

More Money Coming Your Way?

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In August 2009, Senate Banking, Housing, and Urban Affairs Committee Chairman, Chris Dodd (D-CT), introduced the Livable Communities Act of 2009[1] ("Act") designed to "help towns and regions across the country plan and implement development projects that integrate their community's needs for transportation, housing, land use, and economic development."[2] Dodd's legislation is cosponsored by Senators Robert Menendez (D-NJ), Jeff Merkley (D-OR), Michael Bennet (D-CO), and Dan Akaka (D-HI). In the House of Representatives, a companion bill was introduced in March 2010 by Congressman Earl Blumenauer (D-OR).[3] In short, the Act establishes the following: the Office of Sustainable Housing and Communities; the Interagency Council on Sustainable Communities; the Comprehensive Planning Grant Program; and the Sustainability Challenge Grant Program.

The sponsors of the bill, and others in the federal government, seem to be moving quickly on the bill. Senator Dodd has made the passage of the bill a priority stating, "I only have about eight to 10 months. My goal is to see the Livable Communities Act become law before I retire."[4] The Department of Housing and Urban Development (HUD) recently announced the creation of the Office of Sustainable Housing and Communities (OSHC), which will:

> provide funding to a wide variety of multi-jurisdictional and multi-sector partnerships and consortia, from Metropolitan Planning Organizations and State governments, to non-profit and philanthropic organizations. These grants will be designed to encourage regions to build their capacity to integrate economic development, land use, transportation, and water infrastructure investments, and to integrate workforce development with transit-oriented development.[5]

Under the Act, the OSHC is responsible for coordinating federal policies and grant programs that "foster livable communities," including encouraging sustainable development, developing comprehensive regional plans, promoting energy-efficient communities/housing, providing "location-efficient" housing choices for all income groups, and encouraging transit-oriented development. Interestingly, OSHC is also responsible for conducting a study on incentives, such as fee reductions and interest rate adjustments, that would encourage lenders and home-buyers to enter into mortgage agreements for "energy-efficient mortgages" and mortgages for the above-mentioned "location-efficient" properties.

The second part of the Act promotes interagency cooperation for sustainable housing and communities. This process also has started. Before the bill was introduced into Congress, HUD and the U.S. Department of Transportation (DOT) announced an "interagency partnership" with the goal of having "every major metropolitan area in the country conduct integrated housing, transportation, and land use planning and investment . . . [and] to make planning grants available to metropolitan areas, and create mechanisms to ensure those plans are carried through to localities."[6] The Act details the official duties of an interagency council[7] to include conducting outreach to state and local governments, creating a clearinghouse of "best practices" regarding sustainable development, and working with OSHC to implement grant programs.

Sections of the Act that may be of more interest to local government attorneys concern the grants listed in the bill. The Act establishes a Comprehensive Planning Grant Program, available to local governments which are part of a "consortium of units of general local governments" and an "eligible partner." An "eligible partner" means a metropolitan planning organization, a rural planning organization, or a regional council and/or a state. Monies received through the grant can be used towards projects that: coordinate land use, housing, transportation, and infrastructure planning processes and assessments across jurisdictions and agencies; identify potential regional partnerships for developing and implementing a comprehensive regional plan; develop or update a regional comprehensive plan or develop goals and strategies for an existing plan; or to implement local zoning and other code changes necessary to implement a comprehensive regional plan.[8] The total amount distributed to eligible entities under this grant program will be $100 million per year over a four-year period. Smaller population areas could be awarded up to $750,000, and large population areas would be eligible for up to $5 million.

The final substantive portion of the Act details the Sustainability Challenge Grant Program. These grants promote integrated transportation, housing, energy, and economic development; promote sustainable and location-efficient development; and implement projects identified in a comprehensive regional plan. In particular, grants will be awarded to projects that promote transit-oriented development, mixed-use development, mixed-income development, improvements to public

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Exculpatory Contracts

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was held unenforceable as against public policy— the use of the term "fault" in the waiver, which stated that visitors assumed all liability without regard to fault and agreed to hold facility harmless for any injuries incurred, made the waiver unenforceable as overly broad and all-inclusive, and did not specify that visitors were releasing the facility for negligent acts; second, it did not provide the signer with adequate notification of the waiver's nature and significance).

23. *See Enforceable Exculpatory Agreements: Do They Still Exist?* Wisconsin Lawyer, Vol. 78, No. 8 (Aug. 2005). ML

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States Reach Agreement on Buy American (5 Feb. 2010). *See* the Foreign Affairs and International Trade Canada website at http://www.international.gc.ca.

85. Ontario Ministry of Economic Development and Trade (MEDT) News Release, *Canada and the United States Reach Agreement on Buy American: McGuinty Government Supports Important Breakthough. See* MEDT website at http://www.ontariocanada.com/ontcan/1medt/en/news_2010_02_12_en.jsp.

86. *Agreement Between the Government of Canada and the Government of the United States of America on Government Procurement*, Part B, Market Access, Thresholds. *See* the Foreign Affairs and International Trade Canada website at http://www.international.gc.ca for the text of the agreement.

87. *Federal Canadian government announcement Canada-European Union: Comprehensive Economic and Trade Agreement* (CETA) *Negotiations. See* the Foreign Affairs and International Trade Canada website at http://www.international.gc.ca. ML

Federal

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transportation, promoting bicycle and pedestrian paths, workforce housing, and other projects that fall under the broad umbrella of "smart growth." The Act appropriates $3.75 billion over three years, starting in 2011, for the program. Areas with population under 200,000 may apply for up to $15 million while large population areas with over 500,000 may be awarded up to $100 million. Some rural states and communities see themselves at a disadvantage with the Act. Senator John Thune (R-SD) has stated that the Act "is a program that's going to overwhelmingly focus on urban areas."[9] Even so, this may very well be a bill that will pass President Obama's desk and it will be worth your local government's time to keep track of S.1619's progress.

Notes

1. Livable Communities Act of 2009, S. 1619, 111th Cong. (2009).
2. Press Release, U.S. Senator Chris Dodd, *Dodd Announces Initiative to Coordinate Housing, Transportation, and Environmental Policies* (Aug. 6, 2009) (on file with author).
3. Livable Communities Act of 2010, H.R. 4690, 111th Cong. (2010).
4. Don Stacom, *Dodd Promises to Promote 'Smart Growth' Housing Plans*, Hartford Courant, March 9, 2010, at http://articles.courant.com/2010-03-09/news/hc-hartford-livable-0309.artmar08_1_smart-growth-plans-housing-authority-directors-sen-christopher-dodd. (last accessed Mar. 15, 2010).
5. Press Release, U.S. Dept. of Housing and Urban Development, HUD *Secretary Donovan Announces New Office of Sustainable Housing and Communities* (Feb. 4, 2010) (on file with author).
6. Press Release, U.S. Dept. of Housing and Urban Development, *HUD and DOT Announce Interagency Partnership to Promote Sustainable Communities* (Mar. 18, 2009) (on file with author).
7. Livable Communities Act of 2009, S. 1619, 111th Cong. § 6 (2009). The Act's Interagency Council would be expanded to include the Administrator of the Environmental Protection Agency and "such representatives from other Federal agencies . . . as the President may prescribe."
8. Livable Communities Act of 2009, S. 1619, 111th Cong. § 7(b) (2009).
9. Elana Schor, *Dodd Vows to Pass Livability Bill Amid Skepticism From Rural Senators*, dc.streetsblog.com, available at http://dc.streetsblog.org/2010/03/09/dodd-vows-to-pass-livability-bill-amid-skepticism-from-rural-senators/. ML

Supreme Court

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the Act was concerned with the *consequences* of the unlawful employment practice. Benna Ruth Solomon, Corporation Counsel for the City of Chicago, argued that the time when the injury occurred or impact was felt was when the tiered list or priority pool was first created. That was the only practice that had adverse impact as contemplated by the statute, and "in this case the defining feature, namely disparate impact, in the sense defined by the statute, required by the statute to limit or classify in a way that denies people employment opportunities based on race — that defining feature was absent within the charging period." Regardless of how many hiring rounds occurred, it "always goes back to the test and the list." Ultimately, what the petitioners were asking the Court to do was to validate new "opportunities to challenge exactly the same thing that they…would have challenged if they had filed a charge promptly." Illustrating the City's dilemma further, she added that, "in a case like this, it – it wasn't possible simply to take the list down. The Court's opinion in *Ricci* makes that quite clear."

The Court's decision is expected by this June. ML