9.4 Concessional rates and reduction of pedestal charges could be considered at local government level. State Housing is already fully exempt from rates, so it would seem reasonable that a similar exemption apply when land is subject to a covenant that secures delivery of affordable housing by the private sector.

9.5 Politically, these propositions would be quite controversial, as they would encourage affordable housing development. More development of this kind would lead to a backlash from those afflicted with NIMBY ism. Allegations of social engineering and the fears born of prejudice would give rise to hostility towards government. As against this, governments should consider the long-term effects of a growing affordable housing sector becoming socially isolated and disadvantaged through lack of home ownership. The home owning sector is also in danger of isolation and fear, as the advent of gated communities and “golden cages” grow.

10. Conclusion and Recommendation to the Inquiry

10.1 Even though the scope of this paper is wider than the primary focus of the Terms of Reference, the tools outlined to achieve affordable housing for the traditional low income sector could still be used to service the narrower 25 to 34 year old couples.Such tools would include:

1. Tax deductibility of a percentage of expenses incurred by developers on affordable housing (which would need to be defined to suite either one of the sectors identified in Diagram 1 at the start of this submission);

2. The deduction to apply for each year of the life of a program, say 10 years, during which time the land must be covenanted and continually rented at a particular level (either a percentage of market rate or a percentage of the area median income level);

3. At the end of 10 years, each lessee be given the option to buy the land or home on which it is built;

4. The Commonwealth to administer the scheme through state housing authorities who have the expertise necessary to identify the desired location of the housing, the rental to be offered;

5. State housing authorities to develop selection criteria acceptable to the Commonwealth for developers to bid for projects that will attract the subsidy;

6. Local governments work with the states to agree upon the locations and levels of density bonuses and other remissions that will be allowed to the affordable housing;

7. State and local governments to form dedicated cells to assess, approve and monitor compliance with the affordability requirements, which might be secured on the land by statutory covenant;

- Join statutory covenants be entered into between developers and state and local government on approved sites to include the following:

- The use of the land restricted to affordable housing for a minimum period;

- The rent be limited and sale be offered to the occupier at the end of the period at a discount to market level;

- Monitoring and compliance functions be agreed between the state and local governments, with the state reporting to the Commonwealth prior to approval of deductibility each year;

- Recapture of subsidies and withdrawal of deductions for non-compliance, with sale (subject to covenant) provision for continued non-compliance.

10.2 A scheme such as this could only work with a clear policy commitment. This might take the following broad form:

Policy Statement

The government supports creative and comprehensive measures to increase the availability of affordable housing and improve the accessibility of such housing to employment, schools, transport and human services.

Such measures will include:

- A Register of land identified for affordable housing (both brown field and green field sites) to be kept by state housing authorities and continually updated. Such land can include former government sites, such as schools, jails or hospital sites no longer used, new airspace subdivisions above roads or rail corridors, particularly suited due to proximity to transport, heritage listed sites, derelict or condemned inner city buildings;

- Amendment of the *Tax Act* to grant tax deductions to developers over the relevant period;

- Amendment of planning legislation to allow local authorities power to plan for the housing to be located in the areas best suited to the affordable residents and the city, allowing it to give relaxations and density bonuses for the building and integration of affordable housing;

- Affirmative action to increase and preserve the supplies of stock of affordable housing and integrate it into the community as much as possible;

- Amendment of legislation, if necessary, to allow state and local governments to dedicate resources to establish the affordable housing assessment, development, monitoring and management programs.

Robyn Trigge
26 October 2003

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