State and Local Regulation of Particular Types of Affordable Housing

Tim Iglesias
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I. Introduction

This chapter will consider state and local regulation affecting the development of several types of affordable housing which are neither traditional single family nor multi-family. Specifically, the chapter discusses statutes, ordinances, regulations and leading case law concerning the siting of manufactured housing (Section II), farmworker housing (Section III), accessory or secondary units (Section IV), single room occupancy hotels (SROs) (Section V), condominium conversion regulation (Section VI), and emergency shelters and transitional housing, including domestic violence shelters (Section VII).

“Affordable housing” is construed more broadly in this chapter than in the rest of the book. Specifically this chapter discusses manufactured housing, SROs, accessory units, and certain apartments which are often “affordable” to lower income households without legal restrictions and without government subsidy, that is, in the private market.

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1 Funding for these types of affordable housing will be briefly mentioned and cross references made to coverage in other parts of the book. This chapter will not discuss the application of the federal fair housing act to these types of housing. Chapter 3 contains coverage of exclusionary zoning and fair housing law. See also Chapter 4 for state and local laws promoting affordable housing.

2 This section does not cover most forms of congregate housing, shared living housing, licensed group homes, or treatment centers because these are not traditionally considered a form of “affordable housing,” and, they are generally supported by distinct funding streams. For these forms of housing see Bazelon Center for Mental Health Law’s DIGEST OF CASES AND OTHER RESOURCES ON FAIR HOUSING FOR PEOPLE WITH DISABILITIES, (2006) available from the “Publications” section of the Center’s website: http://www.bazelon.org/ (last accessed July 12, 2010). “Permanent supportive housing” is briefly discussed in the SRO subsection and more information is available at the Corporation for Supportive Housing website: http://www.csh.org/ (last accessed July 12, 2010). Fair housing issues for senior housing are covered in Robert Schwemm & Michael Allen, For the Rest of Their Lives: Seniors and the Fair Housing Act, 90 IOWA L. REV. 121 (2004).
Three topics—regulation of accessory units, SROs, and condominium conversion—concern regulatory authority employed to create and/or preserve the supply and affordability of these housing units.

II. Mobilehomes and Manufactured Housing

“Mobilehomes,” “manufactured housing,” and “modular rooms, units or housing” provide an important source of affordable housing for seniors, farmworkers and low-income households, especially in rural communities. “Eight percent of the United States population—more than 23 million people—live in manufactured homes.” Over the past 20 years their role has grown and is expected to continue to increase, moving from rural

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3 A “manufactured home” is defined in federal law as “a structure, transportable in one or more sections...which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained in the structure.” 24 C.F.R. § 3280.2 (2010). The federal definition of a manufactured home excludes “any self propelled recreational vehicle.” Id.

4 “Modular homes” are factory-built housing “designed only for erection or installation on a site-built permanent foundation.” 24 C.F.R. § 3282.12(b)(1) (2010). “Factory-Built Homes” and “pre-fab homes” are generally synonyms for modular homes. They are often constructed to comply with the state or local building codes where they will be installed. “Panelized homes” are constructed using factory-built panels, and are generally constructed to comply with state building codes.

5 See discussion infra in Section III regarding “Farmworker Housing.”

6 In 2008, the cost per square foot of a new manufactured home (excluding land costs) was about half of the cost of a new single-family site-built house, p.1, Understanding Today’s Manufactured Housing at: http://www.manufacturedhousing.org/understanding_today/mhi_understanding_today.pdf/ (last accessed July 12, 2010) See also Amy J. Schmitz, Promoting the Promise Manufactured Homes Provide for Affordable Housing, 13 Affordable Hous. and Cmty. Econ. Dev. L. 384 (2004); LAWRENCE A. FROLIK, RESIDENCE OPTIONS FOR OLDER OR DISABLED CLIENTS §§ 7-2–7-4 (1997 & Supp. 2002); HOUSING ASSISTANCE COUNCIL, RENTAL HOUSING IN RURAL AMERICA 1 (2003). Also see a recent study, “Affordable Manufactured Housing Best Practices: Opportunities for California Affordable Housing Developers” (available at http://www.calruralhousing.org/sites/default/files/Best%20Practices%20Guide_Final_Version_Feb_26_2010.pdf/) (last accessed July 7, 2010). Published by the CALIFORNIA COALITION FOR RURAL HOUSING in 2010 which provides in-depth and valuable case studies demonstrating the cost-effectiveness, quality, and versatility of manufactured housing as an affordable housing option.

7 Ann M. Burkhart, Bringing Manufactured Housing into the Real Estate Finance System, (arguing that manufactured housing should be recharacterized as real property)http://ssrn.com/abstract=1548441 (last accessed November 21, 2010).
areas to suburban and urban contexts and from “mobile home parks” to privately owned land.

The popular use of the term “mobilehome” encompasses a wide variety of dwellings, including “house trailers,” manufactured housing built prior to and after the National Manufactured Housing Construction and Safety Standards Act of 1980, and trailers and vans designed primarily for temporary recreational use. The terminology is complex and is complicated by federal regulation, industry changes over the last three decades, and proponents’ attempts to win community acceptance for this form of housing.

8 “Rural and suburban markets have traditionally been the stronghold of the industry. While this remains true even today, manufactured homes are increasingly being used in urban areas. Two converging factors virtually ensure manufactured housing will play an evergrowing role in providing housing in urban neighborhoods—the escalating cost of new housing, and the rising use of technological and design innovations in homes.” See, e.g. 22 affordable housing infill manufactured housing development in Escondido, California called “Brotherton Square” described in http://www.ci.escondido.ca.us/depts/cs/housing/CRA-presentation.pdf (last accessed July 13, 2010). p. 8, Understanding Today’s Manufactured Housing at: http://www.manufacturedhousing.org/understanding_today/mhi_understanding_today.pdf (last accessed July 12, 2010). This publication presents the MANUFACTURED HOUSING INSTITUTE’s (MHI) perspective on the future of manufactured housing generally. See also a report on the MHI’s Urban Design Demonstration Project at: http://www.manufacturedhousing.org/developer_resources/UDP_Booklet.pdf (last accessed July 12, 2010).

9 “According to the U.S. Census in 2008, over 75 percent of manufactured homes were placed on private property, while the remaining 25 percent were sited in residential land-lease communities. The percentage of manufactured homes placed on private property has been growing over the last decade, and this trend is expected to continue as more and more residential land is zoned appropriately to allow for manufactured housing. [citation omitted.]” p. 8, Understanding Today’s Manufactured Housing at: http://www.manufacturedhousing.org/understanding_today/mhi_understanding_today.pdf (last accessed July 12, 2010). The availability of two-story HUD-approved manufactured housing may increase demand, visit: http://www.toolbase.org/Technology-Inventory/Whole-House-Systems/two-story-manufactured-homes (last accessed, November 21, 2010).

10 In an attempt to engender broader public support, a 1980 federal statute officially substituted “manufactured housing” for all references to “mobilehome” in federal statutes and regulations. See Housing and Community Development Act of 1980, Pub. L. No. 96-399, § 308(c)(4), 94 Stat. 1614, 1641 (1980). Some states and some courts have adopted the language. See, e.g., CAL. HEALTH & SAFETY CODE §§ 18007–08 (West 2010); W.VA. CODE § 21-9-2 (J) (West 2010); Carr v. Michael Motors, Inc., 557 S.E.2d 294 (2001). This language is confusing to the general public because the federal definition of “manufactured housing” includes reference to “permanent chassis” which is associated with the phrase “mobilehome” by the general public. See, e.g., Bourgeois v. Parish of St. Tammany, 628 F. Supp. 159, 160 n.2 (1986) (“parties disagree over the application of the term "manufactured home" or "mobilehome" to the structure in question”) (invalidating ordinance provisions that provide that "mobilehomes" are not classifiable as a dwelling because the structure as assembled is mobile). Some people live in recreational vehicles (commonly called “RVs”) parked on city streets (not in RV parks) and have been subject to
While some mobilehome parks are protected by rent control, most mobilehomes are “affordable” in market terms because they are less expensive to build than site-built housing. The development and preservation of manufactured housing may be subsidized by federal programs, such as the HOME Investment Partnership Program and the Community Development Block Grant Program, or by mortgage revenue bonds issued by state or local governments. Manufactured housing is one of three “underserved markets” which the Housing and Economic Recovery Act of 2008 requires Fannie Mae and Freddie Mac to better assist.

localities’ regulations to limit their “residence” in a city by limiting parking hours. Although some farmworkers rely on RVs as homes, this book does not address them as forms of affordable housing.

See Chapter 4 for a discussion of rent control. See also Yee v. City of Escondido, 503 U.S. 519 (1992) (finding no taking). And see Cashman v. City of Cotati, 374 F.3d 887 (9th Cir. 2004) (invalidating mobilehome rent control without vacancy decontrol in California as a regulatory taking). However, the Cashman Court’s takings claim which alleged that the rent control ordinance is an unconstitutional regulatory taking by failing to substantially advance a legitimate government interest was foreclosed by the U.S. Supreme Court’s unanimous decision in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005), Cashman v. City of Cotati, 415 F.3d 1027, 1028 (9th Cir. 2005). The most recent takings challenge to mobile home rent control is Guggenheim v. City of Goleta (9th Cir.2009) (finding facial taking under Penn Central ad hoc balancing test), Rehearing en Banc Granted, March 12, 2010.

The average sales price of a manufactured home was $64,900 in 2008, p.1

According to the MANUFACTURED HOUSING INSTITUTE (MHI), the affordability of manufactured housing is “mainly attributable to the efficiencies of the factory-building process” and “the economies of scale which result from being able to purchase large quantities of building materials and products.” Id. at 4.

See Chapter 8, infra, for discussion of the HOME and CDBG programs. See Chapters 10 & 11, infra, for discussions of state and local bond financing of affordable housing. Qualifying manufactured housing units are also eligible for mortgage insurance available under 12 U.S.C. 1709 (2010). Lending programs and requirements for manufactured housing may differ depending upon the type of support system used (e.g., perimeter wall block, “piers and blocks” or wooden pilings). For an example of a 75 unit development by a non-profit affordable housing developer in an urban neighborhood using CDBG and other public subsidies, see Local Initiative Support Corporation’s Best Practices Profile “Manufacturing Affordability in Seattle” available at http://www.lisc.org/content/publications/detail/789/ (last accessed July 12, 2010).

This act is discussed extensively in Chapter 7, infra.

The primary legal issue concerning the expanded use of manufactured housing is siting.\textsuperscript{15} Local opposition, based in concerns about safety, aesthetics (including compatibility with neighborhood character), crime, property values, tax revenue generation, and their potential for transience has plagued the expansion of this market by restricting siting opportunities.\textsuperscript{16} Localities employ various strategies to limit or block siting (discussed, \textit{infra}). In response, some states have enacted statutes to protect or promote mobilehomes and manufactured housing (discussed, \textit{infra}).

Manufacturers of mobilehomes and manufactured housing have attempted to address many of opponents' concerns, including by upgrading production standards\textsuperscript{17} and designs and by highlighting their compliance with federal regulation of manufactured housing.\textsuperscript{18} A federal statute and implementing regulations mandate minimum building standards for “manufactured homes.”\textsuperscript{19} HUD administers a program to enforce the standards primarily

\textsuperscript{15} Mobilehome park closure due to redevelopment, gentrification and discriminatory code enforcement are also important issues but are not addressed in this chapter.

\textsuperscript{16} For a review of the issues, see \textit{Factory-Built Construction and the American Homebuyer: Perceptions and Opportunities} (HUD’s Office of Policy Development and Research, 2007), available at: \url{www.huduser.org/publications/dsetech/perception.html} (last accessed July 13, 2010). \textit{See, e.g.}, In re Tadlock, 134 S.E.2d 177, 179 (N.C. 1964). Underlying class (and possibly racial) concerns may also fuel resistance.

\textsuperscript{17} \textit{See, e.g.}, \textit{More About Panelized Construction}, \textit{Research Works} 4 - 5(HUD User, October 2007) (discussing research regarding the first comprehensive treatment of the connection systems used for the wall panels in panelized construction).

\textsuperscript{18} Understanding Today’s Manufactured Housing at: \url{http://www.manufacturedhousing.org/understanding_today/mhi_understanding_today.pdf} (last accessed July 12, 2010). This publication represents the \textit{MANUFACTURED HOUSING INSTITUTE}’s (MHI) response to opponents’ concerns generally. \textit{See also} Yee v. City of Escondido, 503 U.S. 519, 532 (1992) (few mobilehomes are actually moved after installation).

through approved States and private third parties. When HUD standards apply, they preempt additional state or local building code standards governing the same components or standards. Some states and localities impose additional requirements, particularly on mobilehome parks, and especially where government subsidies are involved. There has been a general trend toward greater public acceptance, but suspicions about safety and the neighborhood effects of manufactured housing persist. And, in the wake of the Katrina disaster, two safety issues have received media attention: (1) the safety of manufactured housing in hurricanes; and (2) unhealthy mobile homes provided by the U.S. Department of Housing and Urban Development to hurricane survivors.

Explicit total exclusion of all manufactured housing from a jurisdiction is rare today because most courts will invalidate such zoning ordinances as arbitrary and capricious and thus beyond a municipality’s legitimate exercise of police power. But localities may still severely limit the siting of manufactured housing. Specifically, localities may seek to and actually achieve total exclusion indirectly by formally allowing manufactured housing but excluding it de facto. In addition, courts will sometimes enforce private

21 See Chapter 6, infra, for a discussion of building codes regulation of manufactured housing.
22 Id.
restrictive covenants that exclude mobilehomes or manufactured housing from neighborhoods.26

Many local jurisdictions ordinances explicitly exclude mobilehomes from single-family residential zones and restrict them to designated zones, sometimes called “mobilehome parks,”27 and require a rezoning or conditional use permit to establish such a park.28 Others have adopted planning standards, e.g. establishing minimum width or a specified pitched roof, that have the effect of excluding older “mobilehomes” as well as some contemporary manufactured housing.29

Many state courts allow these types of partial exclusions when they are challenged as violations of substantive due process or equal protection or as ultra vires acts.30 But state

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26 Courts typically apply the specific language in the restrictive covenant. Where covenants have not been updated to include the newer nomenclature, the result turns on the court’s interpretation and application of the terms “mobilehome” or “manufactured home.” Compare Tucker v. Wolfe, 968 P.2d 179 (Colo. Ct. App. 1998); Frander & Frander, Inc. v. Griffen, 457 So. 2d 375 (Ala. 1984), and Kinchen v. Layton, 457 So. 2d 343 (Miss. 1984) with Aragon v. Brown, 78 P.3d 913 (N.M. App. 2003) and Wilcox v. Timberon Protective Assn, 806 P.2d 1068 (N.M. App. 1990). See also CAL. CIV. CODE § 714.5 (West 2010) (preventing enforcement of covenants excluding manufactured housing after 1988).


constitutional challenges to these restrictions sometimes succeed. Some courts have rejected these forms of explicit partial exclusion, especially since the adoption of federal construction standards and other changes in the manufactured housing industry.\(^{31}\) The leading case, *Robinson Township v. Knoll*,\(^{32}\) held that “the per se exclusion of mobilehomes from all areas not designated as mobilehome parks has no reasonable basis under the police power, and is therefore unconstitutional.”\(^{33}\) And, in state courts that interpret their state constitutions to require localities to provide their “fair share” of affordable housing opportunities, exclusion of manufactured housing can be successfully challenged.\(^{34}\) However, without a separate statutory basis, generally courts will not require localities to afford manufactured housing “equal” treatment with traditional site-built housing.\(^ {35}\)

Some local jurisdictions allow manufactured housing on single lots in some residential districts outside of designated mobilehome parks, but require a rezoning or a special use or conditional use permit.\(^{36}\) Most state courts uphold such permit requirements against prima facie constitutional challenges because they are typically based upon permissible objectives, such as promoting compatibility with traditional site-
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built housing or protecting property values.\textsuperscript{37} Courts have upheld the application of conditional use permit requirements and accompanying regulations to deny permits to developers,\textsuperscript{38} but they have also rejected unreasonable conditions\textsuperscript{39} and mandated approvals.\textsuperscript{40}

At least 20 states have adopted statutes attempting to promote the development of manufactured housing (or to protect it from discrimination) outside of mobilehome parks.\textsuperscript{41} Some mandate localities to include consideration of manufactured housing in comprehensive planning.\textsuperscript{42} Courts have applied these provisions to provide some protection.\textsuperscript{43} A leading case is \textit{In re Lunde}\textsuperscript{44} in which Vermont’s Supreme Court held that a regulation restricting mobilehomes to mobilehome parks violated state statute 24

\textsuperscript{42} New Jersey, Oregon, California and Florida are the leaders. White, \textit{supra} note 41, at 286–88. For example, California’s housing element law requires localities to identify adequate development sites for “factory-built housing” and “mobilehomes.” CAL. GOV. CODE § 65583(c)(1)(A) (West 2010). \textit{See also} OR. REV. STAT. § 197.307(5) (West 2010) and REV. CODE WASH. § 36.70A.070(2)(c) (West 2010).
\textsuperscript{44} 688 A.2d 1312 (Vt. 1997).
V.S.A. § 4406(4)(A) which called for equal treatment of housing. As applied, these statutes do not always enable the siting of manufactured housing, in part because they often allow localities to apply planning standards which are easily met by typical site-built single-family housing but not by manufactured homes, as long as they do so consistently.

In contemporary urban and suburban installations of manufactured homes the home owner typically also owns the lot. In contrast, previous installations, especially of “mobilehomes,” involved the homeowner adding a single manufactured unit to a parcel with an existing conventional unit or placing the manufactured home in a land lease community. These latter “homeowners” are vulnerable to the landowner’s decision to sell the land for redevelopment or take other decisions forcing difficult (or impossible) relocation. In response, some states have adopted statutes providing these mobilehome owners protection akin to landlord-tenant laws or adopted funding programs and other measures to assist such mobilehome owners in relocating to another park. However, these protections have received mixed receptions from courts.

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45 Id. at 1313. The provision of the statute interpreted by the court was 24 Vt. Stat. Ann. § 4406(4)(A). Note: 2003, Adj. Sess., No. 115, § 119, repealed former § 4406(4)(A), which prior thereto provided in pertinent part: “no zoning regulation shall have the effect of excluding mobile homes, modular housing, or other forms of prefabricated housing from the municipality, except on the same terms and conditions as conventional housing is excluded.”

46 See, e.g., Bangs v. Wells, 760 A.2d 632, 638 (Me. 2000); Bahl v. City of Asbury, 656 N.W.2d 336, 345 (Iowa 2002); County of Wright v. Kennedy, 415 N.W.2d 728 (Minn. Ct. App. 1987).


48 See note supra. But the proportions vary widely by state.

49 See Manufactured Housing Communities of Washington v. State of Washington, 13 P.3d 183, 224–226 (Wash. 2000) (providing list of thirty-six states providing such protection). As of July 2010, all of the statutes listed are still in force with the following exception: Mont. Code. Ann. § 70-24-436(2) – Repealed Sec. 52, Ch. 267, L. 2007. For more on relocation and replacement requirements, see Chapter 16, infra.

50 See, e.g., Cal. Gov. Code § 66427.4 - 66427.5 (West 2010); Minn. Stat. § 327C.095 (West 2010). Florida state law requires that developers seeking to redevelop mobile home parks into other uses must show that “adequate” and “suitable” housing alternatives exist for displaced mobile home park residents. One locality adopted a program allowing developers to provide residents with rental aid for up to two years. 

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III. Farmworker Housing

This section will consider certain legal obstacles to the development of housing for “migrant workers” and “seasonal workers” (hereinafter “farmworkers”).

Historically, farmworkers have endured dreadful housing conditions in the United States and received very little legal protection, in part because so many farmworkers are racial minorities. In addition to discrimination, farmworkers face an inadequate supply of housing that is often unaffordable and plagued by substandard physical conditions, overcrowding, and unique environmental hazards. Hurricanes and other natural disasters which affect agricultural areas also negatively impact migrant workers and their housing.

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as one way to satisfy the state law. Will Van Sant, Program Supports Tenants Affected by Mobile Home Park Closures, St. Petersburg Times, Oct. 26, 2005. In at least one case, the mobile home park residents acquired the property and are working to create a resident-controlled, affordable housing manufactured home development, http://www.peopleofhope.us/ (last accessed July 13, 2010).


52 According to the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), a “migrant worker” is “an individual who is employed in agricultural employment of a seasonal or temporary nature, and who is required to be absent overnight from his permanent place of residence,” 29 U.S.C. § 1802(8)(A), and a “seasonal agricultural worker” is “an individual who is employed in agricultural employment of a seasonal or temporary nature and is not required to be absent from his permanent place of residence,” 29 U.S.C. § 1802(10)(A). Estimates of seasonal workers and their dependants alone range from 1.9–4 million. Hous. Assistance Council, Migrant and Seasonal Farmworker Housing 1 (Sept. 2003).

53 See generally Jennifer D. Franz, Rural Community Assistance Corporation and California Coalition for Rural Housing—Survey About Farmworker Housing: Final Report, (2000); Hous. Assistance Council, Taking Stock: Rural People, Poverty, and Housing at the Turn of the 21st Century (2002); Hous. Assistance Council, No Refuge From the Fields: Findings From a Survey of Farmworker Housing Conditions in the United States (2001); Working Group on Agriculture and Affordable Housing, Operation of Farm Labor Housing in California, A Survey of Farmers/Ranchers (2001). The Housing Assistance Council (www.ruralhome.org) is the leading national advocate for rural housing, including farmworker housing. Farmworkers are a subset of the rural population that share many housing problems. See generally, Housing Assistance Council, Race, Place, and Housing: Housing Conditions in Rural Minority Counties (2004) and Housing in Rural America: Building Affordable and Inclusive Communities (Joseph N. Belden and Robert J. Wiener, eds., Sage Publications, 1999).

54 See Hous. Assistance Council, No Refuge, supra note 53.
The private housing market has not served the full spectrum of farmworker housing needs because of their low incomes\footnote{For data on the high poverty rates of migrant workers, see \textit{Housing in Rural America} (Housing Assistance Council, June 2009) available at: \url{http://www.ruralhome.org/storage/documents/housingruralamerica09.pdf} (last accessed July 13, 2010).} and the itinerancy of some farmworkers.\footnote{See \textit{Environmental Health Policy and California’s Farm Labor Housing} (John Muir Institute on the Environment, University of California, Davis, October 2006) (discussing the lack of housing for farm laborers, which forces them to live out of their cars or build squatter shacks) available at: \url{http://agcenter.ucdavis.edu/Announce/Documents/Env_Health_Pol.pdf} (last accessed July 13, 2010). The wide variety of farmworkers’ housing needs (single workers; large families; single family and multi-family; short term and permanent) also present a challenge to the private market. Many farmworkers live in manufactured housing, trailers or recreational vehicles. See \textit{supra}, Section II on manufactured housing. See e.g., \textsc{Hector A. Fernandez, Agricultural Worker Health and Housing Program, Rural Community Assistance Corporation, La Posada Health and Housing Project for Unaccompanied Migrant Agricultural Workers} (Oct. 2003).} Housing provided by employers or labor contractors, e.g. in migrant labor camps, has often been substandard, accompanied by exploitative terms, a failure to recognize farmworkers as “tenants,”\footnote{State courts take different approaches on the issue of whether farmworkers living in employer-supplied housing are “tenants” for purposes of a state’s landlord tenant laws. See Sherylle Gordon, \textit{Note, Michigan Housing Law Should Apply to Migrant Farm Workers}, 41 \textsc{Wayne L. Rev.} 1849, 1850–53 (1995). Some courts have held farmworkers living on employer-supplied housing eligible for protection under the federal fair housing act and state equivalents. See, e.g., Vilegas v. Sandy Farms, Inc., 929 F. Supp. 1324 (D. Or. 1996). \textit{See also} Rivcom Corp. v. Agricultural Labor Relations Bd., 34 Cal.3d 743 (1983); S.P. Growers Assn. v. Rodriguez, 17 Cal.3d 719 (1976). See also additional employee housing protections in \textsc{California Health & Safety Code §§ 17031.5 and 17031.7} (West 2010).} and inadequate health and safety standards. Mutual Self-Help or “sweat equity” housing has been an important strategy for providing farmworkers with homeownership opportunities.\footnote{This form of housing is usually organized by a non-profit organization and often utilizes federal or state subsidies. See \textit{Creating the Village: How Mutual Self-Help Housing Builds Community} (Housing Assistance Council, 2005), available at: \url{http://www.virtualcap.org/downloads/US/US_USDA_Self_Help_Housing_Creating_the_Village.pdf} (last accessed July 13, 2010); and \url{http://www.rurdev.usda.gov/rhs/brief_selfhelpsite.htm} (providing information about USDA’s Mutual Self-Help Housing Loan program, including the purpose, eligibility, terms and standards) (last accessed July 13, 2010).} Some federal and state subsidies are available for state-provided housing\footnote{See United States Department of Agriculture’s Rural Information Center at \url{http://ric.nal.usda.gov/nal_display/index.php?info_center=5&tax_level=1&tax_subject=577} (last accessed July 13, 2010) and Housing Assistance Council (www.ruralhome.org).} and private nonprofit housing for farmworkers,\footnote{For federal programs, see \textsc{Housing Assistance Council, A Guide to Federal Housing and Community Development Programs for Small Towns and Rural Areas} (2003). California has been a leader in providing state programs. See, e.g., California Farmworker Housing Grant Program, \textsc{California Health & Safety Code §§ 50017.5-50017.11} (West 2010), but note proposed legislation to amend} but never in
sufficient quantities to meet the needs. Cooperative housing appears to be a promising alternative. And, affordable construction models have been developed and tested.

Developers of farmworker housing face a lack of adequate infrastructure, potentially expensive environmental remediation, exclusionary zoning, and local opposition to land use approvals. Once built, farmworker housing is subject to particular code and maintenance requirements. This section will only discuss code and maintenance requirements briefly and focus on the exclusionary zoning problem.

In 1983, Congress enacted the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), which regulates health and safety requirements of housing provided for migrant workers, and provides enforcement provisions, including a private right of action. The Act provides that "each person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be

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62 See "Prototype Home Addresses Migrant Housing Shortage," RESEARCH WORKS 6 - 7 (HUD USER, April 2007).
63 See also Chapter 3, supra, for discussion of exclusionary zoning.
64 See ENCYCLOPEDIA OF HOUSING 174 (Willem Van Vliet, ed., 1998) (“Farmworker Housing” entry by Susan Peck); HOUSING ASSISTANCE COUNCIL, FAIR HOUSING, THE ZONING PROCESS, AND LAND USE POLITICS IN RURAL AREAS (1988); HOUSING ASSISTANCE COUNCIL, OVERCOMING EXCLUSION IN RURAL COMMUNITIES: NIMBY CASE STUDIES (1994). This section will not address the unique issues regarding conflicts with code setting and enforcement raised by “colonias” in Texas and other border states. To learn more on that topic, see HOUSING ASSISTANCE COUNCIL, THE BORDER COLONIAS REGION: CHALLENGES AND INNOVATIVE APPROACHES TO EFFECTIVE COMMUNITY DEVELOPMENT (1998).
65 See Chapter 6, infra, for a discussion of building and housing codes, including concerning farmworker housing.
67 Id. at § 1823.
68 Id. at §§ 1851–56.
responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing. 69

The MSPA has been interpreted broadly to apply to anyone supplying any form of housing to farmworkers. Courts have validated farmworker housing rights under MSPA concerning the failure of responsible federal agencies to implement the statute, 70 legal standards of liability for farm owners, 71 the scope of liability of growers, 72 and liabilities of farm owners. 73

Congress intended MSPA to supplement state law, not to preempt it. 74 Most states have enacted statutes regulating health and safety standards for farmworker housing offering varying degrees of protection. 75 California’s law ranks among the strongest. 76

Farmworker housing has long been subject to local opposition and other attempts to exclude it through localities’ exercise of their planning and zoning power. 77 In response, some states enacted statutes to promote and protect the development of farmworker housing. These measures have included requirements to include

71 Conlan v. U.S. Dept. of Lab., 76 F.3d 271 (9th Cir. 1996).
75 See FLA. STAT. ANN. § 381.0086 (West 2010); ILL. ADM. CODE § 935 (West 2010); ME. REV. STAT. ANN. § 586 (West 2010); MD. CODE ANN., LAB. & EMP. § 7-401 (West 2010); MICH. COMP. LAWS §§ 333.12411–333.12412 (West 2010); N.J. STAT. ANN. § 34:9A-20–34:9A-36 (West 2010); N.C. GEN. STAT. §§ 95-222–95-229 (West 2010); OH. REV. CODE ANN., § 3733.42 (West 2010); OH. ADMIN. CODE § 3701-33 (West 2010); 43 PA. CONST. STAT. ANN. §§1301.301-1301.308 (West 2010); V.T.C.A., Government Code §§ 3206.921- 3206.933 (West 2010); VA. CODE ANN. §§ 32.1-203–32.1-211 (West 2010); WASH. REV. CODE §§ 70.114A.010–70.114A.901 (West 2010).
77 See supra note 64.
farmworkers’ housing needs in mandatory land use planning\(^\text{78}\) and to promote
farmworker housing development within rural areas\(^\text{79}\) and on agriculturally-zoned land.\(^\text{80}\)
Other laws provide farmworker developments some protection against local opposition,
including by requiring localities to treat employee housing of six or fewer as single
family residences,\(^\text{81}\) by limiting localities’ discretion to deny farmworker housing
proposals,\(^\text{82}\) and by exempting some farmworker housing from review under the state
environmental quality act.\(^\text{83}\)

Farmworker housing development has also been protected against discriminatory
treatment by localities under the federal fair housing act and state equivalents.\(^\text{84}\) A
California statute prohibiting housing discrimination based upon “occupation” and level
of income has been used to protect farmworkers.\(^\text{85}\) Finally, farm owners have

\(^\text{78}\) California’s housing element law requires localities to include analysis of farmworker housing needs (Cal. Gov. Code § 65583(a)(7) (West 2010)) and to identify adequate development sites for “housing for agricultural workers” (CAL. GOV. CODE § 65583(c)(1) (West 2010)), and, in some circumstances, provide zoning that permits farmworker housing use by right (CAL. GOV. CODE § 65583(c)(1)(C) (West 2010)).

\(^\text{79}\) Oregon’s farmworker housing provides “farmworker housing within the rural area of a county shall be permitted in a zone or zones in rural centers and areas committed to nonresource uses.” OR. REV. STAT. § 197.685(2) (West 2010). See also OR. REV. STAT. § 197.307(1) and (3)(a) (West 2010). During v. Washington County, 34 P.3d 169 (Or. Ct. App. 2001).

\(^\text{80}\) See, e.g., CAL. GOV. CODE § 51220 et seq. (West 2010), the “Williamson Act,” which allows landowners of “agricultural preserves” to subdivide land for development of “agricultural laborer housing facilities” and directing that such use is “compatible use” within agricultural preserve. Id. at § 51230.2 (West 2010).

\(^\text{81}\) CAL. HEALTH & SAFETY CODE § 17021.5 (West 2010).

\(^\text{82}\) California’s “Housing Accountability Act” CAL. GOV. CODE § 65589.5(4)(d) (West 2010), limiting localities’ discretion to disapprove proposed affordable housing developments, specifically includes “farmworker housing.”

\(^\text{83}\) CAL. PUB. RES. CODE § 21159.22 (West 2010) exempts “residential housing for agricultural employees” from California’s state environmental review statute.


\(^\text{85}\) See CAL. GOV. CODE § 65008 (West 2010).
successfully used pro-agricultural statutes to override local zoning in order to site
farmworker housing on their own farm land.\textsuperscript{86}

IV. Accessory Units

An “accessory unit” is an independent living unit with a bedroom, a bathroom and
a kitchen and a separate entrance from the main house that is deemed “subordinate” to
the primary dwelling.\textsuperscript{87} They are generally less than 1000 square feet and are usually
built in rear of the primary dwelling or over a garage. They are called by many names
including, granny flat or elder cottage, in-law unit, secondary unit, and “ohana”
(Hawaiian for extended family/kin group). This form of housing is broadly supported as
a form of housing by HUD, planners, smart growth advocates, affordable housing
advocates, advocates for seniors, and disability rights advocates because it typically
serves adult children, the elderly (including in-laws), persons with disabilities, as well as
low-income people and smaller households.\textsuperscript{88}

\textsuperscript{86} See Town of Lysander v. Hafner, 759 N.E.2d 356 (N.Y. Ct. App. 2001); Braden Trust v. County of

\textsuperscript{87} \textsc{Encyclopedia of Housing, supra} note 64, at 3 (“Accessory Dwelling Units” entry by Patrick H.
Hare). \textit{See also} CAL. DEP’T OF HOUS. AND CMTY. DEV., \textsc{Bibliography of Selected Resources on
Second Units} (August 2005) available at: \url{http://www.hcd.ca.gov/hpd/secondunits0805.pdf} (last accessed
July 13, 2010); MUN. RESEARCH & SERVS. CTR. OF WASH., Accessory Dwelling Units in Plain English
(June 2010) available at: \url{http://www.mrsc.org/subjects/planning/LU/accessory.aspx/} (last accessed July 13,
2010).

\textsuperscript{88} See, \textit{e.g.}, \textsc{Accessory Dwelling Units: Case Study} (U.S. Department of Housing and Urban Development,
June 2008), available at: \url{http://www.huduser.org/publications/af/hsg/du.html} (last accessed July 13,
2010); AM. PLANNING ASS’N, \textsc{Regional Approaches to Affordable Housing} (2003), available at:
\url{http://www.huduser.org/Publications/pdf/reg_aff_hsg_ch.pdf/} (last accessed July 13, 2010); FUNDERS’
NETWORK FOR SMART GROWTH AND LIVEABLE COMMUNITIES, \textsc{Aging and Smart Growth: Building
Age-Sensitive Communities} 9–11 (Dec. 2001), available at:
\url{http://www.fundersnetwork.org/files/learn/aging_paper.pdf} (last accessed July 13, 2010); Rodney L. Cobb
& Scott Dvorak, Public Policy Institute, Accessory Dwelling Units: Model State Act and Local Ordinance
(2000) (the Public Policy Institute is part of the Research Group at the American Association of Retired
Persons), available at:
\url{http://transformca.org/ja/acssdwel/sup/AARP+APA_ADUReport_ModelAct+Ordinance.pdf} (last accessed
July 13, 2010). For an articulate essay supporting accessory units in suburbs, see James van Hemert, \textsc{A
Place for Granny: The Case for Accessory Dwelling Units}, available at:
Accessory units are widely viewed as having a broad potential to increase the stock of market-affordable housing. They are usually “market-affordable” by virtue of their smaller size and lower building costs. Some second units are income-restricted by deed restrictions. They may also provide low income households with a unique opportunity for homeownership because rental income from the accessory unit can subsidize the mortgage of the primary unit. Some newer single family subdivisions include second units. While it is seldom necessary, some public funding is available for the development of accessory units for low income households.

Studies suggest that where city zoning and planning codes are permissive, accessory units can become up to an average of 10% of the housing stock. However, many cities oppose them. Typical opposition concerns include higher density, increased traffic and parking congestion, changing the “character” of single family neighborhoods, purported negative effects on property values, school overcrowding and sometimes aesthetic concerns.

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89 Depending upon whether they are attached or detached, accessory units “could be built for about one-third the cost of constructing a conventional rental unit.” ENCYCLOPEDIA OF HOUSING, supra note 64, at 3.

90 See, e.g., CARLSBAD, CAL. MUN. CODE § 21.85.149(A) (Municode.com 2010).


92 Such subdivisions have been built in Livermore, California and Santa Rosa, California.

93 For example, HAW. REV. STAT. § 201H-201—204, 210 (West 2010) (“Rental Housing Trust Fund”) gives a preference to accessory units (among other forms) for funding. Some jurisdictions waive or defer various fees in order to encourage development of accessory units. See, e.g., SANTA CRUZ, CAL. MUN. CODE § 26.16.180 (2010).


Apart from the threshold issue of defining whether a dwelling space is “accessory” or not, exclusionary zoning and exacting planning standards are the primary legal issues involved in the development of accessory units.

Many local jurisdictions adopt a very restrictive approach to accessory units in single family zoned neighborhoods which is the primary desired location. Some jurisdictions exclude them from single family zones altogether. Possibly as a result, many accessory units are constructed illegally—without permits and sometimes in violation of building codes.

If accessory units allowed, localities typically require a conditional or special use permit (and its attendant public hearing), site plan review, or even a zoning amendment. In addition, accessory apartments are often subject to restrictive planning

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96 The issue is when is a dwelling “accessory” to a primary dwelling, typically meaning that the use is “customary and subordinate to primary use” in contrast to being a “separate dwelling” for which multi-family zoning would normally be required. Trent v. City of Pittsburg, 619 P.2d 1171 (Kan. Ct. App. 1980). Township of Randolph v. Lamprecht, 542 A.2d 36 (N.J. Super. App.Div. 1988).


98 “A zoning amendment is often needed to permit accessory units, and … the zoning process can be used to severely limit the installation of accessory units.” Patrick Hare, Accessory Apartments for Today’s Communities, in 1 PLANNING COMMISSIONERS J. 14 (1991).

99 Some cities have adopted legalization or amnesty programs for illegally-constructed units. See, e.g., Sherman v. Frazier, 446 N.Y.S.2d 372 (N.Y. App. Div. 1982); Ilasi v. City of Long Beach, 342 N.E.2d 594 (N.Y. 1976); Marin County, California adopted a “Second Unit Amnesty Program” for the calendar year of 2007, which was subsequently extended for an additional year, http://www.co.marin.ca.us/comdev/comdev/CURRENT/second_unit_amnesty.cfm (last accessed July 13, 2010).

100 See PATRICK HARE, ACCESSORY APARTMENTS: USING SURPLUS SPACE IN SINGLE-FAMILY HOUSES 10 – 23 (1981). “ADUs are typically regulated either as a permitted use, with an administrative review, or as a conditional use, subject to a public hearing requirement.” MUN. RESEARCH & SERVS. CTR. OF WASH., supra note 87, at 26.
and design requirements and other conditions, e.g. limiting or preferring use by particular population.

A few states have enacted statutes to promote the development of accessory units. One stated purpose of California’s second unit statute when first enacted in 1982, was to “[p]rovid[e] relatively affordable housing for low- and moderate-income households without public subsidy.” The current version of the law forbids outright exclusion unless a locality makes specific findings, requires that localities only impose ministerial (i.e. non-discretionary) review of accessory unit applications, and provides maximum planning standards that apply in the absence of a local ordinance in

101 See, e.g., WASHINGTON COUNTY, OR. CMTY. DEV. CODE § 430-117 (2010), which, in an attempt to create more “flexibility” for secondary and accessory units, allows such units in the county, with restrictions on size (no more than 50% of the main house or <600 sq ft), setbacks, and “a minimum contiguous rear or side yard outdoor area of four-hundred and fifty (450) square feet.”


103 In 1993, the State of Washington enacted legislation requiring cities and counties with populations over 20,000 that are subject to Washington’s Growth Management Act to develop ordinances accommodating accessory units. Localities are allowed to incorporate appropriate developmental standards and other restrictions. RCW 43.63A.215 (West 2010). In 2002, Connecticut made accessory dwelling units qualify as “affordable housing” for purposes of its affordable housing land use appeals law provided that they are legally-approved and subject to recorded deeds limiting occupancy for at least 10 years to lower-income households. See CONN. GEN. STAT. § 8-30g(k) (West 2010). Requiring such deed restrictions may deter some homeowners from building accessory dwelling units.

compliance with the statute.\textsuperscript{105} Some cities have complied with the statute.\textsuperscript{106} Others have resisted it because it partially overrides local land use control.\textsuperscript{107} While its ministerial review requirement has not been tested in court, courts have upheld the basic elements of the previous versions of the statute against city resistance\textsuperscript{108} while also upholding denials of proposed accessory units in specific cases.\textsuperscript{109}

Accessory units have also received favorable treatment by local governments in Santa Cruz, California;\textsuperscript{110} Boulder, Colorado;\textsuperscript{111} Portland, Oregon;\textsuperscript{112} and Seattle, Washington.\textsuperscript{113} A recent HUD report concluded that successful accessory unit development programs “must be flexible, uncomplicated, include fiscal incentives, and

\textsuperscript{105} \textit{See Cal. Gov. Code} \S 65852.2(c) (West 2010) (circumstances in which second units may be prohibited); \textit{id.} \S 65852.2(a)(3) (West 2010) (requiring ministerial review); \textit{id.} \S 65852.2(b) (West 2010) (specifying State standards).

\textsuperscript{106} The city of Santa Cruz, California has established a progressive policy in its Accessory Unit Development Program. \textit{See ADU Zoning Regulations}, Chapter 24.16.100 et seq Zoning Ordinance of the City of Santa Cruz; ADU Technical Assistance Program and ADU loan program, \url{http://www.cityofsanctacruz.com/index.aspx?page=1150} (last accessed July 13, 2010).

\textsuperscript{107} Note that there are innumerable ways cities can undermine the statute’s goal and still not be out of compliance. Pursuant to \textit{Cal. Gov. Code} \S 65852.2(a)(1)(A) and (B) (West 2010), cities can restrict areas where second units can be located, restrict maximum allowable density, and impose restrictive parking, height, setback, and lot coverage standards subject to the limits defined by \S 65852.2(d) and (e) (West 2010), and possibly the intent of the statute stated at \S 65852.150 (West 2010). \textit{See also, e.g.,} Wilson v. City of Laguna Beach, 7 Cal. Rptr. 2d 848, 849 (Cal. Ct. App. 1992).

\textsuperscript{108} Wilson, 7 Cal. Rptr. 2d at 850; Coalition Advocating Legal Housing Options v. City of Santa Monica, 105 Cal. Rptr. 2d 802 (Cal. Ct. App. 2001).


\textsuperscript{110} \textit{See supra} note 106.

\textsuperscript{111} \textit{Boulder Rev. Code} \S 9-6-3(a) (2010).

\textsuperscript{112} 1997 amendments to Portland, Oregon’s zoning Code (\textit{City of Portland Mun. Code} \S 33.205.010 (2010)) were intended to promote development of accessory dwelling units. For an evaluation of that effort, see \textit{Bureau of Planning, City of Portland, Accessory Dwelling Unit (ADU) Monitoring Project: Report to Planning Commission} 6 (2003) (finding 83 ADUs built in 1998 and 1999).

\textsuperscript{113} \textit{See City of Seattle, Department of Planning and Development, Detached Accessory Dwelling Units: Director’s Report} (2004); City of Seattle’s Director’s Report on the Mayor’s Recommended Comprehensive Plan Amendments 21 (2009) is available at \url{http://clerk.seattle.gov/~public/meetingrecords/built20100208_b.pdf} (last accessed July 13, 2010). San Luis Obispo County exempts accessory units from its growth management allocation process, \url{http://www.slocounty.ca.gov/Assets/PL/Allocations/Guide+to+Growth+Management+++Allocations+Allotments.pdf} (last accessed July 13, 2010). Other localities continue to give accessory units a mixed reception. See \textit{e.g.,} Tara A. Scully, \textit{Legalizing Accessory Units}, \textit{Newsday}, June 26, 1998, at C9 (listing 12 of 14 localities in Long Island that allow secondary units for various types of residents and with various restrictions).
be supported by public education campaigns so as to engender and maintain community support.”

V. Single Residence Occupancy Hotels

Single Residence Occupancy Hotels (SROs) historically served low wage single workers and some small households “permanently or for long periods of time” in downtown locations by offering “single, unfurnished rooms without private kitchens.” They were “market affordable” for a long time, but became a disfavored form of housing and were subject to widespread demolition or conversion as part of urban renewal and urban redevelopment. Many were converted into tourist hotels, luxury apartments or condos and mixed uses.

Beginning in the late 1970’s, SRO’s were rediscovered as a source of permanent affordable housing, in particular as “supportive housing” to provide independent living with social services for a variety of populations with special needs, including homeless persons and persons with disabilities. Several states and some large cities have led efforts to develop new SROs and to rehabilitate and save existing SROs from continuing threats of demolition or conversion. Some federal and state funding is available for such efforts.

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114 Accessory Dwelling Units: Case Study, note 88 at 7, supra.
115 ENCYCLOPEDIA OF HOUSING, supra note 64, at 538 (“Single-Room Occupancy Housing” entry by Karen A. Franck).
116 Id. See also Ann M. Burkhart, The Constitutional Underpinnings of Homelessness, 40 HOUS. L. REV. 211, 269 & n.536 – 37 (2003); Andy Merrifield, Lepers at the City Gate: Single Room Occupancy and the Housing Crisis, 48 DISSERT 78 (2001).
117 SROs are currently the dominant form of supportive housing. Another model employs cooperative apartments using master leasing which avoids the need for land use approvals and the risk of local opposition while providing for more integration with typical housing. For more about supportive housing, visit the Corporation for Supportive Housing website at www.csh.org (last accessed November 21, 2010).
118 Charles Hoch & Robert A. Slayton, New Homeless and Old: Community and the Skid Row Hotel (1989) (describing the loss of skid row and SRO hotels). Karen A. Franck credits Portland, Oregon as the early leader in the effort. See ENCYCLOPEDIA OF HOUSING, supra note 64, at 538. See also Mary Lou
Revived SROs appear to be a flexible and successful model for certain populations.\textsuperscript{120} Yet, landowners (claiming the regulations constitute “regulatory takings”) and neighbors (preferring demolition or different uses, especially where they fear a proposed site might affect a downtown redevelopment scheme) have resisted the revival of SROs.

The primary legal issues concern municipal regulatory attempts to regulate the demolition and conversion of existing SROs.\textsuperscript{121} Cities often first adopt a moratorium on demolition and conversion, and then adopt more comprehensive conversion control ordinances.\textsuperscript{122} These ordinances typically include tenant notification requirements and impose permit requirements for conversion which trigger replacement requirements or \textit{in lieu} fees.

Enforcement of SRO conversion ordinances has been controversial.\textsuperscript{123} Property owners and developers have sought to circumvent these requirements by avoiding the


\textsuperscript{120} The Corporation for Supportive Housing website (www.csh.org) contains numerous academic studies demonstrating the cost-effectiveness of supportive housing over other options.

\textsuperscript{121} Whether or not SRO residents qualify as “tenants” under state landlord-tenant law has also been an issue. See, e.g., Ann Arbor Tenants Union v. Ann Arbor YMCA, 581 N.W.2d 794 (Mich. Ct. App. 1998).

\textsuperscript{122} For example, in San Diego, California, a 1985 moratorium on demolition and conversion of SROs was replaced in 1997 by a SRO ordinance regulating demolition and conversion. See SAN DIEGO MUN. CODE § 143.0510-0590.

classification of “SRO.” In two cases, California courts found that a state statute preempted San Francisco’s SRO regulation.

Property owners have also challenged the ordinances, particularly the replacement requirements, as unconstitutional takings. Currently, these ordinances appear to have withstood regulatory takings challenges. After decades of encouraging SRO demolition, NYC adopted a series of ordinances between 1985 and 1987 establishing a moratorium on the demolition of SROs. Local Law No. 9, enacted in 1987, “prohibit[ed] the demolition, alteration, or conversion of single room occupancy (SRO) properties and obligate[d] the owners to restore all units to habitable condition and lease them at controlled rents for an indefinite period.” The law also guaranteed SRO owners an 8.5% rate of return. In 1989, New York’s highest court found that the ordinance on its face was unconstitutional both as a physical taking, under Loretto v. Teleprompter Manhattan CATV Corp., and as a regulatory taking applying the “heightened scrutiny” of Nollan v. California Coastal Commission. However, both of Seawall’s holdings appear to have been undermined by later cases. Seawall’s physical taking

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125 See Bullock v. City and County of S.F., 271 Cal. Rptr. 44 (Cal. Ct. App. 1990); Reidy v. City and County of S.F., 19 Cal.Rptr.3d 894 (Cal. Ct. App. 2004); Pieri v. City and County of San Francisco, 137 Cal.App.4th 886 (2006). However, as of January 1, 2004, subsequent state legislation overruled Bullock at least for the City and County of San Francisco and other cities “with a population over 1,000,000” where certain other conditions are met. See CAL. GOV. CODE § 7060(a) (West 2004); accord Reidy, 19 Cal. Rptr. 3d at 902–903.
127 Seawall Assocs., 542 N.E.2d at 1060–62.
128 Id. at 1065.
130 Seawall Assocs., 542 N.E.2d. at 1065.
holding was impliedly overruled in Yee v. City of Escondido,\textsuperscript{132} in which the Supreme Court held that a regulation that did not compel property owners to suffer the physical occupation of their property, did not effect a per se, physical taking.\textsuperscript{133} And, in Monterey v. Del Monte Dunes,\textsuperscript{134} the Supreme Court held that Nollan’s heightened scrutiny was limited to regulatory takings cases involving exactions, and “inapposite” to permit denials and other land use restrictions.\textsuperscript{135}

Beginning in 1979, San Francisco, California adopted a series of measures to control the demolition and conversion of SROs.\textsuperscript{136} The current ordinance requires a permit for conversion, notification to tenants, relocation payments to former tenants, and fulfillment of one of a variety of options for one-for-one replacement of lost units.\textsuperscript{137} Despite the ordinance’s complex interaction with a state statute limiting local governments’ authority to enact and maintain rent control and providing owners a right to exit the rental housing business, it has largely endured sustained attacks combining constitutional claims and state statutory claims.\textsuperscript{138} In the San Remo Hotel case, applying a deferential standard of scrutiny, California’s Supreme Court held that the one-for-one

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\textsuperscript{132} 503 U.S. 519 (1992).
\textsuperscript{133} Id. at 527.
\textsuperscript{134} 526 U.S. 687 (1999).

\textsuperscript{136} A moratorium enacted in 1979 was followed in 1981 by a SRO conversion ordinance which has been substantially revised several times. San Remo Hotel v. City and County of S.F., 27 Cal.4th 643, 650 (2002). See, e.g. San Remo Hotel v. City and County of S.F., 27 Cal.4th 643 (2002) (affirming the City’s conditional use requirement and upholding the HCO’s legislatively mandated replacement fee provision against a regulatory takings claim as bearing a reasonable relationship to the loss of affordable housing in the city). But see Reidy v. City and County of San Francisco, 123 Cal.App.4th 580 (Cal.App. 1 Dist., 2004) (finding HCO preempted by state law). See also Action Apartment Ass’n v. City of Santa Monica, 166 Cal.App.4th 456 (upholding a similar ordinance requiring that developers of multi-family ownership housing projects construct affordable housing).
replacement of lost units or alternative in lieu fees did not effect an unconstitutional regulatory taking. The Court reasoned that the legislatively-enacted replacement fees requirement which was applicable to over 500 residential hotels in San Francisco was “a burden placed broadly and nondiscriminatorily on changes in property’s use” and “not the equivalent of an arbitrary decision to hold an individual’s property for ransom” and thus not a taking.139 In upholding the San Francisco ordinance, the California Supreme Court explicitly rejected the Seawall court’s takings holding.140

In addition, courts have applied the federal Fair Housing Act’s “reasonable accommodation” requirement as applied to homeless people with disabilities to support permits or variances to establish SRO housing for homeless people.141

VI. Condominium Conversion Regulation

In areas where housing and land prices are high and appear to be increasing, owners of existing apartment houses may find it profitable to convert their apartments into condominiums.142 In response to the shortage of adequate and affordable housing exacerbated by frequent conversion of apartments to condominiums in the 1970’s, some local governments adopted condominium conversion controls. Some courts found local jurisdictions’ attempts to regulate condominium conversions to be ultra vires or preempted by state law.143

139 San Remo, 27 Cal. 4th at 677.
140 The San Remo court specifically rejected the Seawall decision, stating that Seawall relied upon a “heightened scrutiny” test which the court deemed inappropriate for reviewing San Francisco’s HCO. Id. at 673 n.15.
Conflicts between local governments and condominium developers led Congress to enact the Condominium and Cooperative Conversion Protection and Abuse Relief Act of 1980.\textsuperscript{144} This statute expressed the “sense of Congress” that “when multifamily rental housing projects are converted to condominium or cooperative use, tenants in those projects are entitled to adequate notice of the pending conversion and to receive the first opportunity to purchase units in the converted projects….\textsuperscript{145} Congress left it to the states and local governments to implement its suggestion.\textsuperscript{146} At least thirty four states currently have statutes regulating condominium and cooperative conversions, providing a range of measures balancing the interests of condominium developers and apartment renters.\textsuperscript{147} The push for homeownership during the second George W. Bush administration created renewed concern among tenants that their protections under these state laws were

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ineffective or not being enforced. These concerns fueled attempts in some states to revisit these statutes.

Some states’ statutes include provisions primarily protecting condominium developers from being subjected to local regulation beyond what would normally be covered in its subdivision ordinance and regulations. For example, some states adopted the Uniform Condominium Act (UCA). Sections 4-106–4-112 of the 1980 version of the UCA regulate condominium conversions. Section 4-106 provides that local regulation may not prohibit condominium conversion or place any requirement on condominiums that would not be imposed on an identical development under a different type of ownership. Some courts have enforced these provisions voiding local condominium conversion ordinances as preempted by state legislation.

Other states enacted statutes ensuring that current apartment tenants would receive a timely notification of the proposed conversion, providing existing tenants with an exclusive right to contract for the purchase of his or her own unit, providing

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148 Id. at 830.
150 See, e.g., Natrella v. Board of Zoning Appeals, 345 S.E.2d 295, 301–02 (Va. 1986). In effect, these prohibit “discrimination” against condominiums by virtue of their form of ownership. Generally, an apartment owner seeking to convert must abide by the requirement of the state’s subdivision act and obtain the local government’s approval of its subdivision map. Subdivision acts typically regulate design and subdivision land improvements, but do not authorize regulation of the type included in some local condominium conversion ordinances, e.g., relocation obligations.
151 See, e.g., MINN. STAT. ANN. § 515A.1-101 to 1-116 (West 2004); MO. STAT. ANN § 448.4-112 (West 2004); TEX. PROP. CODE ANN., § 82.160 (Vernon 2004); VA. CODE ANN. §§ 55-79.74:3, 55-79.94 (Michie 2004).
152 UNIF. CONDO., ACT § 1-106 (amended 1980).
154 A majority of states provide 120 days notice. Some state statutes provide for a minimum of 30 days notice (e.g. 765 IL. COMP. STAT. § 605/30 (2005); others for a one year (e.g., 68 PA. CONS. STAT. ANN. § 3410 (West 1965 & Supp. 2004). These provisions have been enforced. See, e.g., Glenn Chaffer, Inc. v. Kennedy, 433 A.2d 1018 (Conn. Super. Ct. 1981); Sibig & Co. v. Santos, 582 A.2d 840 (N.J. Super. Ct. App. Div. 1990).
tenants a right to comparable housing or temporary waiver of rent, and allowing local governments to further regulate condominium conversion under their zoning authority.

Other tenant benefits in state statutes include: reimbursement for moving and relocation expenses, prohibitions of evictions of tenants except for good cause, and provision of a private right to action to aggrieved tenants. In these states, courts have allowed local governments to require apartments converting to condominiums to obtain a conditional use permit (including tenant relocation and unit replacement provisions), and to restrict the number of condominium conversions permitted annually. Judicial review of constitutional challenges (e.g. due process, equal protection and takings claims) to such protective legislation has reached mixed results.

VII. Emergency Shelters and Transitional Housing including Domestic Violence Shelters

This section considers various forms of “temporary” housing, primarily emergency shelters and transitional housing in which the persons housed generally have either attenuated rights as renters or none at all.

Homelessness, substance abuse and domestic violence continue to present substantial and growing housing problems. “Emergency shelters” provide shelter for a night at a time (often with a maximum stay of 30 days) primarily to homeless people, including subgroups such as persons with substance abuse issues and domestic violence survivors. While variously defined, “transitional housing” typically provides time-limited housing (less than two years), often intended as a “step” in between emergency shelter and permanent housing. Transitional housing usually includes a program of substantial services, such as substance abuse counseling, job counseling and training, and money management. Funding for emergency shelters and transitional housing comes

163 See National Law Center on Homelessness and Poverty, KEY DATA CONCERNING HOMELESS PERSONS IN AMERICA (2006); UNITED STATES CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA’S CITIES (2008); Elizabeth Halpern, What’s Wrong with America’s Homeless?, 9 GEO. J. ON POVERTY L. & POL’Y 279, 280–82 (2002).


165 Since 1994, transitional housing was conceived as a critical component of the U.S. Department of Housing and Urban Development’s “Continuum of Care” solution to homelessness. The three-step plan includes: 1) outreach and assessment of homeless people in public places and placement in emergency shelters; 2) transitional housing combined with rehabilitative services; and, 3) supportive permanent housing designed around the specific, individual needs of homeless families and individuals. See Continuum of Care 101 (HUD 2009), available at: http://www.hudhre.info/documents/CoC101.pdf (last accessed July 14, 2010). Stanley S. Herr & Stephen M.B. Pincus, A Way to Go Home: Supportive Housing and Housing Assistance Preferences for the Homeless, 23 STETSON L. REV. 345, 377 (1994).

166 The Stewart B. McKinney Homeless Assistance Act defines transitional housing as “housing, the purpose of which is to facilitate the movement of homeless individuals and families to permanent housing within 24 months or such longer period as the Secretary determines necessary.” 42 U.S.C. § 11384(b) (2009). Transitional housing is often provided in congregate living setting with no individual leases. Transitional housing serves many of the same populations as emergency shelters but specific programs are often targeted to particular groups, e.g., women domestic violence survivors. While transitional housing always includes some social services associated with the housing, emergency shelters may provide little or none. Transitional housing can be contrasted with “supportive housing,” which is permanent housing with support services. For more information about supportive housing, visit the Corporation for Supportive Housing website at http://www.csh.org/ (last accessed July 14, 2010).
from private sources (including private individuals, churches, businesses and foundations) as well as government funding programs.\textsuperscript{167}

This section will focus on restrictive city zoning and local opposition to the development of emergency shelters and transitional housing.\textsuperscript{168} Other important legal issues raised by these types of housing\textsuperscript{169} include whether a state recognizes any “right to shelter,”\textsuperscript{170} state regulation of the habitability of shelters,\textsuperscript{171} and limited tenancy rights of persons living in transitional housing.\textsuperscript{172}

\textsuperscript{167} See Part II, infra, for overviews of funding sources for affordable housing, and particularly Chapter 8, infra, for discussion of some federal programs funding housing for homeless people. See, e.g., Stewart B. McKinney Homeless Assistance Act of 1987, Pub. L. No. 100-77, 101 Stat. 482 (codified in scattered sections of titles 7, 28, and 42 U.S.C.) (enacted to increase emergency services, housing, medical services, educational aid, and job training).

\textsuperscript{168} See generally NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, ACCESS DELAYED, ACCESS DENIED: LOCAL OPPOSITION TO HOUSING AND SERVICES FOR HOMELESS PEOPLE ACROSS THE UNITED STATES, (1997); Robert A. Nasdor, Legal Support for Affordable Housing Development, 156 N.J. LAW. (Magazine) 23, 24 (Oct. 1993).

\textsuperscript{169} Because of this book’s focus on housing development law, this section will not consider the important issue of the criminalization of homelessness and attempts to secure a right for homeless persons to sleep in public places. See Jonathan L. Hafetz, Homeless Legal Advocacy: New Challenges and Directions for the Future, 30 FORDHAM URB. L.J. 1215, 1235–1240 (2003). See also A Dream Denied: The Criminalization of Homelessness in U.S. Cities, A Report by The National Coalition for the Homeless and The National Law Center on Homelessness & Poverty, available at: http://www.nlchp.org/content/pubs/A_Dream_Denied1.pdf (last accessed July 14, 2010).


\textsuperscript{172} States are split on the status and tenancy rights of persons living in transitional housing. California’s Transitional Housing Participant Misconduct Act, Cal. HEALTH & SAFETY CODE §§ 50580–50591 (West 2009), provides persons living in transitional housing with limited rights. Iowa excludes from residential landlord and tenant laws “[o]ccupancy in housing owned by a nonprofit organization whose purpose is to provide transitional housing for persons released from drug or alcohol treatment facilities and in housing for homeless persons.” IOWA CODE ANN. § 562A.5(8) (West 2010). Massachusetts extends tenancy rights to women in domestic violence transitional housing programs. See Serreze v. YWCA of Western Massachusetts, 572 N.E.2d 581 (Mass. App. Ct. 1991).
Most localities zone emergency shelters and transitional housing restrictively if they allow them at all.\(^{173}\) Most jurisdictions limit the zones in which these uses are allowed, nearly universally excluding them from single-family zones.\(^{174}\) Some localities limit emergency shelters to traditionally “non-residential areas,” e.g. industrial or commercial zones, either as permitted uses or with a zoning variance or conditional use permit.\(^{175}\) Other jurisdictions apply spacing requirements to control the concentration of these uses.\(^{176}\)

Typically, local zoning ordinances require a conditional or special use permit either directly or indirectly for the establishment of emergency shelters and transitional housing in areas where they are permitted.\(^{177}\) Some jurisdictions explicitly define “homeless shelter” “emergency shelter” or “transitional housing” as uses in their

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\(^{173}\) For example, the Albuquerque Zoning Code specifically authorizes emergency shelters as a permissive use in the M-1 Light Manufacturing Zone and M-2 Heavy Manufacturing Zone, and as a conditional use in the R-2 Residential Zone, the R-3 Residential Zone, the C-2 Community Commercial Zone, and the C-3 Heavy Commercial Zone. Albuquerque Zoning Code §§ 14-16-2-20(A)(7), -21(A)(1), -11(B)(6), -12(B)(1), and -17(B)(6) (2010). See also In re Society for Preservation of Historic Oakwood, 571 S.E.2d 588 (N.C. Ct. App. 2002) (reviewing Raleigh City Code ordinance which excludes transitional housing from Shopping Center, and Office and Institution-II district, but allows multi-family housing in that district).


“(6) Emergency shelters shall be located a minimum of 1,500 feet from any other emergency shelter, and no more than one other emergency shelter shall be within one mile of the proposed emergency shelter.

(7) The total combined number of emergency shelters and community residential programs located in any Planning Information Area, as defined by the city's Planning Department, shall not exceed one for each 1,000 dwelling units within that Planning Information Area.”

planning codes, and require a conditional or special use permit directly. \(^{178}\) Other
ejurisdictions do not include these specific definitions in their planning codes, and require
a conditional or special use permit for whatever category it is found to fit, e.g.
considering an emergency shelter as a “community service,” “community use,” or some
other type of non-residential use which requires a special permit. \(^{179}\)

When conditional or special use permits are approved, they often contain
burdensome and sometimes expensive conditions. \(^{180}\) In addition, many jurisdictions
apply demanding development standards for emergency shelters and transitional housing
for which variances or other regulatory relief must be sought. \(^{181}\)

Some localities have adopted less restrictive zoning. \(^{182}\) Local government zoning
restrictions may not apply if an emergency shelter is operated on public land \(^{183}\) or run by
a government entity (or a closely associated private entity). \(^{184}\) Emergency shelters or
transitional housing programs intending to serve survivors of domestic violence
sometimes receive more favorable zoning treatment than those serving other

\(^{178}\) See e.g., ALBUQUERQUE, N.M., ZONING CODE § 14-16-1-5(B), -3-13 (2010); Siesta Hills Neighborhood
Assn v. City of Albuquerque, 954 P.2d 102 (N.M. Ct. App. 1998); FORT LAUDERDALE, FLA., CODE § 47-

v. Board of Zoning Appeals, Evansville, 695 N.E.2d 983 (Ind. Ct. App. 1998); Turning Point, Inc. v. City
of Caldwell, 74 F.3d 941, 944 (9th Cir. 1996); Vitti v. Zoning Bd. Adjustment, 710 A.2d 653, 656 (Pa.
(1989) (considering homeless shelter as “community service” and therefore permitted use in commercial
service district).

\(^{180}\) See Turning Point, Inc., 74 F.3d at 945. Limitations on permitted occupancy is a common conflict,
sometimes resolved by a condition in a permit.

\(^{181}\) See, e.g., Wagner, 675 A.2d at 799.

\(^{182}\) In response to a fair housing lawsuit, the city of Portland, Oregon revised it planning and zoning
ordinances, including for emergency shelters and transitional housing. The American Planning Association
gave a national planning award to Portland for its work. See PORTLAND, OR., PLANNING AND ZONING CODE
ch.33.285 (2001) for Portland’s regulations of “short term housing and mass shelters.” See also Smith v.

\(^{183}\) See, e.g., Pittsfield Charter Township v. Washtenaw County, 664 N.W.2d 193 (Mich. 2002).

\(^{184}\) See, e.g., 85 Op. Att’y Gen. No. 00-010 (Apr. 27, 2000) (Maryland Attorney General Opinion finding
domestic violence center House of Ruth exempt from local zoning because operating on public property
and performing “public purpose” use).
In some cases, no public hearings are required in order to protect the confidentiality and security of the residents.

HUD funding requirements, the federal Fair Housing Act (and its state counterparts), and Religious Land Use and Institutionalized Persons Act of 2000 (RUIPA) each offer federal statutory support for the development of emergency shelters and transitional housing. HUD’s Consolidated Plan requires participating jurisdictions to plan for the housing needs of homeless persons as a condition of receiving certain federal funding.

Localities may be liable under the federal fair housing act (FHA) for zoning and planning decisions that discriminate against the rights of homeless people who qualify for its protection. Courts often consider emergency shelters as covered “dwellings” for purposes of the FHA, and the populations of homeless people that shelter sponsors seek to serve often qualify as members of classes protected under the FHA.

185 See N.J. STAT. ANN. § 40:55D-66.1 (West 2010); METROPOLITAN KING COUNTY, W.A. ZONING CODE § 21A.08.030 (June 2010). Portland, Oregon permits “short term housing” that exclusively serves victims of sexual or domestic violence as of right in several zones. PORTLAND, OR., PLANNING AND ZONING CODE § 33.285.040(A)(4) (2010). While restricting admission to a domestic violence shelter to women could conceivably be challenged as illegal sex discrimination under the federal Fair Housing Act and state equivalents, no published opinion has ever come to this conclusion. The issue was not raised in Doe v. City of Butler, 892 F.2d 315 (3d Cir. 1989). The issue was raised in Blumhorst v. Jewish Family Services of Los Angeles, 126 Cal.App.4th 993 (2 Dist., 2005), in which a male plaintiff sued multiple domestic violence shelters that received state funding, all of which exclusively served women, for sex discrimination pursuant to California Government Code section 11135, but the court found that the plaintiff lacked standing to sue. See generally SUSAN A. LYNCH, REAL PROPERTY: LAND USE AND ZONING, IN THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER’S HANDBOOK (ABA, Drew et al. eds., 2004).

186 See, e.g., DETROIT, MICH., CITY CODE § 32.0085 (2003) (providing that, for confidentiality and security, shelter for victims of domestic violence are permitted as of right in certain zoning districts). California is currently considering a bill that would increase the confidentiality of domestic violence shelter addresses, 2009 CA A.B. 2762 (NS) (Jun 22, 2010).

187 See Chapter 2, supra, for a discussion of Consolidated Plan requirements. And see Chapter 3, supra, for general coverage of the federal Fair Housing Act. For substantial coverage of fair housing issues, see ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION (West 2010).

188 Determining whether or not any particular emergency shelter is a “dwelling” for purposes of the FHA is a fact issue. See Turning Point, Inc. v. City of Caldwell, 74 F.3d 941, 945 (9th Cir. 1996) (applying the FHA to a homeless shelter); Community House, Inc. v. City of Boise, 468 F.3d 1118, 1123 (9th Cir. 2006) (same with additional discussion); Woods v. Foster, 884 F. Supp. 1169 (N.D. Ill. 1995) (finding homeless shelter was a “dwelling” for purposes of the FHA); Johnson v. Dixon, 786 F. Supp. 1, 4 (D.D.C. 1991) (assuming without deciding that homeless shelter is a “dwelling” under the FHA); Intermountain Fair
Courts have applied the FHA’s “reasonable accommodation” requirement to force localities to give regulatory relief for development proposals designed to serve homeless people who are disproportionately persons with disabilities.\footnote{189}

When churches or religious entities sponsor the development of shelters or transitional housing, they may encounter particular forms of opposition, but also may have special opportunities. The Religious Land Use and Institutionalized Persons Act (“RLUIPA”) prohibits enforcement of land use regulations "that impose[] a substantial burden on the religious exercise of a person, including a religious assembly or institution."\footnote{190} Courts have applied RLUIPA’s predecessor statute to enable the establishment of a religiously-affiliated homeless shelter as “accessory use” to a church, a temple or a mosque.\footnote{191} Some courts have found such uses as permissible accessory uses to religious institutions without reference to the federal statute.\footnote{192}

Several states encourage or enable the creation of emergency shelters and transitional housing. They do so by prohibiting housing discrimination based upon the

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\footnote{189} Housing Council v. Boise Rescue Mission Ministries, 717 F.Supp.2d 1101 (D.Idaho, 2010) (finding a temporary shelter is not a “dwelling” pursuant to the FHA); \textit{Renda v. Iowa Civil Rights Com’n}, 2010 WL 2218611 (Iowa, 2010) (finding a correctional facility is not a “dwelling” pursuant to the FHA). Community notification and permit approval requirements as well as denying or conditioning funding may be illegal if discriminatorily applied to housing for persons protected by the FHA.  
\footnote{190} Turning Point, Inc., 74 F.3d at 945.  
\footnote{193} See, e.g., Greentree at Murray Hill Condo v. Good Shepherd Episcopal Church, 550 N.Y.S.2d 981 (N.Y. Sup. Ct. 1989).}
\end{footnotesize}
income status of the intended occupants,\(^{193}\) requiring localities to plan for the siting of such housing developments in their jurisdiction,\(^{194}\) making state facilities, e.g. state armories, or other public land available as emergency shelters,\(^{195}\) and facilitating their development by reducing localities’ legal liability for establishing their own shelters.\(^{196}\) In some cases, courts find that local laws that would exclude emergency housing are preempted by state laws.\(^{197}\)


\(^{194}\) California’s housing element law requires localities to include analysis of the housing needs of “families and persons in need of emergency shelter,” CAL. GOV. CODE § 65583(a)(7) (West 2010), and to identify adequate development sites for “emergency shelters” and “transitional housing,” CAL. GOV. CODE § 65583(c)(1) (West 2010). See Hoffmaster v. City of San Diego, 64 Cal. Rptr. 2d 684 (Cal. Ct. App. 1997); Disagreed with in Fonseca v. City of Gilroy, 148 Cal.App.4th 1174, n.32 (Cal. App. 2007), review denied (Jul 18, 2007), and declined to extend in St. Vincent’s School for Boys, Catholic charities CYO v. City of San Rafael, 161 Cal.App.4th 989 (Cal. App. 2008).

\(^{195}\) See, e.g., CAL. GOV. CODE § 15301.3 (West 2010). See Chapter 2, supra, for a discussion of California’s Housing Element law.

\(^{196}\) See, e.g., CAL. GOV. CODE § 8698.1 (West 2010).