

NOTE

HOUSING FOR SOME: CLOSING THE LOOPHOLE OF SECTION 80-IBA

*Zachary Silvers**

INTRODUCTION

Jamil Pawar is eight months pregnant and living under a bridge in the Chembur neighborhood of Mumbai.¹ She is somewhere between sixteen and eighteen years old; she cannot remember her age and has no family to remind her.² The lack of basic amenities like sanitation and electricity is not Jamil's immediate concern, because she recently lost her foot after a drunk driver plowed through her encampment.³ Her mother-in-law considers Jamil lucky, because only a year ago, her seven-year-old grandson was killed by a speeding driver while he was playing near the edge of the slum.⁴

Jamil Pawar's story is but one of millions, as India has more than seventy-eight million homeless citizens.⁵ Many are migrants from rural communities and are forced to live in urban slums without basic amenities like sanitation, clean water, and power.⁶ Fortunately, Prime Minister Modi launched his Housing for All program that aims at housing every

* J.D. expected 2018, The George Washington University Law School; B.A. 2015, The University of Texas at Austin College of Liberal Arts.

1. Shalini Nair, *Homeless People in Mumbai: When the Sky Is the Roof*, INDIAN EXPRESS, <http://indianexpress.com/article/india/india-others/homeless-in-mumbai-when-the-sky-is-the-roof/> (last updated June 6, 2015) [<https://perma.cc/NZ6R-9J7U>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Global Homelessness Statistics*, HOMELESS WORLD CUP, <http://www.homelessworldcup.org/homelessness-statistics/#asia>. (last visited Dec. 20, 2017) [<https://perma.cc/M8AG-D9F5>].

6. *See Urban Poverty in India, Slamming the Slums*, POVERTIES (May 3, 2013), <https://www.poverties.org/blog/urban-poverty-in-india> (describing Indian slum growth as being linked to rural migration) [<https://perma.cc/FX8Q-NL69>]; *33% of Slum Population Live Without Basic Facilities*, TIMES INDIA (Oct. 3, 2013), <http://timesofindia.indiatimes.com/india/33-of-slum-population-live-without-basic-facilities/articleshow/23434271.cms> (discussing lack of basic amenities in India's slums) [<https://perma.cc/MA6V-YRRB>]; *About Half of Slums Reported No Change in Basic Amenities, Says National Sample Survey Report*, ECON. TIMES (Dec. 30, 2014), <http://economictimes.indiatimes.com/news/politics-and-nation/about-half-of-slums-reported-no-change-in-basic-amenities-says-national-sample-survey-report/articleshow/45689522.cms> (citing government report finding no improvement in provision of amenities to slum dwellers from years 2007–2011) [<https://perma.cc/TA59-WZXJ>].

Indian citizen by 2022.⁷ Critical to the scheme is a 100% deduction for profits derived from housing developments that have been approved by the relevant government authority and contain units between thirty and sixty square meters.⁸

Despite Prime Minister Modi ostensibly seeking to house India's poorest, the drafters of the new tax deduction failed to include a provision requiring a certain percentage of the project's occupants to be from the Economically Weaker Sector (EWS) or the Lower Income Group (LIG).⁹ This omission creates the possibility that developers will build apartments between thirty and sixty square meters but rent them at rates that India's poor and homeless cannot afford. Profit-minded developers will likely recognize that the value of the deduction increases proportionally to increases in rent charged because 100% of profits can be deducted so long as the apartments meet the size requirements and have been approved by the relevant authority.¹⁰

However, the power to approve building plans is historically coveted. After decades of the federal government centralizing its power, states have developed the same centralizing pattern even when a constitutional amendment seemingly urges the states to devolve this very power to municipal governments.¹¹ State and parastatal agencies continue to infringe upon the jurisdiction of municipal housing authorities, functioning as the competent authority to approve building plans.¹² The danger of state jurisdictional infringement increases when large private-public partnerships are involved or when the state doubts the municipality's technical expertise in the matter.¹³

7. MINISTRY OF HOUS. & URBAN POVERTY ALLEVIATION, HOUSING FOR ALL (URBAN) SCHEME GUIDELINES i (Mar. 2016) [hereinafter HOUSING FOR ALL (URBAN) SCHEME GUIDELINES].

8. See Income-tax Act, No. 43 of 1961, *amended by* Finance Act, No. 28 of 2016, § 80-IBA (legislation codifying profit deduction and enumerating developer qualifications).

9. *Id.*

10. *Id.* at (2)(b), (e).

11. See Sharmila L. Murthy & Maya J. Mahin, *Constitutional Impediments to Decentralization in the World's Largest Federal Country*, 26 DUKE J. COMP. INT'L L. 79, 101–06 (2015) (describing central government's efforts to centralize power and states and citing Comptroller and Auditor General's finding that states failed to devolve powers to states per the Memorandum of Agreement); INDIA CONST. art. 243W (allowing for states to devolve "Twelfth Schedule powers," including urban planning and building construction regulation, to municipalities); INDIA CONST. sched. 12.

12. See John Harriss, *'Participation' and Contestation in the Governance of Indian Cities*, 3 SIMONS PAPERS IN SECURITY AND DEVELOPMENT 1, 6–8 (2010) (discussing state infringement of municipal urban planning in "corporate economies").

13. Leslie Wellington, *Protecting India's Slum Dwellers: Rajiv Awas Yojana's Slum-Free Cities Program and the Seventy-Fourth Constitutional Amendment Act*, 39 BROOK. J. INT'L L. 915, 935–37 (2014) (describing how municipal exclusion from large private-public partnerships is due in part to strong relationships between the central and state governments and the capitalist class);

This Note outlines the difficulties in closing the loophole of the new 100% profit deduction with a simple EWS and LIG occupancy requirement. By exploring the history surrounding the devolution of the power of building approval, this Note aims to reveal the improbability of states or municipalities creating regulations to fix the deduction's drafting error. This leaves only the central government, existing outside the jurisdictional battle between states and municipalities, to intervene and craft an amendment that prevents developers from exploiting the deduction to the detriment of India's most vulnerable families—like Jamil Pawar and her mother-in-law.

I. BACKGROUND

A. *The Housing for All Program*

India is facing a housing crisis. According to the federal Ministry of Housing and Urban Poverty Alleviation, 18.6 million homes need to be built to house all of India's homeless citizens.¹⁴ To address this problem, Prime Minister Modi launched his bold housing initiative called *Pradhan Mantri Awas Yojana* ("Housing for All—Urban") in June of 2014,¹⁵ which is to be implemented in the years 2015–2022.¹⁶ The stated goal of Housing for All is that "[b]y the time the Nation completes 75 years of its independence [2022], every family have a pucca house with water connection, toilet facilities, 24x7 electricity supply and access."¹⁷

To accomplish the prime minister's mission, the Housing for All program has rolled out a number of different schemes, all of which either stimulate development of additional housing or incentivize the purchase of homes. The "In Situ" Slum Redevelopment Program aims to "leverage the locked potential of land under slums" with a two-step redevelopment of the land.¹⁸ The first step requires a "slum rehabilitation component," in which the residents of slums are relocated to alternative housing equipped with "basic civil infrastructure."¹⁹ The second step involves a "free sale component" in which private developers submit plans for redevelopment of the newly unlocked land.²⁰ Developers are encouraged to

Murthy & Mahin, *supra* note 11, at 102 (claiming lack of technical expertise as one impediment to devolution of administrative powers to municipal authorities).

14. *Housing Shortfall for EWS, LIG Segments at 95%: CSE*, ECON. TIMES, <http://economictimes.indiatimes.com/wealth/real-estate/housing-shortfall-for-ews-lig-segments-at-95-cse/articleshow/51291416.cms> (last updated Mar. 7, 2016) [<https://perma.cc/V4DQ-YCBP>].

15. HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7.

16. *Id.* at 1.

17. *Id.* at i.

18. *Id.* at 2.

19. *Id.* at 4.

20. *Id.*

build housing for the slum's inhabitants and any remaining unused portion of the slum must be "utilised for rehabilitating slum dwellers living in other slums or for housing for other urban poor."²¹

The second major initiative under the Housing for All scheme is the Credit Linked Subsidy.²² This program provides an interest rate subsidy to beneficiaries from the EWS and LIG on loans for purchase of a home or construction of certain improvements.²³ In India, EWS families are those with an annual income up to Rs. 3 lakh,²⁴ and LIG families are those with an annual income between Rs. 3-6 lakh.²⁵ The Credit Linked Subsidy reduces the beneficiary's annual interest rate on the qualifying loan by 6.5% for up to fifteen years.²⁶ To qualify, the loan cannot exceed Rs. 6 lakhs, and the size of the home cannot exceed thirty square meters and sixty square meters for EWS and LIG families, respectively.²⁷

The third program under the Housing for All initiative is Affordable Housing in Partnership (AHP).²⁸ The program allows developers to receive a lump subsidy of Rs. 1.5 lakh per EWS unit in a qualifying project.²⁹ A qualified development must have at least thirty-five percent of the units "for [the] EWS category," and at least 250 units must be installed.³⁰

As a part of the 2016–17 federal budget, India unveiled its most aggressive tax incentive under the Housing for All program to date: a 100% deduction of profits generated from qualifying low income housing projects.³¹ To qualify for the deduction, the units within the development cannot exceed thirty square meters for projects in Chennai, Delhi, Kolkata, and Mumbai, and sixty square meters everywhere else.³² Addition-

21. *Id.*

22. *Id.* at 6.

23. *Id.*

24. *Id.* at iii, 2. One lakh is equal to 100,000. NATIONAL REPOSITORY OF OPEN EDUC. RES., KNOWING OUR NUMBERS 7, http://nroer.gov.in/nroer_team/file/readDoc/55b23f2881fccb054b6be25f/ (last visited Dec. 20, 2017) [<https://perma.cc/C53M-8V2V>].

25. HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at 2.

26. *Id.* at 6.

27. *Id.*

28. *Id.* at 9.

29. *Id.*

30. *Id.* at 10.

31. *Budget 2016 Gives Massive Push to Affordable Housing Supply and Construction Activity, Seeks to Spur Demand*, ECON. TIMES, <http://economictimes.indiatimes.com/wealth/real-estate/budget-2016-gives-massive-push-to-affordable-housing-supply-and-construction-activity-seeks-to-spur-demand/articleshow/51191895.cms> (last updated Feb. 29, 2016) [<https://perma.cc/ZCJ4-WQ2H>].

32. Income-tax Act, No. 43 of 1961, *amended* by Finance Act, No. 28 of 2016, § 80-IBA(2)(e).

ally, no more than three percent of the aggregate buildup within the project can be dedicated to commercial development.³³ Finally, the building plans must be approved by the “competent authority” before qualifying for the deduction.³⁴ “Competent authority” is defined as “the authority empowered to approve the building plan.”³⁵ Later Sections will discuss this in greater detail.

The Finance Bill of 2016 amended the Income-tax Act of 1961 to include Section 80-IBA, which codifies the 100% profit deduction.³⁶ The law became effective on April 1, 2017, although project approvals began on June 1, 2016 and will continue until March 31, 2019.³⁷

Noticeably absent from Section 80-IBA is any sort of occupancy requirement requiring a percentage of the housing under the program to be occupied, and continue to be occupied, by EWS or LIG families.³⁸ There is such a requirement in the AHP subsidy, which requires thirty-five percent of the units to be occupied by EWS families for a developer to receive a subsidy.³⁹ The Section 80-IBA deduction, however, seems to assume that the square meters restriction, which requires the units within qualifying projects to be no more than thirty or sixty square meters, depending on the city, is sufficient to ensure that India’s poorest families will benefit from the scheme.⁴⁰

Consider the following hypothetical to understand the problem with this logic. Imagine you are a developer with the opportunity to build either Project *A* or Project *B*. Project *A* is comprised of 100 units, all of which are sixty square meters. Thirty-five of the units within Project *A* are guaranteed to be occupied by India’s poorest demographic, the EWS group. Project *B* is also comprised of 100 units, all of which are also sixty square meters. However, there is no restriction on who may occupy the units in Project *B*.

Both projects meet the requirements of Section 80-IBA, as written.⁴¹

33. *Id.* at (2)(c).

34. *Id.* at (2)(a).

35. *Id.* at (6)(b).

36. The Finance Bill, 2016, No. 18, Acts of Parliament, 2016 (India); Income-tax Act, No. 43 of 1961, *amended by* Finance Act, No. 28 of 2016, § 80-IBA.

37. Income-tax Act, No. 43 of 1961, *amended by* Finance Act, No. 28 of 2016, § 80-IBA(2)(a).

38. *See id.* (square meter restriction is only requirement directed at protecting low income families).

39. HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at 10.

40. *See* Income-tax Act, No. 43 of 1961, *amended by* Finance Act, No. 28 of 2016, § 80-IBA (offering no protection for low income families except square meter restriction); HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at i (providing that goal of Housing for All is that “every family will have a pucca house with water connection, toilet facilities, 24x7 electricity supply and access.”).

41. *See* Income-tax Act, No. 43 of 1961, *amended by* Finance Act, No. 28 of 2016, § 80-IBA

Which project would you prefer to build? Seeing as the deduction is equally available to developers that fill these small units with tenants who can pay higher rates than EWS families, developers will choose Project *B* to maximize the value of the 100% profit deduction.

As written, the law allows profit-minded developers to game the system—building small apartments, charging higher rents, and still enjoying the deduction. This possibility is troubling both on a humanitarian and political level, as Prime Minister Modi has expressly made the provision of housing to India's poorest communities, including the EWS group, a goal of his administration.⁴²

How can this drafting error be corrected before the window of project approvals closes in early 2019?⁴³ To fully answer this question, one needs a better understanding of “competent authorities” and the power to approve building plans.

B. *A History of Centralization*

As mentioned above, a developer can benefit from the 100% profit deduction of Section 80-IBA only if the relevant “competent authority” has approved the building.⁴⁴ However, who wields this power is unclear. State and municipal housing authorities have engaged in a decades-long struggle for the power of not only building approval, but also urban planning at large.⁴⁵

To fully understand the overlapping jurisdictions of state and municipal housing authorities, one must first understand the states' incentive for maintaining control over building approval. This is largely a consequence of the history of power centralization by the Indian central government.⁴⁶ Despite adopting a model of federalism, the central government began a campaign of centralization from the outset.⁴⁷ In the 1960s and 1970s, Prime Minister Indira Gandhi dissolved state power numerous

(developer must comply with certain other restrictions, including completing project within three years; however, such requirements are not relevant to the hypothetical).

42. HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at i.

43. Income-tax Act, No. 43 of 1961, *amended by* Finance Act, No. 28 of 2016, § 80-IBA(2)(a).

44. *Id.*

45. *See* Murthy & Mahin, *supra* note 11, at 111–13 (analyzing states' unwillingness to devolve powers, including urban planning powers enumerated in the Twelfth Schedule, despite their being empowered to do so under India's 74th Constitutional Amendment (74th CAA), passed in 1992).

46. *See id.* at 104–05, 113 (arguing that central government's encroachments on state authority caused states to believe that devolving urban planning powers to municipalities would “exacerbate their already subordinate position vis-à-vis the central government”).

47. *See* INDIA CONST. art. 1, § 1 (“India . . . shall be a Union of States.”); Murthy & Mahin, *supra* note 11, at 104–105.

times by invoking Article 356, which allowed the prime minister to revoke states' authority when he or she perceives that the state failed to uphold the Constitution.⁴⁸ Further centralization occurred under the proclamation of emergency declared under Article 250 of the Constitution from 1975–1977, giving the central government power to legislate on matters normally left to the states.⁴⁹ The Janata Party, upon assuming control of Parliament in 1977, sought to eliminate state assemblies altogether, without even invoking Article 356.⁵⁰

Thus, for decades, the Indian states felt the brunt of central government power grabs. Despite the states having their authority constitutionally enshrined in the State List, their powers were routinely diminished, and at times, wholly eliminated.⁵¹ Though the centralizing tendencies of the central government declined over time, this history left the states protective of their authority.⁵² Within the housing sphere, state governments have never fully relinquished the power of building approval.⁵³

The 1970s and 1980s witnessed another important development in the consolidation of state authority over building approval: the advent of the parastatal authority.⁵⁴ Although created by state governments, parastatal authorities function more like corporations and enjoy legal independence from other public service providers.⁵⁵ They were introduced into Indian politics to leverage a private-sector model to bring about the efficient provision of public services.⁵⁶ Parastatal agencies were filled with technical specialists with the necessary expertise to satisfy the goals of their parent-state government.⁵⁷ Soon, housing boards and city planning parastatal agencies emerged with the power to approve building plans.⁵⁸

48. INDIA CONST. art. 356; see Murthy & Mahin, *supra* note 11, at 105 (describing Indira Gandhi's use of Article 356).

49. See INDIA CONST. arts. 246, 250 (Article 246 incorporates the State and Concurrent Lists, which enumerate areas in which the state governments have authority to legislate. Article 250 vests power with Parliament to wield powers under the State List when a Proclamation of Emergency is in effect); Murthy & Mahin, *supra* note 11, at 104. Relevant to this Note, subsection 18 of the State List gives states authority to legislate over "land" and "rights in or over land." INDIA CONST. sched. 7.

50. Murthy & Mahin, *supra* note 13, at 105.

51. *Id.* at 104–05 (discussing invocations of Articles 250 and 356, and the Janata Party's attempts to dissolve state assemblies).

52. *Id.* at 111–12.

53. See Wellington, *supra* note 13, at 934 (claiming that decentralization efforts in land use planning and development have been "undermined by state governments").

54. See Murthy & Mahin, *supra* note 11, at 115.

55. *Id.*

56. See *id.*

57. See *id.* (technical staff of parastatal agencies benefitted their parent-state by providing an "efficient way to manage the delivery of public services" while "reduc[ing] the potential for political interference").

58. See, e.g., Maharashtra Housing and Area Development Act, 1976, No. 28 of 1977, §§ 3–

In 1989, a municipal monkey-wrench was thrown into the political apparatus. Proposals for the sixty-fourth and sixty-fifth Constitutional Amendments were introduced to Parliament to grant panchayats⁵⁹ and municipalities constitutional status, thereby recognizing a third local tier of government on the local level, and endowing its constituent bodies with substantive authority.⁶⁰ However, the proposals failed, largely due to protests from representatives within the National Congress that perceived the municipalization of the country as an infringement on their state's constitutional powers.⁶¹ In their eyes, creation of a third tier of government would inevitably lead to the dilution of state authority because any powers devolved to the municipalities would previously have been under the states' authority.⁶² Nevertheless, many held the belief that decentralization of the Indian government was necessary to make politics accessible to more Indians.⁶³ Just three years later, in 1992, the seventy-fourth Constitutional Amendment Act (74th CAA) was passed, paving the way for the creation of municipal governments.⁶⁴

C. *Resistance to the 74th Constitutional Amendment Act*

To get around the states' resistance to the creation of municipalities with substantive authority, the 74th CAA proposed a novel solution: the states themselves would have the option, though not the obligation, to devolve powers vested in them to the municipal governments.⁶⁵ Article 243W of the 74th CAA provides that "the Legislature of a State *may*, by law, endow . . . the Municipalities with such powers and authority . . . with respect to . . . the performance of functions and the implementation of schemes . . . including those in relation to the matters listed in the Twelfth Schedule."⁶⁶ In *Ranga Reddy Dist. Sarpanches Ass'n v. Gov't*

4, 28(1)(a), (c) (establishing parastatal Maharashtra Housing and Area Development Authority in state of Maharashtra and vesting it with the authority to approve building plans); Karnataka Housing Board Act, 1962, No. 10 of 1963, *amended by* Act No. 8 of 1988, §§ 3, 17–18A (establishing parastatal Karnataka Housing Board in state of Karnataka and vesting it with the power to frame and execute housing schemes, land development schemes, and infrastructure development).

59. Panchayats are local governments established in rural areas in India. INDIA CONST. art. 243(d).

60. Murthy & Mahin, *supra* note 11, at 107 (suggesting that one reason for amendments' introduction was Prime Minister Rajiv Gandhi's desire to limit power of states following loss of state seats by members of his Congress Party).

61. *See id.* (citing Crispin Bates and Subho Basu's *Rethinking Indian Political Institutions*).

62. *See* INDIA CONST. art. 243W, §§ 1–2, 10 (containing list of the powers to be devolved to municipalities, which include powers previously contained in the States List, such as regulation of land use and building approval).

63. *See* Murthy & Mahin, *supra* note 11, at 108.

64. *See id.*; Wellington, *supra* note 13, at 916–17.

65. *See* Murthy & Mahin, *supra* note 11, at 112.

66. INDIA CONST. art. 243W, sched. 12 (emphasis added); *see also* Murthy & Mahin, *supra* note 11, at 87 (establishing that Article 243W was added to the Indian Constitution under the 74th

of *Andhra Pradesh*, the Supreme Court of India foreshadowed its belief that the 74th CAA does not create an affirmative obligation on the states to devolve the powers enumerated in the Twelfth Schedule to the newly formed municipalities by deciding that the analogous 73rd CAA creates no such obligation with regards to panchayats.⁶⁷

The Twelfth Schedule includes powers that affect the authority to approve building plans.⁶⁸ First, municipalities can be given authority over “[u]rban planning including town planning.”⁶⁹ Second, states can give municipalities power in the realm of “[s]lum improvement and upgradation.”⁷⁰ Finally, and most specifically, municipalities can be given authority over “[r]egulation of land-use and construction of buildings.”⁷¹ Taken together, the amendment allows states to confer on municipal governments the power to approve building plans.⁷²

Most states have refused to devolve the power of building approval to municipalities.⁷³ This occurred for a number of reasons. After years of having their power usurped by the central government, states have been reluctant to give away any of their substantive authority.⁷⁴ Additionally, state-level parastatal housing authorities, which are staffed with skilled technical employees who perform many of the functions included in the Twelfth Schedule, especially urban planning, have been around for decades.⁷⁵ These parastatal bodies have pursued the interests of their parent-state, and thus, a devolution of power over building and housing approval was equally unappealing to parastatal bodies because doing so might jeopardize the state interests.⁷⁶ In addition, the states perceived the municipalities as lacking the resources necessary to adequately exercise the authorities of the Twelfth Schedule and were wary of devolving any power to the municipalities.⁷⁷

Constitutional Amendment Act (74th CAA)).

67. Murthy & Mahin, *supra* note 11, at 87.

68. See INDIA CONST. sched. 12.

69. *Id.* § 1.

70. *Id.* § 10.

71. *Id.* § 2.

72. See *id.* §§ 1–2, 10.

73. See Murthy & Mahin, *supra* note 11, at 111–13 (arguing that as late as 2015, municipalities remained largely without substantive authorities enumerated in the Twelfth Schedule).

74. See *id.* (detailing the power struggle between the states and central government and claiming that states fear an “exacerbate[d] . . . subordinate position” as against central government if they devolve powers to the local level).

75. *Id.* at 115.

76. *Id.* at 117–18 (citing India’s Second Administrative Reforms Commission’s finding that because parastatal bodies are “directly accountable to the State . . . local governments are often divested of their important functions.”).

77. *Id.* at 113.

Nevertheless, states began to create municipal bodies with the theoretical power of building approval following the passage of the 74th CAA.⁷⁸ Unfortunately, in practice, many of the functions included in the Twelfth Schedule have remained in the hands of the states or their parastatal counterparts.⁷⁹ Because of the unclear allocation of power, an administrative grey area has spawned. Municipal housing authorities cropped up with the legislative power of building approval while that power was often retained by the states.⁸⁰ The effects of this jurisdictional competition and its impacts on those within the community are succinctly illustrated by John Harriss in his discussion of Bangalore's "local" and "corporate" economies.⁸¹ In Bangalore, the "local economy," which "provide[s] most of the population with their accommodation, work, and livelihoods," appears to work as envisioned by the 74th CAA, with locals "aimed at influencing councilors and the middle level bureaucracy of the city so as to provide improved infrastructure, basic amenities and greater security of land tenure."⁸² In contrast, the Bangalore "corporate economy," which Harriss describes as being the arena for "industrial, bureaucratic and IT sector elites," uses its ties to "higher level political circuits" to circumvent local autonomy.⁸³ Using its elite access, large corporate developers are able to go over the heads of municipal housing authorities and directly to the state, which in turn can use its power of eminent domain to "poach" valuable land for corporate developers.⁸⁴

This system of patronage between state-level entities and large corporate developers has only increased as India has begun to privatize the provision of amenities such as water, sanitation, and housing.⁸⁵ These "private-public partnerships" often excluded municipalities, despite the

78. See The Karnataka Municipal Corporations Act, 1976, No. 14 of 1977, §§ 296–321B (state of Karnataka legislation giving municipal housing authority, known as Bangalore Mahanagara Palike, power to approve building plans); Development Control Regulations for Greater Bombay, 1991, § 4(1) (describing Municipal Corporation of Greater Mumbai's authority to approve building plans); Development Control Regulations for Municipal Corporation of The City of Thane, 1994, § 3 (detailing Thane Municipal Corporation's authority over approving building plans); see also Wellington, *supra* note 13, at 937–38 (citing National Institute of Urban Affairs's 2005 study on implementation of, which found that most states had passed legislation creating municipal bodies endowed with substantive functions of Twelfth Schedule).

79. See Wellington, *supra* note 13, at 938 (noting that the National Institute of Urban Affairs's 2005 study also revealed that states often retained Twelfth Schedule powers in practice despite formally devolving powers to municipal bodies through legislation).

80. *Id.*

81. See *infra* notes 82–84.

82. See Harriss, *supra* note 12, at 6–7.

83. See *id.* at 7–8 (arguing that state and parastatal bodies exercise de facto control over urban planning affecting large corporate developments).

84. *Id.*

85. Wellington, *supra* note 13, at 935–36; Murthy & Mahin, *supra* note 11, at 98 (describing

constitutional authority of states to delegate such matters to local government.⁸⁶

Interestingly, this system of patronage mirrors the central government's own efforts in the 1960s and 1970s to dilute the power of the states.⁸⁷ Just as the central government continually eroded state powers to protect its own interests,⁸⁸ states are unwilling to relinquish the practical power of building approval to protect their own interests.⁸⁹ These interests include holding on to substantive authority that eluded states during the aforementioned decades,⁹⁰ doubts about municipal technical expertise,⁹¹ and perhaps most importantly, a fear that devolution of such power would undermine the patronage relationship developed between large corporate developers and the states.⁹²

D. *Decentralization Under the Jawaharlal Nehru National Urban Renewal Mission*

More than a decade after passage of the 74th CAA, the central government recognized the states' failure to devolve the Twelfth Schedule powers to municipalities.⁹³ In 2005, Prime Minister Manmohan Singh launched Jawaharlal Nehru National Mission (JnNURM), a program with the goal of developing urban infrastructure and enhancing access to essential amenities in India's growing cities.⁹⁴ In addition, JnNURM included a program known as the Integrated Housing and Slum Development Program that was aimed specifically at the creation of "housing and basic amenities for the urban poor, especially slum-dwellers."⁹⁵

Prime Minister Singh's JnNURM program, "grounded in [the] idea that strengthening municipal government is the key to increased urban growth and poverty alleviation," represented an important policy shift in

India's Jawaharlal Nehru National Urban Renewal Mission and its goal to stimulate private investment in housing, sanitation, sewage and waste management).

86. *Id.* at 935; *see also* INDIA CONST. art. 243W, sched. 12 (authorizing states to delegate authority to municipalities to oversee inter alia "urban planning," "regulation of land-use and construction of buildings," "slum improvement and upgradations," and "water supply for domestic, industrial and commercial purposes").

87. *See* Murthy & Mahin, *supra* note 11, at 104–05 (detailing invocations of Articles 250 and 356 and dissolution of state assemblies under the Janata Party).

88. *Id.* (outlining central government's use of constitutional centralizing mechanisms to prevent perceived unconstitutional actions at the state level).

89. *See* Wellington, *supra* note 13, at 934 (describing states' fears of losing corporate patronage).

90. *See* Murthy & Mahin, *supra* note 11, at 113.

91. *See id.* at 120.

92. Wellington, *supra* note 13, at 934.

93. Murthy & Mahin, *supra* note 11, at 97–102.

94. *Id.* at 98–99.

95. *Id.*

Indian politics, seeking “to realize the potential of the 74th CAA by linking financial assistance and service delivery to the promotion of decentralization and municipal empowerment.”⁹⁶ The permissive language of the 74th CAA continued to allow states to resist the devolution of Twelfth Schedule powers,⁹⁷ creating a danger of state interference in the outlay of JnNURM programs involving large and highly technical public contracts.⁹⁸ Moreover, even those states that had formally devolved such powers to municipalities often retained authority over urban planning to protect their relationships with large corporate developers and to ensure technical expertise.⁹⁹ Nevertheless, the program was one step ahead with a partial solution.

To get around the states’ reticence to confer true authority on the municipal governments, which Prime Minister Singh believed was essential to the program’s successful implementation, Prime Minister Singh conditioned funding under the JnNURM program on states making efforts to decentralize.¹⁰⁰ Each state, before it could receive funds, had to sign a Memorandum of Agreement that required the state to “implement identified reforms” which included the devolution of the “city planning function” to municipal authorities.¹⁰¹ Despite this fact, states avoided devolving the Twelfth Schedule powers by exploiting vague language in the JnNURM Guidelines; the Guidelines only required “[i]mplementation of decentralization measures *as envisaged* in the 74th CAA.”¹⁰²

Despite the effort made under the JnNURM program, most participating states, presumably continuing to view the 74th CAA changes relating to the powers of local authorities as simply advisory in nature,¹⁰³ continued to hold on to their Twelfth Schedule powers.¹⁰⁴ India’s Comptroller and Auditor General summarized the failure of JnNURM by saying that

96. *Id.* at 98.

97. The Twelfth Schedule powers include inter alia urban planning, building approval, and slum improvement. *See* INDIA CONST. art. 243W, sched. 12 (allowing states to choose whether or not to devolve powers enumerated).

98. *See* Murthy & Mahin, *supra* note 13, at 98 (describing two schemes of JnNURM aimed at development of sanitation and road networks and redevelopment of slums).

99. *See* Wellington, *supra* note 13, at 934–35 (claiming that “close ties” between state and corporate developers “create incentives to block local participation”); *see also* Murthy & Mahin, *supra* note 13, at 120 (arguing that municipalities’ lack of technical expertise made states wary of devolving power over urban planning, especially in light of parastatal authorities’ relative expertise in such matters).

100. Wellington, *supra* note 13, at 941–42.

101. MINISTRY OF URBAN EMP’T & POVERTY ALLEVIATION, JAWAHARLAL NEHRU NATIONAL URBAN RENEWAL MISSION: OVERVIEW 7, 18 (2005), http://www.indiaenvironmentportal.org.in/files/guidelines_jnnurm.pdf [<https://perma.cc/PZ4L-95AB>].

102. *Id.* at 18.

103. Murthy & Mahin, *supra* note 11, at 112.

104. *Id.* at 101–02 (citing Comptroller and Auditor General of India’s finding that states failed to uphold commitments of Memorandum of Agreement requiring decentralization).

“all the mandatory and optional reforms were not implemented as per the commitments made in the Memorandum of Agreement.”¹⁰⁵ Thus, the cycle continued. With no affirmative constitutional obligation to devolve power to the municipalities,¹⁰⁶ the states and the parastatal agencies below them continued to protect their interest in wielding the approval authority of large housing developments.¹⁰⁷ Moreover, states continued to doubt the administrative and technical capacity of the very municipal bodies that they created, especially in light of the fact that the parastatal agencies under their control had decades of experience and were staffed by technical experts.¹⁰⁸

What remained after these political gymnastics was a “mazelike structure of management and accountability.”¹⁰⁹ States gave power to municipal housing authorities on paper, both through legislative acts¹¹⁰ and through their signed Memoranda of Agreement as part of the JnNURM program.¹¹¹ Nevertheless, states often retained this power for significant developments to maintain a system of patronage with private developers and out of fear that municipal bodies lacked the expertise required to administer the JnNURM schemes.¹¹² Though JnNURM ended in 2014,¹¹³ Prime Minister Modi’s Housing for All initiative suffers from many of the same jurisdictional flaws that plagued JnNURM.

E. *The Jurisdictional Flaws of Housing for All’s Administration and Application*

Much like the JnNURM program that preceded it, the Housing for All

105. *Id.* at 101.

106. *See* INDIA CONST., art. 243W(a) (giving states discretion in devolving Twelfth Schedule powers).

107. *See* Murthy & Mahin, *supra* note 11, at 113, 120 (arguing that states fight decentralization because of history of central government’s encroachment on state authority and doubts that municipalities have technical expertise necessary to wield Twelfth Schedule powers); Wellington, *supra* note 13, at 934 (claiming that states fear decentralization because of possibility of loss of patronage of large corporate developers).

108. Murthy & Mahin, *supra* note 11, at 102.

109. *Id.* at 118.

110. *See* The Karnataka Municipal Corporations Act, 1976, No. 14 of 1977, §§ 296–321B (vesting power of building approval with Bangalore Mahanagara Palike); Development Control Regulations for Greater Bombay, 1991, § 4 (describing Municipal Corporation of Greater Mumbai’s authority to approve building plans); Development Control Regulations for Municipal Corporation of The City of Thane, 1994, § 3 (detailing Thane Municipal Corporation’s authority over approving building plans).

111. *See* MINISTRY OF URBAN EMP’T & POVERTY ALLEVIATION, *supra* note 101.

112. *Id.* (citing Comptroller General’s finding that JnNURM’s decentralization requirement failed); *see id.* at 934 (arguing that states continue to protect corporate patronage); Murthy & Mahin, *supra* note 11, at 120 (emphasizing state’s unwillingness to devolve power because of municipalities’ relative lack of expertise).

113. Murthy & Mahin, *supra* note 11, at 99–100.

initiative encourages municipal participation,¹¹⁴ and yet truly effective decentralization is stymied by the program's grants of overlapping jurisdiction. The guidelines for the implementation of Prime Minister Modi's Housing for All program do not clearly indicate which tier of government—central, state, or municipal—wields the building approval authority.¹¹⁵ This creates the same danger as in Bangalore's "corporate economies" and the JnNURM rollout: developers will go over the heads of municipal housing authorities and seek approval of building plans from state or parastatal authorities.¹¹⁶

To begin with, legislation in many states has endowed municipal bodies with the formal power of building approval.¹¹⁷ For each individual project approved, municipalities are required to submit a Detailed Project Report to a State Level Sanctioning and Monitoring Committee (SLSMC) for approval.¹¹⁸ However, a Central Sanctioning and Monitoring Committee (CSMC) also exists with the power of "implementation of the Mission, approvals thereunder and monitoring."¹¹⁹ Thus, the guidelines, in combination with state legislation, appear to give all three tiers of government the power to approve Housing for All developments.¹²⁰

The guidelines add an additional layer of confusion in that states and cities are required to "divid[e] the task" of preparing "Annual Implementation Plans" that must be approved by both SLSMC and CSMC.¹²¹ The Annual Implementation Plans detail the number of projects constructed under the Housing for All schemes during the past year, their number of beneficiaries, and more.¹²² Without approval of the Annual Implementation Plans at both the state and central level, the central government will not release additional funds to the states for implementation of Housing for All schemes.¹²³

One immediately senses the overlapping jurisdictions of the central,

114. See HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at 12, 14 (detailing municipalities' role in the implementation of the Housing for All program).

115. See *id.* at 19–21 (allowing central and state Sanctioning and Monitoring Committees to review municipal Detailed Project Reports for approval).

116. See Harriss, *supra* note 12, at 6–8 (describing de facto control of state authorities over urban planning involving industrial, bureaucratic, and IT developments); Wellington, *supra* note 13, at 941–42 (citing Comptroller General's finding that decentralization requirements of JnNURM were largely ignored by states).

117. See, e.g., *supra* note 110 and accompanying text.

118. HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at 14.

119. *Id.* at 20.

120. See *id.* at 19–21 (giving central and state Sanctioning and Monitoring Committees approval power over Housing for All projects); *supra* note 110 and accompanying text.

121. See HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at 12, 14.

122. *Id.* at Annexure 6.

123. See *id.* at 19.

state and municipal authorities. Both the central and state level Sanctioning and Monitoring Committees have the power to make “approval[s]” for projects developed under the Housing for All schemes.¹²⁴ Additionally, each individual development’s Detailed Project Report is subject to scrutiny by both the central and state level Sanctioning and Monitoring Committees.¹²⁵ This may allow corporate developers, in navigating this jurisdictional maze, to skip over municipal housing authorities and seek approval directly from state or central bodies. This danger was realized in Bangalore, where developers in the “corporate economy” worked with state authorities, instead of their municipal counterparts, to build industrial and IT buildings.¹²⁶ Moreover, it is no secret that state housing authorities continue to protect the system of patronage they have developed with corporate developers, as witnessed by the states’ failure to implement the decentralizing requirements of the JnNURM program.¹²⁷ Finally, conditioning the release of central funds on approval of the Annual Implementation Plan by both SLSMC and CSMC creates the possibility of a subtler and non-transparent building approval process.¹²⁸

F. *Application of Section 80-IBA*

Using the existing Housing for All guidelines for the application of Section 80-IBA, one sees the danger in the overlapping powers of the municipal, state, and central powers. This Note utilizes Bangalore and the neighboring cities of Mumbai and Thane as examples.

First, developers, hoping to qualify for the 100% profit deduction, will submit their building plans to the municipal housing authority for approval.¹²⁹ Bangalore Mahanagara Palike, the Municipal Corporation of Greater Mumbai, and the Thane Municipal Corporation are all municipal housing authorities that have been empowered by their states with the ability to approve building plans.¹³⁰ However, as discussed previously, state and parastatal agencies are known to exercise this same authority

124. *Id.* at 20–21 (“Administration and Implementation Structure” gives both central and state level Sanctioning and Monitoring Committees power of “approvals” for various schemes under the Housing for All program).

125. *Id.* at 14, 19; see RÉMI DE BERCEGOL, *SMALL TOWNS AND DECENTRALIZATION IN INDIA: URBAN LOCAL BODIES IN THE MAKING* 180 (Marie-Hélène Zérah ed., 2017) (arguing that municipalities’ lack of technical expertise in drafting Detailed Project Reports allows approvals not to be made on the basis of need, but rather “in accordance with the political priorities of the state”).

126. See Harriss, *supra* note 12, at 6–8.

127. See Wellington, *supra* note 13, at 941–42 (Comptroller General found that decentralization under JnNURM did not occur despite states signing Memorandum of Agreement).

128. HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at 14, 19.

129. See Income-tax Act, No. 43 of 1961, *amended* by Finance Act, No. 28 of 2016, § 80-IBA(2)(a) (requiring developers to submit plans to authority with power to approve building plans).

130. See *supra* note 110 and accompanying text.

when large public-private partnerships are at stake,¹³¹ or when “corporate economies” are affected,¹³² despite the municipal housing authority having statutory power to approve the building plans.

Each municipal housing authority has its own set of building regulations that could affect the developer’s bid.¹³³ Except for the requirement that the apartments be no larger than either thirty or sixty square meters, depending on the project’s location, any additional requirements fall to the “competent authority” during the building plan approval process.¹³⁴ Mumbai and Thane’s municipal housing authorities provide that, for purposes of applying for “low cost housing schemes,” a plan will only be approved if sixty percent of the units are occupied by families from either the EWS or LIG category.¹³⁵ Bangalore, however, has no comparable requirement detailing which building plans qualify under low income housing schemes.¹³⁶ Thus, a developer in Bangalore need only ensure that all of the units within the project are below sixty square meters to be approved by the municipal housing authority, Bangalore Mahanagara Palike.

However, even after the municipal housing authorities approve the building plans, Detailed Building Plans must be sent to the SLSMC and CSMC for approval.¹³⁷ The Housing for All Guidelines provide no guidance on the Sanctioning and Monitoring Committees’ review process and whether or not additional requirements, such as an EWS or LIG occupancy requirement, will be added to the review.¹³⁸ Finally, even after the SLSMC and CSMC approve the Detailed Building Plans, the receipt of additional Housing for All funds, necessary to implement the AHP, Credit-Linked Subsidy, and In-Situ Slum Redevelopment programs, is conditioned on approval of the municipalities’ Annual Implementation Plans.¹³⁹ If either of the Sanctioning and Monitoring Committees disapproved of the municipal regulations used to approve low-income housing projects, this annual review process could be used to influence the municipal housing authority’s future building approval process.

131. Wellington, *supra* note 13, at 935–36.

132. Harriss, *supra* note 12, at 6–8.

133. *See generally* Bangalore Mahanagara Palike, Building Bye-Laws, 2003 (municipal building regulations for Bangalore); Development Control Regulations for Greater Bombay, 1991 (municipal building regulations for Mumbai); Development Control Regulations for Municipal Corporation of The City of Thane, 1994 (municipal building regulations for Thane).

134. *See* Income-tax Act, No. 43 of 1961, *amended by* Finance Act, No. 28 of 2016, § 80-IBA.

135. Development Control Regulations for Greater Bombay, 1991, § 33(5); Development Control Regulations for Municipal Corporation of The City of Thane, 1994, Reg. No. 165.

136. *See generally* Bangalore Mahanagara Palike, Building Bye-Laws, 2003.

137. HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at 14, 19.

138. *See id.*

139. *Id.* at 19.

II. ANALYSIS

A. *Occupancy Requirements Offer a Solution*

To correct the exploitable loophole of the new 100% profit deduction, the conflict between the state and municipal surrounding the power of building approval must be confronted. As written, Section 80-IBA only requires that developers build small apartments, between thirty and sixty square meters depending on the city, but does not oblige the developer to fill the units with families from the LIG or EWS groups.¹⁴⁰ The law appears to assume that size restrictions are sufficient to ensure that the qualifying housing developments will benefit India's poorest groups.¹⁴¹ However, commercially-minded builders may quickly discover that, with the size requirements of Section 80-IBA satisfied, increase in the value of the deduction is proportional to the increase in rent.¹⁴² This strongly incentivizes developers to charge higher rents, because all those profits will be deductible.¹⁴³

Although developers began submitting building plans to benefit from the scheme on January 6, 2016, approvals will continue until March 31, 2019.¹⁴⁴ Therefore, it is not too late to correct the drafting error of Section 80-IBA to ensure that all future building approvals serve Prime Minister Modi's goal of housing all Indians by 2022.¹⁴⁵ Occupancy requirements offer a simple and familiar solution that would guarantee that the new deduction serves India's poorest. Such requirements already exist in other Housing for All programs, namely, the AHP scheme, which requires that at least thirty-five percent of the units developed under the program be occupied by EWS families.¹⁴⁶ Moreover, cities like Mumbai and Thane have adopted regulations requiring that buildings seeking to take part in "low cost housing schemes" be occupied by a specified percentage of EWS or LIG families.¹⁴⁷ Thus, because occupancy requirements are common in low cost housing schemes, they also offer a realistic

140. See Income-tax Act, No. 43 of 1961, amended by Finance Act, No. 28 of 2016, § 80-IBA (additional requirements not relevant to this Note include that buildings be built within three years of receiving approval, that commercial buildup not exceed three percent of development, and that the plot be between 1000–2000 square meters depending on the city).

141. See *id.* at (2)(e) (providing the square meter restriction for apartments as the only requirement to qualify for the deduction).

142. See *id.* at (1) (deduction is available for 100% of all profits from qualifying developments).

143. *Id.*

144. *Id.* at (2)(a).

145. HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at i.

146. *Id.* at 10.

147. See, e.g., Development Control Regulations for Greater Bombay, 1991, § 33(5); Development Control Regulations for Municipal Corporation of The City of Thane, 1994, Reg. No. 165.

fix to the Section 80-IBA loophole. The amendment could model the occupancy requirements already in place in the AHP program and Mumbai and Thane municipal codes, preventing a protracted drafting process.

B. *State and Municipal Resistance to Occupancy Requirements*

Though occupancy requirements would prevent developers from exploiting Section 80-IBA, the contentious history between state and municipal housing authorities discourages either from creating such a regulation. This is because state and municipal bodies are still struggling over the power of building approval,¹⁴⁸ and the deciding vote falls all too often to the corporate developers themselves.¹⁴⁹ Thus, it is unlikely that either will create an occupancy requirement that developers dislike, because doing so might drive developers into the other tier's camp.

State and parastatal housing authorities will resist the creation of an EWS or LIG occupancy requirement because such a regulation could erode their practical power of building approval. Most states, after decades of resisting decentralization and arm-twisting arrangements like JnNURM,¹⁵⁰ have formally devolved the power of building approval to their municipal counterparts.¹⁵¹ This means that the states' only way of maintaining a practical hold on the power is by preserving their historic relationship with large corporate developers.¹⁵² Bangalore provides a good example. Despite the municipal housing authority, Bangalore Mahanagara Palike, having constitutional authority over urban planning and construction of buildings,¹⁵³ the states continued to exercise de facto control over the development of the "corporate economy."¹⁵⁴ This is an example of the states' understanding that their authority over building approval rests not in constitutional or statutory language, but rather in the

148. See Wellington, *supra* note 13, at 937–38 (citing National Institute of Urban Affairs's study, which described states' retention of urban planning powers despite formally devolving powers through legislation).

149. See Harriss, *supra* note 12, at 7–8 (describing how participants in the "corporate economy" often leap over municipal planning authorities to obtain desired approvals from state and parastatal agencies).

150. See MINISTRY OF URBAN EMP'T & POVERTY ALLEVIATION, *supra* note 101 (seeking to require states to devolve urban planning powers to municipalities through Memorandum of Agreement).

151. See, e.g., *supra* note 109 and accompanying text.

152. See Wellington, *supra* note 13, at 934 (noting that state-level officials fear decentralization because of "possible loss of their powers of patronage").

153. The Karnataka Municipal Corporations Act, 1976, No. 14 of 1977, §§ 296–321B. These powers are originally under the auspices of the state, as designated in the Twelfth Schedule. INDIA CONST. art. 243W, sched. 12 §§ 1–2.

154. See Harriss, *supra* note 12, at 7–8 (describing state's tight grip on "corporate economy" building approvals in the city of Bangalore).

corporate developers themselves.¹⁵⁵ Therefore, states will shy away from creating regulations that run contrary to the interests of the developer. Doing so may cause the states to lose their strongest ally in the fight for the practical power of building approval.

On the other hand, because municipalities understand that support from the “corporate economy” is a necessary precursor to truly wielding urban planning powers, it is equally unlikely that municipalities will create EWS or LIG occupancy requirements. After decades of being denied the functions anticipated by the Constitution¹⁵⁶ and having what jurisdiction they have been granted over urban planning ignored,¹⁵⁷ municipalities are keen to win over the developers in the “corporate economy” so that they can establish exclusive jurisdiction over the powers enumerated in the Twelfth Schedule.¹⁵⁸ However, states occupy the pole position in the race for corporate goodwill.¹⁵⁹ “Corporate economy” developers have a vested interest in state authorities continuing to wield the power of building approval because they have reaped the benefits of the states’ willingness to intervene on their behalf.¹⁶⁰ Thus, it should not be expected that municipalities will create regulations that harm corporate developers. Instead, it is more likely that municipalities will work to serve corporate interests because doing so will reduce the likelihood that developers continue to go directly to state or parastatal authorities when they want to build.

Moreover, the ambiguous grants of overlapping authority in the Housing for All guidelines make it all too easy for corporate developers to seek out state aid when trying to qualify for the deduction.¹⁶¹ Though municipal housing authorities make initial building approvals, these approvals are subject to state scrutiny through the SLSMC’s review of the Detailed Project Reports and Annual Implementation Plans.¹⁶² In a country where

155. See Wellington, *supra* note 13, at 934 (arguing that devolution of authority to municipalities is resisted by states to protect their relationship with corporate developers).

156. See *id.* at 933–34.

157. See Harriss, *supra* note 12, at 7–8 (describing tendency of corporate developers to go directly to state or parastatal agencies when seeking to build).

158. See Wellington, *supra* note 13, at 935 (discussing exclusion of municipalities in urban planning when large public-private partnerships are at stake).

159. See Harriss, *supra* note 12, at 7–8 (describing tendency of corporate developers to go directly to state or parastatal agencies when seeking to build).

160. See *id.*

161. See HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at 20–21 (giving central and state Sanctioning and Monitoring Committees power of review over municipal building approvals).

162. See *id.* at 12, 14, 21.

corporate developers have a history of ignoring the constitutional and legislative authority of municipalities,¹⁶³ the overlapping jurisdictions of the municipalities and SLSMC¹⁶⁴ only increase the danger that corporate developers will skip over the municipal tier and go directly to the states. Understanding that the guidelines themselves invite the historic patronage between the state and corporate developers, municipalities will again resist the creation of an occupancy regulation that might encourage developers to go directly to the SLSMC to get their building plans approved.

C. *Change Must Come from the Central Government*

The state and municipal infighting requires that the remedy for the Section 80-IBA loophole come from the central government. State and municipal fears of alienating corporate developers make both unlikely to pass regulations that work against developers' interests.¹⁶⁵ Developers will oppose an EWS or LIG occupancy requirement because it reduces the value of the deduction.¹⁶⁶ By requiring a certain portion of the approved buildings to be occupied by India's poorest, rental rates in the buildings will be lower. Though 100% of the profits will still be deductible, occupancy requirements would make it so there is less profit to deduct.¹⁶⁷ Because this effect is directly averse to the goals of profit-minded developers, states and municipalities will be discouraged from pursuing occupancy requirements.

The central government, unlike the states and municipalities, is not tied to the interests of corporate developers, making it the best candidate to create an occupancy requirement. The central government's primary interest with regards to the 100% profit deduction is not consolidation of building approval power, but rather the provision of housing to all of India's citizens by 2022.¹⁶⁸ The historic struggle for jurisdictional rights over building approval limits the state's and municipality's ability to pursue that goal, because doing so threatens their goodwill with corporate

163. See Harriss, *supra* note 12, at 7–8 (describing state infringement on Bangalore's municipal housing authority through development of "corporate economy"); Wellington, *supra* note 13, at 937–38 (citing National Institute of Urban Affairs study finding that states infringed on municipalities' authority despite devolving such powers through legislation).

164. HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at 14, 21 (giving State Level Sanctioning and Monitoring Committee oversight over Detailed Project Reports of municipalities).

165. See Wellington, *supra* note 13, at 934–36 (describing both states' fears of losing corporate patronage to municipalities and exclusion of municipalities from urban planning when public-private partnerships are at play).

166. See Income-tax Act, No. 43 of 1961, *amended by* Finance Act, No. 28 of 2016, § 80-IBA (deduction, as currently drafted, can be abused by developers who charge high rents for small apartments).

167. See *id.* at (1).

168. HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at i.

developers.¹⁶⁹ But the central government exists outside of this conflict, thus having the freedom to craft an EWS or LIG occupancy requirement.

Therefore, a realistic solution is to amend the Income-tax Act to create an EWS or LIG occupancy requirement that obliges developers seeking to benefit from the profit deduction to fill their buildings with a specified percentage of EWS or LIG families. The occupancy requirements of the AHP scheme and Mumbai and Thane municipal regulations offer easily adaptable models for the amendment.¹⁷⁰ Both make the developer's qualification under the low cost housing scheme contingent upon the continued occupancy of a certain percentage of poor families; for AHP this is thirty-five percent of the total units,¹⁷¹ and under the Mumbai and Thane regulations the number is increased to sixty percent.¹⁷² The central government can tailor the required percentage to the need for affordable housing in different cities. Section 80-IBA already adjusts the maximum unit size for certain cities,¹⁷³ and thus an adjustable occupancy requirement will be both familiar and effective. Larger cities with bigger slum populations will be protected by a higher occupancy requirement, perhaps sixty percent, whereas smaller cities less in need of affordable housing could benefit from a smaller occupancy requirement, maybe thirty-five percent. Additionally, because the central occupancy requirement would function as a floor, it would still be possible for states and municipalities like Mumbai and Thane to buck the trend and create their own occupancy requirements for low cost housing schemes that are above the level amended into Section 80-IBA.

Moreover, the central authority is already in a position to enforce an occupancy requirement.¹⁷⁴ First, because this is a federal income tax deduction, the central government already has the authority to create an amendment adding qualifications that state and municipal authorities can

169. See Harriss, *supra* note 12, at 7–8 (discussing Bangalore's willingness to use eminent domain to garner corporate goodwill).

170. See HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at 10 (the Affordable Housing in Partnership occupancy requirement); Development Control Regulations for Greater Bombay, 1991, § 33(5) (Mumbai occupancy requirement); Development Control Regulations for Municipal Corporation of The City of Thane, 1994, Reg. No. 165 (Thane occupancy requirement).

171. HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at 10.

172. Development Control Regulations for Greater Bombay, 1991, § 33(5); Development Control Regulations for Municipal Corporation of The City of Thane, 1994, Reg. No. 165.

173. Income-tax Act, No. 43 of 1961, *amended by* Finance Act, No. 28 of 2016, § 80-IBA(2)(e) (providing varying maximum square meter requirement depending on city).

174. See INDIA CONST. art. 265 (giving central government authority to tax when supported by legislation); HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at 20 (granting the Central Sanctioning and Monitoring Committee oversight over building approvals).

then apply.¹⁷⁵ Additionally, under the Housing for All guidelines, all Detailed Project Reports have to be approved by the CSMC.¹⁷⁶ This structure allows the central government to double-check that each building approved under the scheme meets the new occupancy requirement of Section 80-IBA. CSMC's oversight over the occupancy requirement sidesteps the jurisdictional battle between the states and municipalities because CSMC will review each Detailed Project Report for the occupancy requirement regardless of which tier of government, in reality, approved the building plan.¹⁷⁷ Thus, the institutional framework is already in place for the central government to install an occupancy requirement to the federal tax deduction. The addition of an occupancy requirement to Section 80-IBA that can then be enforced through the oversight of CSMC will ensure that India's poorest families are not left unprotected as a result of state and municipal jousting for control over building approval. Though it is likely that states and municipalities will continue to fight for this coveted power, a central-level occupancy requirement protects EWS and LIG families from becoming collateral damage in the struggle.

CONCLUSION

Despite Prime Minister Modi taking affirmative steps towards solving India's desperate need for housing, it is unlikely that all Indians will be housed by 2022 unless the jurisdictional infighting that haunts the building approval process is solved. Decades after the 74th CAA predicted states devolving urban planning powers to municipalities, the two continue to battle for exclusive jurisdiction over development approval. In this fight, the corporate developers themselves have proven to be the most effective ally, capable, in practice, of making either the state or the municipality the competent authority. For this reason, neither the state nor the municipality can be expected to take regulatory actions that would hurt the developers' interests, because doing so risks losing the corporate goodwill necessary to establish jurisdiction over the building approval process. Instead, the central government, which is not engaged in this urban planning power struggle, must step in and amend the Income-tax Act to add an occupancy requirement and shore up the exploitable gap in Section 80-IBA.

The housing sector is a single microcosm of the jurisdictional maze that spawned in the wake of India's decentralization. By making the devolution of authority to municipalities contingent upon the states' consent, the central government invited state resistance that has persisted to

175. See INDIA CONST. art. 265.

176. HOUSING FOR ALL (URBAN) SCHEME GUIDELINES, *supra* note 7, at 19–20.

177. See *id.*

this day. And though this muddy process has caused municipalities to lose out on the exclusive dominion over the Twelfth Schedule powers, the real loss is for Indian citizens. How can one feel safe in the powers of their local government when their local government does not feel safe in its own ability to exercise its constitutional and statutory authority?