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FROM THE KEMP COMMISSION: SOUND ADVICE FOR REMOVING BARRIERS TO AFFORDABLE HOUSING

INTRODUCTION

Americans are being forced to pay billions of dollars extra for housing each year. Examples:

◆◆ In Bridgehampton, Long Island, a 102-acre residential construction project that included low-cost dwellings was halted when New York State environmental officials happened to sight in a pond on the property a tiger salamander, a species classified as "endangered." The project was halted over a year until the developer agreed not to build within 100 feet of the pond. To compensate for delay and compliance costs, the developer reduced the number of affordable units within the project by almost one-half. The result: less housing that working Americans could afford.

◆◆ In King County, Washington, which includes Seattle and many surrounding suburbs, there was in 1989-1990 the largest one-year increase in housing prices among major American metropolitan areas. A major cause of this increase was the county's zoning of more than 1,500 square miles of land for only one house per five acres.

◆◆ In Sacramento, California, a developer faced civil and criminal charges if he began to build housing on a dry tract of land that federal officials insisted included 18 acres of wetlands. The developer had to spend nearly \$3.5 million in extra legal and consulting costs to gain final approval for the project. This, naturally, drove up the cost of the housing.

◆◆ In New Jersey, land use regulations have increased the cost of a new home by up to 25 percent.

These are just four of the hundreds of findings by the federal Advisory Commission on Regulatory Barriers to Affordable Housing, which released its report last month. Entitled, "*Not In My Back Yard*" :*Removing Barriers to Affordable Housing*,¹ the report culminates a year-long study funded by the United States Department of Housing and Urban Development (HUD) Secretary Jack Kemp. The aim of the study was to investigate the extent to which regulation and other government policies drive up the cost of new and existing housing.

"Yes" is the answer that the Commission gives to this question, especially in the most expensive metropolitan areas of the country. Growth control measures, zoning ordinances, subdivision ordinances, impact fees, rent control, property taxes, building codes, and environmental regulations all can boost housing costs. The greatest factor in making housing unaffordable, finds the Commission, is open hostility by local residents toward new construction.

These findings are based on 116 written and oral testimonies at hearings in Chicago, Trenton (New Jersey), San Francisco, and Washington, D.C., and hundreds of pages of documents. Chaired by former New Jersey Governor Thomas Kean, a Republican, with former Representative Thomas Ashley, an Ohio Democrat, serving as Vice-Chairman, the 22-member Commission consisted of mayors, construction experts, economists, state housing officials, and heads of nonprofit organizations.²

"*Not In My Back Yard*" recommends 31 measures for government at all levels to make housing more affordable. Among the recommendations:

- 1) **Change federal law and tie federal housing assistance to states' and localities' removal of regulatory barriers to housing.** The report cites numerous state and local laws and regulations that reduce the availability of affordable housing.
- 2) **Monitor performance of states in promoting affordable housing.** The federal government should establish standards for evaluating progress of states in deregulating the housing market.
- 3) **Insist that local governments give a high priority to protecting individual property rights.** When property rights are compromised, the economic value of property declines. The result is less investment in property, reduced supply, and higher prices. If property is taken or devalued because of government regulation, the property owner is to be compensated for the loss.

1 Advisory Commission on Regulatory Barriers to Affordable Housing, "*Not In My Back Yard*" : *Removing Barriers to Affordable Housing* (Washington, D.C.: U.S. Department of Housing and Urban Development, July 1991).

2 Heritage Foundation Director of Domestic Policy Studies Stuart Butler was a Commission member. As such, he has not contributed to nor reviewed this study.

While the Commission did not define “affordable housing,” it did draw upon highly reliable data indicating that prices and rents increased during the 1970s and 1980s, especially in California metropolitan areas and along the Northeastern seaboard. Analyzing data from the National Association of Realtors (NAR) Housing Affordability Index, the report indicates that although prices increased, prospects for home ownership have improved for Americans generally, and for first-time buyers since the early 1980s, when home mortgage interest rates were at record highs.³

During the 1970s and 1980s, increases in home prices were most evident in fast-growing areas in California and the Northeast.⁴ The San Francisco, Los Angeles, New York City, Boston, and Washington areas combined contain roughly 50 million people. It is in these regions that regulations have been most extensive. Their effects have been to raise rents as well as purchase prices. The Commission reported that the Boston, Los Angeles, and San Francisco areas—all with a sizable portion of their rental stock under rent control—saw real rents rise at least 20 percent during the 1980s.

While claims of a crisis in affordable housing are exaggerated, housing costs notwithstanding are too high, even in reasonably priced areas. In many instances this is because government regulations and policies interfere with market forces. These include exclusionary zoning, ordinances, impact fees on construction, excessive property taxes, rent control, and overly restrictive building codes. Some government regulation of course is necessary to protect the health and safety of a community. Yet governments too often use such concerns, especially environmental protection, as a pretext for keeping prices of existing properties high at the expense of those who might wish to buy or rent them.⁵ Increasing the public’s access to housing is not achieved by massive infusion of federal cash.

“NIMBY”: DEFINITION, RATIONALES, AND COSTS

“Not in my back yard!”—or NIMBY!—frequently is the cry of many well-off residents determined to block new real estate development in their neighborhoods. They press local officials to enact a broad array of anti-growth measures which often take the forms of restrictive land use and environmental regulations. Big apartment complexes for low- and middle-income families receive the most hostile reception.⁶

3 See National Association of Realtors, *Home Sales* (Washington, D.C.: National Association of Realtors, monthly).

4 *Homes Sales* data cited in “Not In My Back Yard,” pp. 1-2 through 1-5.

5 Jack Kemp, “Free Housing from Environmental Snobs,” *Wall Street Journal*, July 8, 1991.

6 This is the political reality confronting advocates of greater deregulation. I. Donald Turner, President of the San Francisco-based nonprofit BRIDGE Housing Corporation, builder of several thousand low-cost dwellings,

Echoing the cry "NIMBY!" is "NIMTOO!" by local officials: "Not in my term of office!" City council members, mayors, and other officials fear being branded as rubber stamps for developers building "undesirable" housing complexes, and being made scapegoats for added automobile congestion.⁷ Elections in the past few years in fast-growing Fairfax County, Virginia, and Montgomery County, Maryland, both in the Washington, D.C. area, demonstrate how politically risky it is for local officials to be so tainted. In both instances, voters replaced pro-growth county board members with anti-growth members.

The Kemp Commission identifies five understandable, if not necessarily justifiable, reasons for the NIMBY syndrome. Each is rooted in "fear of change in either the physical environmental or population composition of a community."⁸

NIMBY Reason #1: Residents fear declining property values. Home owners fear that certain forms of housing—small detached houses, town homes, and certain types of apartments—erode home values.

NIMBY Reason #2: Development may change community characteristics. Even when development could raise property values, residents may oppose it because they fear added traffic, commercial development, and destruction of the natural beauty or historic character of the surrounding area.

NIMBY Reason #3: New housing may compromise the quality of public services. An increasing number of residents could require wider streets or a new highway, place excessive demands on water, sewer, and waste treatment capacities, and bring new children into already crowded public schools.

NIMBY Reason # 4: New development may raise taxes. Residents especially worry about paying for new schools, boulevards, and sewer systems.

NIMBY Reason #5: Although hesitant to articulate such fears, established residents are often concerned that development may bring in new neighbors who are racially or ethnically "undesirable." Housing proposals prefaced with terms like "subsidized," "low-cost," or "affordable" particularly are viewed as threats to the continued homogeneity of the neighborhood.

asked in Commission testimony: "How many times have you seen in an evening here, the developer, his attorney, and architect go in and there are three of them against 500 people sitting in the audience screaming for blood, who basically tell every one of the elected officials up in front of them that there will be recall petitions circulated in the morning if this thing is passed tonight?"

7 A 1990 survey of San Francisco Bay area residents reveals that 38 percent see traffic congestion and mass transit service quality as by far the two most important problems facing the area. See "Poll Reveals Gaps Between Renters, Owners," *Housing and Development Report* (San Francisco: Bay Area Council, Vol. 4, No. 1, January 1991), p. 3. This view was especially prevalent among home owners.

8 "Not In My Back Yard," p. 1-5.

These NIMBY concerns lead to new regulation or litigation, which then raises the cost of housing:

First, they reduce the potential local housing supply by forcing developers to drop or scale down housing proposals. They also can do this by prompting developers to substitute expensive for moderately-priced dwellings.⁹

Second, to receive government approval to build new housing, developers often must agree to provide public services or fees to pay for such services. These costs are passed on to new residents. California communities now charge up to \$20,000 in "impact fees" for each new house.

Third, regulation can put land off-limits to development. This, predictably, raises the price of parcels where development is permitted. Higher land costs are then reflected in higher housing costs.

Fourth, a hostile regulatory climate delays approval for building. Local hearings and negotiations can drag on for months, even years, before construction commences. Delays force developers to pay more for labor and materials, interest on construction loans, property taxes, and legal and other consulting fees to help them jump through the paperwork hoop. The nonprofit New York City Housing Partnership tried to build 50 reasonably-priced houses in Brooklyn. The Partnership underwent a mandatory environmental review of 21 months before being allowed to begin construction. The delay drove up the cost of the houses so much that \$500,000 extra in public subsidies was needed to keep houses affordable.¹⁰

Fifth, limiting new housing adds to commuting times and costs throughout a metropolitan area. When housing is expensive near office, commercial, or industrial workplaces, employees often can afford housing only a long distance from their workplace. This adds to their transportation costs.¹¹

FORMS OF OVERREGULATION

Laws, ordinances, and regulations at all levels of government can thwart housing opportunity, especially in areas on the fringes of growth in the metropolis. The most common regulations are growth controls, exclusionary zoning and subdivision ordinances, impact fees, real property taxes, rent controls, building codes, the Davis-Bacon Act, and environmental legislation, including wetlands and species protection. Based on written and oral testimony at the Kemp Commission hearings, and in research and reporting elsewhere, the evidence is overwhelming that regulation can needlessly raise housing costs.

9 See Carl F. Horowitz, "Why New Homes Are Unaffordable," *Richmond Times-Dispatch*, August 22, 1990.

10 Testimony by Kathryn Wylde, President, New York City Housing Partnership, to Advisory Commission on Regulatory Barriers to Affordable Housing, July 11, 1990.

11 For evidence, see Robert Cervero, *Suburban Gridlock* (New Brunswick, New Jersey: Center for Urban Policy Research, 1986).

Growth Control Ordinances

To control growth, local governments, among other things, impose an annual or multi-year ceiling (or even a ban) on the number of residential building permits granted, the number of new residents, the number of permits allowing developers to tap into a sewer system, and on housing construction in designated "green" areas.

Since the early 1970s, state and local governments, especially in fast-growing California, Florida, New Jersey, and Oregon, have put the brakes on long-term growth, driving up land prices in the process. Environmental protection and prevention of traffic congestion are the main reasons for these laws. The Kemp Commission report focuses especially on California, where 907 local growth control or management ordinances had been passed by the end of 1988, by far the most in the nation.¹²

Growth controls raise prices of existing housing and of the vacant lots on which development is allowed.¹³ Under the pretext of addressing problems associated with rapidly increasing population, such controls merely shift the problems elsewhere. A study of limitation on building permits in Davis, California, concludes that house prices jumped 9 percent because of the ordinance.¹⁴

Exclusionary Zoning Ordinances

A zoning ordinance prohibits certain types of housing. These include: apartments and factory-assembled homes; dwellings with certain design modifications; residential per-acre densities above a certain maximum; and lot frontages shorter than a certain minimum. When intentionally used for reasons beyond the protection of health and safety, this zoning becomes what experts refer to as "exclusionary."

When zoning became increasingly popular in the early part of this century, localities used it to prevent incompatible uses of nearby or contiguous land. The justification for zoning is to protect property values from noise, congestion, pollution, and grime from industrial and other land uses that interfere with normal residential neighborhood life. This, however, is also the basis for exclusion. The Kemp Commission finds that what localities often label as "incompatible" uses are multifamily housing, manufactured and modular housing, and accessory apartments, precisely the kinds of housing most experts consider among the most af-

12 "Not In My Back Yard," p. 2-2.

13 For strong evidence, see William A. Fischel, *Do Growth Controls Matter? A Review of Empirical Evidence on the Effectiveness and Efficiency of Local Government Land Use Regulation* (Cambridge, Massachusetts: Lincoln Institute of Land Policy, May 1990).

14 Seymour I. Schwartz, Peter M. Zorn, and David E. Hansen, "Research Design Issue and Pitfalls in Growth Control Studies," *Land Economics*, Vol. 62, No. 3, August 1986, pp. 223-33. This result was observed despite the fact that builders in Davis who receive residential building permits must set aside some units for low-income persons.

fordable. Exclusionary zoning restricts the choices open to developers of vacant land. It raises the cost of housing within a community and surrounding area.¹⁵

Subdivision Ordinances

The subdivision ordinance sets standards for the configuration of private lots and streets, and the location of public lights and signs. These ordinances can be costly and, intentionally or otherwise, exclude reasonably-priced housing. If ordinances force builders to provide services well beyond those demanded by new homeowners, the ordinance becomes a free lunch for existing residents. This is especially true of ordinances requiring improvement of land beyond the immediate location of the building site—what technically is known as “offsite” land. One New Jersey developer told the Commission that as part of approval for a residential development, he had to build a 100-unit senior citizen complex, a 7-acre commuter parking lot, a 200-acre park, and 5 miles of water lines.¹⁶

In Orlando, Florida, builders must place manhole covers for sewer systems no more than 200 feet apart, even though such spacing is unnecessary given current technology governing sewer flow.¹⁷ Ordinances mandating offsite improvements are even less justifiable. Boston-area developer William Stetsen reported in Commission hearings that he had to build a six-mile water main as a condition of approval to build a multifamily housing complex. The new main, in essence, was a bribe to be paid to the community. The extra water capacity was not required by Stetsen’s new housing development.¹⁸

Impact Fees

Since the late 1970s, local governments have used impact fees to make new residents pay for growth. By this, the locality imposes a fee upon the developer at a flat rate per unit, ostensibly representing the locality’s cost of extending public services to new residents.

Constrained by state spending and tax ceilings, local governments cannot easily raise property taxes for the services. This makes the impact fee a politically painless way of making new residents pay for the benefits of growth. Says the Kemp Commission report: “Newer residents are pitted against older ones in the struggle over who pays for infrastructure, and some potential new residents are simply priced out of the housing market.”¹⁹ Consumers of the least expensive new homes are the most penalized by these fees. The impact fee then amounts to a regressive tax that provides incentives for builders to construct housing for consumers able to buy the most expensive homes.²⁰

15 Henry Pollakowski and Susan Wachter, “The Effects of Land-Use Constraints on Housing Prices,” *Land Economics*, Vol. 66, No. 3, August 1990, pp. 315-24.

16 Cited in “Not In My Back Yard,” p. 2-10.

17 “Not In My Back Yard,” p. 2-9.

18 *Ibid.*, p. 2-10.

19 *Ibid.*, p. 2-12.

Impact fees are now a large and growing component of the cost of housing. The San Francisco case is instructive. According to the Bay Area Council, the median impact fee in the San Francisco Bay area jumped 126 percent during 1981-1987 to \$9,110.²¹ The Commission finds the fee to have since doubled in some California communities. Small, nominal fees have become major nuisances. Example: In the early 1980s, the City of San Jose raised the fee for a sewer plant treatment connection from \$23 to \$780 per dwelling.²²

Real Property Taxes

When they must pay high real property taxes, home owners and landlords have less money left for property improvements or additions. In older neighborhoods, high tax rates can lead to decay and even abandonment. This in turn reduces the stock of a community's affordable housing, raising the area's cost of housing even higher.

The rapidly rising costs of public services and large budget deficits have encouraged local governments to raise property taxes. But these tax increases often make matters worse, driving jobs out of the city and reducing private funds available for housing investment.

High property taxes also discourage investment. This is most evident in New York City. Its property tax on single-family residences is among the nation's highest, while its tax on apartment buildings, in which live two-thirds of the city's households, is the nation's highest. Property taxes, moreover, are a growing portion of the costs of running an apartment building. During 1985-1990, the portion of rental operating costs that went to pay property taxes rose from 18 percent to 23 percent.²³

The rash of abandoned rental properties in New York since the mid-1970s is partly the result of the city's high property tax. It has led to the foreclosure and seizure of some 8,000 apartment buildings, now costing the city \$180 million annually to operate or maintain. Half of these buildings are totally vacant, yet the city is reluctant to give them away despite their having very little value.²⁴

20 For evidence, see Fischel, *Do Growth Controls Matter?*; Charles L. Delaney, "Impact Fees, Housing Costs, and Housing Affordability: Who Bears the Impact of Impact Fees?" *University of Florida Journal of Law and Public Policy*, Vol. 1, 1987, pp. 87-101; Thomas P. Snyder and Michael A. Stegman, *Paying for Growth: Using Development Fees to Finance Infrastructure* (Washington, D.C.: Urban Land Institute, 1986).

21 "Not In My Back Yard," p. 2-11.

22 Mark P. Barnebey, Tom MacRostie, Gary J. Schoennauer, George T. Simpson, and Jan Winters, "Paying for Growth: Community Development Approaches to Development Impact Fees," *Journal of the American Planning Association*, Vol. 54, No. 1, Winter 1988, p. 19.

23 Gerard C. S. Mildner, "New York's Most Unjust Tax," *NY: The City Journal*, Vol. 1, No. 4, Summer 1991, p. 26.

24 *Ibid.*, p. 24. The total of buildings seized to date is actually higher than 8,000, some of them already having been sold, donated, or razed. For evidence that the City is reluctant to return these properties to the private market, see Peter Weber, "Scenes from the Squatting Life," *National Review*, February 27, 1987, p. 31.

Rent Control

Rent control is a ceiling on rental increases. The goal is to protect the least well-off tenants from an inflated rental housing market. The outcome is just the opposite: Rent control reduces the stock of affordable housing.

During the late 1960s and throughout the 1970s, rent control became a way to keep rents "affordable." Following the lead of New York City, the cities of Boston, Los Angeles, San Francisco, Washington, D.C., and dozens of smaller communities all enacted rent control. By the early 1980s, over 200 local jurisdictions, containing some 10 percent of the nation's rental housing, mainly in California and Northeastern states, had some system of rent control.

Rent control makes it hard for investors to build, renovate, and operate rental housing profitably. Worse, it encourages landlords to remove existing apartments from the market by deliberately keeping them vacant, by converting them to condominiums and cooperatives, or even by abandoning them.²⁵ Rent control thus creates rental shortages.

According to a 1987 study for New York City, Michael Stegman, of the University of North Carolina City and Regional Planning Department, found that if all of New York City's apartments held deliberately empty because of rent control were put back on the market, the city's 2.5 percent rental vacancy rate would rise to a little over 5 percent.²⁶ A higher vacancy rate would mean lower rents. In Berkeley and Santa Monica, California, rigid rent control ordinances enacted in 1979 resulted in the rental vacancy rate declining by about one-half in less than a decade.²⁷

Rent control typically benefits the well-off and well-connected. A 1986 study published by Arthur D. Little and Associates, a Cambridge, Massachusetts-based consulting firm, reveals that 45 percent of tenants in New York City's rent controlled apartments had incomes of at least \$40,000.²⁸

The Kemp Commission recommends that rent controls be lifted "at least for upper-income tenants," implicitly accepting the rationale that such controls protect middle- and lower-income tenants. Yet since such controls do not protect

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- 25 These practices, and why rent control led to them in New York City, are discussed extensively in William Tucker, *The Excluded Americans: Homelessness and Housing Policies* (Washington, D.C.: Regnery Gateway, 1990), pp. 241-308.
 - 26 Michael A. Stegman, *Housing and Vacancy Report: New York City, 1987* (New York: New York City Department of Housing Preservation and Development, 1987).
 - 27 R.S. Radford, "The Evils of Rent Control," background paper (Sacramento: Pacific Legal Foundation, November 15, 1988), p. 2.
 - 28 Arthur D. Little, Inc., *A Tale of Two Cities: Rent Regulation in New York City* (Cambridge, Massachusetts: Arthur D. Little, Inc., May 1986).

them, the federal government should withhold housing aid to communities with rent control of any kind.

Building Codes

A building code sets standards for materials and design techniques used in construction. The code aims at protecting the public against structural collapse, fire, or other calamity. State, county, and local governments have been using various model building codes since early in this century.

Political pressures for strict building codes are different from those for exclusionary zoning or rent control. Political conflict over such codes occurs mainly among builders, trade unions, and state and local building officials, and in cities, where space is limited and pressure to build stress-resistant elevator buildings is greater.

Over the past several decades, states have used model building codes for their localities. While these model codes permit local builders to use new technologies, or synthetic and prefabricated materials, officials may ban such innovations anyway. For example, the newer plastic plumbing fixtures are as efficient as more expensive cast iron and copper pipes. Building trade unions, however, fearing a decline in the need for labor, often successfully pressure localities to ban them.

Building codes thus increase costs. The Kemp Commission cites the well-publicized example of Bethel New Life, a nonprofit neighborhood group building low-cost housing in Chicago. The organization compared prices on its new town homes on Chicago's West Side with identical town homes in local suburbs. The difference between the \$60,000 price in Chicago and the \$48,000 price in the suburbs was traceable to the city's insistence that Bethel New Life use expensive and often outdated materials and construction methods.²⁹

Environmental Legislation.

The Kemp Commission sees the effects of overzealous environmental regulation on housing costs as so serious that it devotes an entire chapter to the subject. The Commission indicates that much of this legislation has an underlying exclusionary purpose. Says the report: "The impact of environmental regulation on the availability of affordable housing is substantially amplified by the widespread use of environmental protection as a stalking-horse for NIMBY groups bent on opposing unwanted development."³⁰

The federal government is heavily involved in erecting environmental barriers to affordable housing, as are many states and localities. Two significant obstacles to housing affordability are wetlands and endangered species protection.

29 "Not In My Back Yard," p. 3-7.

30 *Ibid.*, p. 4-1.

Wetlands Protection

During the 1980s, the federal government used statutes under the Clean Water Act of 1977 to begin what now amounts to a national zoning program. The federal legislation limits the discharge of pollutants into bodies of water. While Section 404 of the Act makes no mention of "wetlands," federal agencies, especially the Army Corps of Engineers and the Environmental Protection Agency (EPA), have steadily expanded regulatory authority to interpret and enforce Section 404 as if it mandated wetlands preservation.

Environmental groups often prevent any new housing development through wetlands regulation. These organizations have convinced the Bush Administration to institute a "no net loss of wetlands" policy, expanding the definition of a wetland to include soil wet as few as seven days a year. Some 104 million acres of privately owned land that is dry nearly year-round are now subject to federal denial of a building permit, even for small developments.³¹ President Bush and the White House Council on Competitiveness recently have recommended that this amount be reduced by about one-third.

Complicating the federal review process is state involvement, including states where the cost of housing is already high, such as California, Massachusetts, and New Jersey.

This federal regulation inhibits the supply of housing in several ways. By enforcing a policy of "no net loss of wetlands," EPA and the Army Corps of Engineers have made approval for construction of new housing in certain instances contingent upon a developer's willingness to create new wetlands. The acreage created must equal that lost to construction. Creating new wetlands costs from \$50,000 to \$250,000 per acre, with ongoing and maintenance charges amounting to as much as \$150,000 annually.³² With these high costs borne by consumers, developers may have an incentive to build only for the very well-off.

Arbitrary federal decision making compounds this problem. Example: In Sacramento, a developer's consultant identified a six and one-half-acre tract of wetlands in preparing a proposal to build new homes. However, EPA and the Army Corps of Engineers insisted, with no discernible justification, that there were eighteen acres of "wetlands." Faced with civil and criminal court action from the federal government, plus the costs of delay, the developer signed a consent decree accepting the regulators' estimate. The result was a \$3.5 million addition to the total project cost.³³

31 Betsy Carpenter, "In a Murky Quagmire," *U.S. News and World Report*, June 3, 1991, p. 45.

32 "Not In My Back Yard," p. 4-6.

33 Ronald A. Zumbun, Robin L. Rivett, Charles A. Klinge, "Comments of Pacific Legal Foundation to the Advisory Commission on Regulatory Barriers to Affordable Housing" (Sacramento: Pacific Legal Foundation, September 12, 1990) p. 12.

Builders also face arbitrary and contradictory state policies. For example, the New York State Department of Environmental Conservation revoked permits granted by both New York City and the federal government for constructing a 200-unit single-family housing proposal in Staten Island. The Department retroactively declared the project site to be a freshwater wetland. The result: The original builder defaulted on the construction loan and went bankrupt. The new builder, the nonprofit New York City Housing Partnership, had to redesign the project and raise sale prices by 50 percent.³⁴

The Kemp Commission rightly condemns such unchecked abuses of regulatory power and calls for compensation for property owners. The Senate took a large step in this direction this June by passing the Private Property Rights Act as an amendment to the 1991 Surface Transportation Act. The new legislation, co-sponsored by Senators David Boren, the Oklahoma Democrat, and Steve Symms, the Idaho Republican, requires that compensation be made to property owners for federal action that reduces the value of their land.³⁵

Endangered Species Protection

The 1973 Endangered Species Act (ESA) is designed to ensure the survival and well-being of plants and animals. The Act makes it illegal to eliminate or modify the habitat of a plant or animal federally designated as "threatened" or "endangered." The U.S. Fish and Wildlife Service is authorized to curtail human intrusion into areas deemed essential to the species' breeding. Many states have enacted similar legislation.

The federal government is using the ESA to deny building permits. Federal determination of a species' endangered status, moreover, is often time-consuming and sometimes inaccurate. EPA, discovering that a little known species might be endangered, single-handedly can reduce an area's housing supply. If the rare California gnatcatcher, a bird found mainly in Orange and adjacent counties, is declared endangered, it could prevent construction of several large housing developments.³⁶

The wetlands issue often surfaces in disputes over species protection. This is because almost one-third of the animals currently on the endangered species list live in or depend upon wetlands.³⁷ As a result, environmental activists often use the wetlands issue to stop housing construction.

The ESA authorizes the U.S. Fish and Wildlife Service to work with developers in creating a Habitat Conservation Plan to ensure the survival of these species while improving the land. Lack of clearly defined criteria for a Habitat Conserva-

34 Testimony of Kathryn Wylde, p. 2.

35 See Warren Brookes, "War on Property Rights," *Washington Times*, July 18, 1991.

36 Frank Mickadelt, "Rare Bird Threatens Projects," *Orange County Register*, February 5, 1991.

37 Richard Minitzer, "Muddy Waters: The Quagmire of Wetlands Regulation," *Policy Review*, Number 56, Spring 1991, p. 73.

tion Plan, however, greatly lengthens the approval process, imposing extra costs. A developer's expenses can be enormous. Example: A recent study of an Orange County wildlife habitat cost \$300,000.³⁸

Stopping development raises the cost of vacant land and housing. The federal government recently declared a moratorium on home building on 20,000 acres in the western area of Riverside County, California, one of the best areas in southern California to purchase moderately-priced housing. The rationale was protection of the Stephens' kangaroo rat. To protect the rat, the Fish and Wildlife Service proposed a conservation plan costing the developer \$1,950 per acre extra as the price for construction.³⁹ This cost did not reflect increased vacant land in nearby tracts.

Overzealous environmental protection also raises the cost of materials for construction and thus housing costs. An order issued this June 24 in Seattle by U.S. District Judge William L. Dwyer to give the U.S. Forest Service until next March to develop a protection plan for the endangered northern spotted owl could remove up to 8 million acres of forest from timber harvesting, substantially raising the cost of lumber, and thus the cost of housing.⁴⁰

Davis-Bacon Act

The 1931 Davis-Bacon Act requires that prevailing wages be paid to workers on all federally-owned and contracted construction projects costing at least \$2,000. "Prevailing wages" typically mean union wages, which are usually two to three times nonunion levels. Many states and localities have their own versions of Davis-Bacon, some even more stringent than the federal law.⁴¹

Davis-Bacon raises the cost of housing, especially in cities, and is a major obstacle to tenant ownership of public housing projects. One St. Louis tenant leader complained that complying with the Act adds approximately 25 percent to the cost of converting public housing to tenant ownership. This is because under this six-decade-old labor law, it is nearly impossible to hire readily available unskilled labor among project residents and other low-income persons.⁴²

38 "Not In My Back Yard," p. 4-9.

39 Zumbun, Rivett, and Klinge, "Comments," pp. 15-16.

40 "Not In My Back Yard," p. 4-11. Wood products account for about 15 percent of the average construction cost of a new single-family home. For the damage that this listing has had on the logging industry and the general economy in the Pacific Northwest region, see Lou Cannon, "Saw-Toothed Despair Leaves Mark on Northwestern Loggers," *Washington Post*, July 27, 1991.

41 San Francisco's law, for example, requires prevailing wages on most private construction projects. Fortunately, that law was recently struck down by a federal District Court in San Francisco in *Associated Builders and Contractors v. Baca*. See "Prevailing Wage Laws on Private Construction Projects Struck Down," *At Issue*, (Sacramento: Pacific Legal Foundation, June 28, 1991).

42 Cited in John Scanlon, "People Power in the Projects: How Tenant Management Can Save Public Housing," Heritage Foundation *Background* No. 758, April 20, 1990, p. 14.

The Kemp Commission recommends raising the minimum of covered projects from \$2,000 to \$250,000, and classifying low-income housing as residential rather than commercial property.⁴³ Such a recommendation is commendable. Yet, since many housing projects cost more than \$250,000, a better solution would be the repeal of the Davis-Bacon Act altogether.

A POLITICAL STRATEGY FOR DEREGULATION

The Kemp Commission is not the first federal panel that has looked extensively into land use, environmental, and other regulatory barriers to the creation of more affordable housing.⁴⁴ The most noteworthy study was the 1982 President's Commission on Housing. Over the years there has also been some thorough private research on the effects of housing regulation.⁴⁵ Both government and private sector studies made recommendations similar to those in the Kemp Commission report.

Among the things setting apart "*Not In My Back Yard*" from its predecessors are recommendations that Washington promote deregulation by withholding federal housing aid to states and localities not removing exclusionary policies, and that state and local governments carry a large load of any deregulatory agenda. The key elements of the Kemp Commission's battle plan are:

1) States should bear the major responsibility for deregulating the housing market.

[Housing] markets are simply too diverse to be regulated at the federal level. Likewise, although most regulation of land use and development occurs at the local level, many local governments are unlikely...to undertake the kinds of regulatory reform that would create a meaningful number of affordable-housing opportunities.⁴⁶

The states have the constitutional authority to pressure localities without necessarily creating new government bureaucracies. States are also more sensitive than the federal government to local political and economic conditions. States can reduce barriers to affordability by reviewing local regulation and judicial intervention, as well as by offering inducements for localities to reduce unnecessary regulation over the housing market.

43 "*Not In My Back Yard*," p. 6-9.

44 The number of federal commissions and panels is impressive. It includes: the President's Committee on Urban Housing (Kaiser Commission), the National Commission on Urban Problems (Douglas Commission), U.S. Department of Housing and Urban Development, and the National Housing Task Force.

45 See Stephen R. Seidel, *Housing Costs and Government Regulations: Confronting the Regulatory Maze* (New Brunswick, New Jersey: Center for Urban Policy Research, 1978).

46 "*Not In My Back Yard*," p. 7-1.

2) Change federal law to tie the availability of federal housing assistance to states and localities to removal of regulatory barriers.

The National Affordable Housing Act of 1990 created the Comprehensive Housing Affordability Strategy (CHAS), a process requiring recipients of certain kinds of federal housing assistance to, among other things, identify and remove barriers to affordable housing. The law, however, explicitly forbids HUD from allocating or denying assistance based upon local policies. It also forbids judicial review of the process. The Commission, therefore, urges Congress to amend the 1990 Act to allow HUD to withhold aid based on a state's inaction or refusal to remove regulatory barriers to affordable housing.

3) Give technical assistance to the states and require the federal government to remove its own regulatory barriers.

Some twenty federal Cabinet departments and independent agencies have overlapping jurisdiction on housing issues. To avoid needless duplication of enforcement, the Commission recommends that Congress give the Office of Management and Budget power to review and revoke unnecessary federal rules that compromise the supply of housing.

The Commission also recommends that the federal government develop reasonable model codes, ordinances, and standards for localities to emulate, and calls for strengthening HUD's Office of Regulatory Reform; this would be the key federal agency to execute the recommendations of the Commission report. The agency would also supply valuable information on the impact of certain types of regulation to state and local governments, as well as to the general public.

With federal encouragement, localities can be convinced of the value of greater regulatory flexibility. Some states and communities already have begun promoting affordability. Examples:

- ◆ Many communities have for years adopted greater flexibility in zoning and other land use control.⁴⁷
- ◆ Some communities have instituted "flexible zoning," doing away with the traditional zoning map in all but name, and instead giving developers a broader latitude as long as they meet certain performance criteria.⁴⁸
- ◆ Eighteen states have made it illegal for localities to enact rent control ordinances.

47 See Welford Sanders, *et al.*, *Affordable Single-Family Housing: A Review of Development Standards* (Chicago: American Planning Association, 1984).

48 See Douglas R. Porter, Patrick L. Phillips, and Terry J. Lassar, *Flexible Zoning: How It Works* (Washington, D.C.: Urban Land Institute, 1988).

- ◆ San Diego has changed its building code to allow construction and renovation of inexpensive single-room hotel apartments, valued between \$220 and \$390 a month, greatly reducing homelessness in the process.⁴⁹

The NIMBY syndrome ultimately can be eliminated when local governments are convinced that it is in their interest to change. This means that Washington should supply evidence countering the erroneous claim that moderately priced housing normally lowers neighboring property values.⁵⁰

CONCLUSION

The Kemp Commission Report can bring quality housing within reach of a greater number of Americans. High property taxes, rent controls, growth controls, impact fees, overzealous environmental rules and other regulatory barriers to affordable housing can all be mitigated. More than simply documenting evidence of government overregulation of housing construction and rehabilitation, the Kemp Commission proposes a sensible political strategy to combat it. The keys to the strategy are expanding the role of the states, and employing the federal government as a source of information and technical assistance.

Massive and costly large-scale new federal housing programs are not necessary. Encouraging cooperation among all levels of governments and between the government and the housing industry should be the key federal role. Using information and persuasion, federal agencies can help states and localities remove barriers to affordable housing. Playing the role of an honest broker rather than that of a spending specialist, the federal government will be best able to improve housing opportunities for Americans at all income levels.

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49 "Not In My Back Yard," p. 3-4.

50 A literature survey of fourteen out of fifteen studies on the issue found that subsidized, special purpose, or manufactured housing had "no significant negative effects" upon the values of nearby market-rate developments. See Department of Housing and Community Development, *The Effects of Subsidized and Affordable Housing on Property Values: A Survey of Research* (Sacramento: State of California, Department of Housing and Community Development, 1990), cited in "Not In My Back Yard," p. 8-11.