AFFORDABLE HOUSING

PROACTIVE & REACTIVE PLANNING STRATEGIES

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Affordable Housing: Proactive and Reactive Planning Strategies

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Chapter 1. Regulatory Reforms and Housing Affordability

In the early twentieth century, the government's role in regulating housing was primarily that of controlling housing quality through the use of building codes. When the federal government finally addressed the issue of the provision of housing, it did so by enacting the United States Housing Act of 1937, which created public housing. The primary purpose of that legislation was to use housing construction as a mechanism to relieve unemployment. Not until the enactment of the Housing Act of 1949, which prohibited discrimination by public housing authorities against welfare recipients, did the issue of affordability become a major concern. Since that time, housing affordability—the relationship between the income of housing consumers and the direct and incidental costs of shelter—has become a major issue on the agendas of local governments, housing officials, and land-use planners.

On a parallel track with the emergence of the housing affordability issue has been an increase in the sophistication of land-use regulation and planning at the local level of government. Zoning, which was originally conceived as a device to separate incompatible uses, now governs the density, height, style, appearance, quality, and the timing of development. Subdivision regulations, which were originally designed to facilitate the conveyance of property, are now the primary vehicle for regulating site design and the provision of public facilities and services in suburban residential developments.

During the 1960s, land-use regulations and capital facilities investment policies were increasingly employed to control the amount, type, and timing of residential development in rapidly growing suburban areas. In these areas, local governments began to tie the level of development to the carrying capacity of public facilities and environmental resources. In addition, development permits were allocated on a limited basis, reserved for those developments that could best achieve local policies defined through a point system or some other criteria. The emergence of growth management and allocation-based land-use controls has significantly broadened the scope of local regulatory authority. Even where these local regulatory schemes were not aimed at excluding low-income persons, well-intended growth management techniques designed to alleviate the congestion of public facilities and to protect environmental or agricultural resources became identified with general increases in the cost of shelter. The result has been a push toward regulatory reform, stemming primarily from exclusionary zoning litigation in the courts.

The lively debate over the relationship between land-use controls and housing costs has renewed a much-needed discussion about regulatory reform. Useful recommendations and reforms have emerged concerning the substantive content of land-use controls, administrative processing, and which level of government should be the source of land-use authority. Unfortunately, much of the literature on growth management and housing affordability focuses exclusively on the effect of such controls on housing affordability, ignoring or downplaying the benefits of land-use regulation to the public health, safety, and welfare. The effect of such criticism, if it dictated public policy, would be to totally eradicate regulations addressing other important public issues—such as environmental protection, fiscal austerity, and quality of life—to accommodate affordable housing. This type of tunnel vision ignores the complexity of local legislation, and policies based on such a vision would do little to further the goals of the production of decent, affordable housing for low- and moderate-income persons, and the integration of neighborhoods. Instead, the better approach is to modify, to the extent possible, development regulations in a comprehensive, informed manner that strikes a balance between these competing public objectives.

For the most part, much of the legislative and judicial activity involving exclusionary zoning has focused on the problem of local parochialism.[1] The efforts of local governments and citizen organizations to exclude Locally Unwanted Land Uses (LULUs) from their jurisdiction are part of what has become popularly known as the NIMBY (Not In My Back Yard) syndrome. While past anti-exclusionary zoning efforts recognized the validity of the underlying regulatory system, combatting its misuse, more recent efforts have questioned the validity of the entire regulatory structure.[2]

The federal government has issued several impor-

tant reports identifying the scope and magnitude of the exclusionary zoning problem. Its most recent effort is a highly publicized report, *"Not in My Back Yard": Removing Barriers to Affordable Housing"* (hereinafter, the NIMBY Report).[3] The report, released on July 8, 1991, was prepared by an ad-hoc advisory commission chartered by the Bush administration. The NIMBY Report addresses a variety of land-use controls, taxation measures, and even the Davis-Bacon minimum wage law in a sweeping and strident argument for land-use reform. While the report seems to retreat somewhat from the overt call for land-use *deregulation* called for by a similar report issued by the Reagan administration,[4] deregulation is an implicit theme of the report. (Deregulation has also become a focus for the administration's anti-poverty and economic growth policies.)[5] By contrast, the report's recommendations for regional governance and state-initiated reforms could provide important focus for the emerging debate on affordable housing and land-use reform. Unfortunately, the report ignores several important land-use tools increasingly used by local governments to fill the vacuum left during the 1980s in the area of federal involvement in housing construction for low- and moderate-income families.

The purpose of this report is to provide a review of regulatory reforms and proactive uses of land-use controls that protect the public health, safety, and welfare while still allowing—even encouraging—the production of affordable housing. Such reforms and controls should not be abandoned or gutted in a rush to deregulate.

THE NATURE OF THE PROBLEM

The issue of housing affordability has several dimensions. First is the issue of housing costs in general. Housing represents a first claim on consumer income and is one of the fastest-rising elements of consumer expenditure. According to the 1990 edition of the *Statistical Abstract of the United States*, shelter costs were the most rapidly growing component of consumer spending in the years 1984-1987, accounting for 27 percent of the total increase in consumer spending during that period.[6] Furthermore, while the median price of existing single-family homes increased by 13.4 percent, and the median price of single-family homes for first-time homebuyers increased by 12.8 percent, per capita personal income rose by only 11.4 percent. The *Abstract* also showed that the average age of first-time homebuyers rose from 28.1 years in 1976 to 30.3 years in 1988, meaning that it was taking citizens longer to reach income levels at which they could afford to buy a house.

The second dimension of the affordability issue is the availability of housing for needy populations, including low-income renters and first-time homebuyers. From 1970 through 1988, public housing construction for low-income persons dropped from 1,268,000 to 97,000 units.[7] While median monthly housing costs comprise only 18 percent of owner income, they comprise 29 percent of renter income. Using a sliding scale of affordability varying with household size and income, a recent report concludes that nearly 32 percent of the nation's population, including 82 percent of those renter households earning less than $10,000 per year, pay such high costs for housing that nonshelter needs cannot be met at minimum levels of adequacy.[8]

A leading resource on housing statistics, the *State of the Nation's Housing* (published by the Joint Center for Housing Studies of Harvard University), reports that housing affordability problems are concentrated largely among the poorest of the poor. While the number of high-income households grew during the 1980s, income growth has stagnated for single-parent and young married households within the lower-income categories.[9] The report also noted that multifamily and manufactured housing starts have declined due to economic conditions.

WHAT IS AFFORDABLE HOUSING?

The *NIMBY Report*, on page 2, defines affordable housing as housing available for rental or purchase to low- or moderate-income families at 30 percent of their income. Low-income persons are defined as those earning 50 percent of area median income (AMI), while moderate-income families are classified as those earning less than 100 percent of area median income (AMI). Most state and federal regulations contain separate definitions for very-low-, low-, and moderate-income families, as follows:

very-low	= ≤ 50% AMI
low	= 50–80% AMI
moderate	= 81–100% AMI

See, for example, 24 C.F.R., Section 91.5 (April 1, 1991), which defines moderate income as 80–95% of area median income.

The NIMBY Report asserts that housing affordability has actually increased during the 1980s, which it also claims was a period of growing regulatory restrictiveness. On page 1-2, the report attributes the increase in affordability to low interest rates and an expanding economy. It points out that the national figures on affordability mask severe disparities in affordability between regions of the country. The report cites Boston, San Francisco, and Los Angeles as having high home purchase and rental costs. On page 1-5, however, the report acknowledges that some areas with tight regulatory restrictions, such as Minneapolis/St. Paul and San Diego, have been able to maintain comparatively level rents while less restrictive areas, such as Detroit, have experienced severe problems.

Significantly, Miami experienced a reduction in rent levels, despite its tight, state-mandated regulatory environment.

Scapegoating Regulation

The rise of housing affordability as a local land-use regulation issue traces its origins to the United States Supreme Court's decision in *Village of Euclid v. Amber Realty*,[10] which upheld the constitutionality of zoning. In sanctioning a zoning ordinance that excluded industrial uses, the Court noted that it did not wish to "exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." The "general public interest" foreshadowed an increasing judicial awareness of the linkage between local zoning and the regional nature of urban development markets. Because the local government's interest in preserving property values and preventing the congestion of public facilities sometimes conflicts with regional housing needs, cases challenging local zoning began to focus on the issue of "exclusionary" zoning and land-use controls.

The rise of housing as a regional land-use issue has manifested itself primarily in an assault on those ordinances that are inherently discriminatory in nature. An exclusionary land-use control may be defined as a public policy that has a disproportionate impact on housing available at affordable prices to low- and moderate-income persons, or which unduly increases the cost of shelter, without a countervailing public purpose.[11] Examples of land-use controls that have been used for exclusionary purposes and that have been contested in the courts include large-lot zoning ordinances;[12] the exclusion of apartments and multifamily uses;[13] moratoria on building permits motivated by a desire to exclude low-income housing;[14] excluding manufactured housing or limiting such housing to parks or subdivisions; excessive frontage or setback requirements; height limits; and high amenity and subdivision improvement requirements.[15]

A regulation is not exclusionary simply because it adds to development costs or restricts housing opportunities. The need to accommodate other legitimate public objectives, such as environmental protection, health and safety, and the provision of adequate public facilities, can justify restrictive land-use controls. For example, in upholding a local development moratorium designed to prevent the congestion of key public facilities, the California Supreme Court distinguished a line of cases invalidating large-lot zoning ordinances:

> The [large-lot zoning] cases cited by plaintiff, however, cannot serve as a guide to the resolution of this controversy. . . . [U]nlike the present case, all involve ordinances which impede the ability of low- and moderate-income persons to immigrate to a community but permit largely unimpeded entry by wealthier persons.[16]

Most courts also uphold restrictive land-use controls that would otherwise be classified as exclusionary where the jurisdiction has accommodated its fair share of regional housing opportunities.[17]

The exclusionary zoning cases and federal task force reports like *Building the American City*[18] (also known as the Douglas Commission Report) accepted the legitimacy of the underlying regulatory system and selectively targeted certain aspects of the system that had a disproportionate effect on low- and moderate-income housing without advancing an offsetting public purpose. However, in the deregulatory environment of the 1980s and 1990s, the debate has shifted to an assault on the regulatory system in the aggregate. Since the publication of the Douglas Commission report in 1969, at least 24 major reports by governmental commissions and major organizations involved in land-use reform have focused on the cost-inducing effects of land-use controls.[19] The NIMBY Report is a strong example of this trend.

Unlike its predecessors, the NIMBY Report is expressly recognized by federal legislation, which calls for further reform based upon its findings. The Cranston-Gonzalez National Affordable Housing Act[20] (hereinafter NAHA), which is discussed in further detail later in this report, establishes a comprehensive housing planning and funding process in which land-use regulations will play an increasing role. Congress, however, declined to mandate deregulation as a binding condition of federal housing assistance. This has placed Congress at odds with the Bush administration's emphasis on deregulation. The administration's 1990 housing bill (H.R. 1180) would have created "Housing Opportunity Zones" (HOZs) wherein certain land-use controls, taxes, and other local regulatory or financing requirements would be lifted in order to promote affordable housing. While the HOZ provisions were not enacted, the HOZ concept plays a major role in the Bush administration's national urban policy. By contrast, Section 105(b)(4) of NAHA requires a local government's Comprehensive Housing Affordability Study (CHAS) to identify "regulatory barriers" to the production of affordable housing, including land-use controls, tax policies, fees, and growth limits. However, the continuation of such policies cannot form the basis for disapproval of the CHAS. NAHA expressly forbids U.S. Department of Housing and Urban Development (HUD) from using its rule-making authority to coerce the repeal or discontinuation of "regulatory barriers," and local autonomy is expressly protected in most of the act's major provisions. This restriction generally applies only to direct assistance, rather than to indirect assistance or the reallocation of unused monies.[21]

The NIMBY Report may lead to a change in these protective measures. It echoes the conclusions of previous federal studies linking restrictive land-use controls to increased housing costs and the denial of access to decent housing by low- and moderate-income persons.[22] The NIMBY Report does not, however, collect empirical data linking land-use controls to increased housing costs or the exclusion of low- and moderate-income housing from a jurisdiction. Early on in its process, the Commission agreed to focus on ways *to implement the removal* of "regulatory barriers" rather than *to identify* which types of land-use controls actually operate as barriers to the production of affordable housing.[23]

The emphasis on deregulation is echoed in the Bush administration's national urban policy and proposed legislation pending before Congress. The National Urban Policy Report cites processing delays, environmental regulations, infrastructure exactions, and zoning and building codes as obstacles to the production of low- and moderate-income housing.[24] HUD is currently seeking legislation to tie housing assistance to the removal of these "regulatory barriers." Secretary Kemp's recommendations for implementing the findings of the Commission on Regulatory Barriers, including recommendations for legislative action, were presented to Congress on May 8, 1992.[25]

This proposed legislation, the Removal of Regulatory Barriers Act of 1992, would eliminate existing provisions in NAHA that prohibit HUD from requiring the removal of regulatory barriers as a condition to receiving federal housing assistance. Ten million dollars in grants under the Housing and Community Development Act of 1974 would be directed to states for planning and implementation of barrier removal strategies, including identification of regulatory barriers, developing legislative reforms and model standards and ordinances, procedural reforms, and technical assistance. Finally, the bill would extend the low-income housing tax credit and mortgage revenue bond programs for 18 months and link tax credit allocations and revenue bond authority to state efforts to identify and eliminate regulatory barriers. The legislation is specifically targeted to states as the source of local land-use authority and could effectuate a significant reduction in local land-use control powers.

The Economics of Land-Use Control

A major shortcoming of the NIMBY Report is its use of strident, value-laden terminology to describe strict land-use controls that have an incidental effect on the cost of housing. The first sentence of the preface reads as follows:

> *Unnecessary* regulations at all levels of government stifle the ability of the private housing industry to meet the increasing demand for affordable housing throughout the country. (Emphasis added.)

Throughout the report, regulations that negatively impact housing costs are characterized as "unnecessary," "excessive," or as "overregulation" without any analysis of the countervailing benefits of the regulations.[26] In part, this rhetoric is a function of the Commission's emphasis on implementation rather than fact finding. However, a careful analysis and weighing of the costs and benefits of land-use controls and environmental regulations would have better served both proponents and opponents of regulatory reforms, and could have formed the basis for important compromises. Instead, the report is peppered with inflammatory rhetoric that could provoke confrontation and counterrhetoric rather than lasting reform.

The NIMBY Report focuses heavily on affordability problems in California, which has a very tight, but very fragmented, regulatory structure. However, laying the state's housing affordability crisis on the doorstep of land-use regulation is simplistic. The causes of housing affordability are too complex to be assigned to one particular factor. Indeed, the report acknowledges that housing affordability problems remain concentrated among the poorest of the poor. Because of California's unique geographic setting and its strong record of social welfare assistance, the state has experienced a fairly steady influx of poor immigrants.[27] This factor skews the incidence of reported affordability problems in California, and especially in those jurisdictions where rapid growth and development have prompted restrictive land-use policies. Any analysis of the effect of land-use controls on housing costs should not ignore these important considerations.

The literature addressing the relationship between land-use controls and housing costs is immense. Most of the empirical analyses employ hedonic housing price models to evaluate the relationship between land-use controls and housing costs. In particular, economists argue that restrictive land-use controls affect housing affordability in the following ways:

- Restricting the supply of new housing below market equilibrium levels;
- Enhancing the quality or character of the community, thereby increasing demand for housing in that jurisdiction;
- Shifting growth pressures to other communities, thereby increasing the demand for housing in those communities; and
- Shifting the demand for housing to the existing housing stock, thereby increasing equilibrium price levels.

Unfortunately, theoretical and empirical analysis to date only touches the tip of the iceberg and leaves many unanswered questions. Because growth controls are typically adopted in areas of high demand—where

housing would be expensive even *without* growth controls—isolating the effects of land-use regulations is a highly speculative venture.[28] In addition to the inherent problems in attempting to isolate the effect of land-use controls on housing costs, the critical analysis of this literature demonstrates that the countervailing benefits of such regulations are generally ignored.[29] Eliminating environmental land-use controls, for instance, is not only an ineffective mechanism for producing housing for the truly needy but also produces costs of its own in the form of disaster mitigation, inefficient fiscal management, and public health—and many of these costs fall most severely on the poorest segments of the population.[30]

Consumer Preferences and Development Practices

While it has become fashionable to blame local land development regulations for increasing development costs, the demand for high-cost amenities and the evisceration of federal housing subsidies during the 1980s have widened the gap between incomes and housing costs.[31] A recent empirical study of California jurisdictions concluded that housing costs were no greater in jurisdictions with growth control than those without growth control.[32] The economic literature in particular suffers from a paucity of discussion on nonregulatory factors that influence the demand for, or cost of, land and housing. These factors include rising real income, growth in employment, cost of materials and labor, inflation, and land speculation. The NIMBY Report, on page 4, acknowledges that "for very-low-income households, the root problem is poverty." Because municipal housing markets tend to operate within larger regions, the economic literature on growth management tends to focus on the availability of substitute housing among communities within a region and community amenities as the primary determinants of demand elasticity.[33]

Most of the economic literature, especially reports sponsored by builders and development interests, tends to either ignore or to understate the effect of demand on housing costs. In particular, little attention is devoted to the effect of land speculation on spiraling land costs. Those regions in which growth controls have become a staple of the regulatory system are typically prime targets for land speculation.

Land speculation drives up housing costs in two major ways. First, conventional economic theory indicates that rapid urbanization, coupled with the inherently fixed supply of land, translates into an escalation in the cost of land as it becomes more intensively used.[34] The tax laws have traditionally enabled favorable purchase terms to be offered to speculative buyers, thereby allowing sellers to command a higher price for the land.[35] Second, the highly leveraged nature of speculative land sales, coupled with complicated chains of title—often with bizarre contractual or mortgage requirements—can render title temporarily unmarketable.[36] This ultimately places a limit on the supply of land that is realistically developable. This is a formula for increased housing costs, and developers must increase profit demands in order to account for the riskiness of the land purchase structure.

Related to the understatement of demand factors is the gross exaggeration of the effect of regulatory controls on housing costs. Regions or jurisdictions in which growth management and restrictive land-use controls have been pioneered—such as the San Francisco Bay area; Sanibel Island, Florida; the State of Hawaii; Boulder, Colorado; and many coastal resorts—are seen as very attractive places to live. As a consequence, immigrants with high incomes are able to bid up housing prices. To go one step further, wealthy immigrants are often able to outbid existing residents for housing, thereby contributing to one problem decried in the NIMBY Report—"young married couples cannot find housing in the community where they grew up." Unfortunately, most studies of the effect of growth management on housing costs have focused almost exclusively on these geographic areas. The result is a distorted picture of the impact of local land-use controls on housing costs.

The NIMBY Report (page 4) asserts that housing cost increases of 20 to 35 percent have been experienced in some areas of the country due to "excessive regulation." Unfortunately, the report does not identify which areas of the country are those "most severely affected" by land-use controls and does not provide empirical evidence that those controls are a significant factor in the price spiral.

Finally, private development controls often have the effect of excluding low-cost or low-income housing. One example is the frequent use of restrictive covenants to exclude manufactured or modular homes from single-family subdivisions—restrictions that are generally upheld by the courts.[37] While the courts have prohibited the enforcement of racially restrictive covenants, challenges to restrictive covenants designed to exclude persons on the basis of income are rarely successful.[38] The elimination of regulatory barriers to the production of low-income housing would be a Pyhrric victory for housing advocates without concomitant progress in the area of private controls.

Funding

The federal retreat from new housing construction has been dramatic. HUD-subsidized housing starts declined by 87 percent from 1980 to 1987.[39] The Section 8 new construction program, which accounted for 42 percent of all federal housing assistance in 1980, was terminated in 1983.

Since the 1986 Tax Reform Act, federal financial assistance has been limited primarily to indirect subsidies in the form of the low-income housing tax

This 104-unit senior project in Pacifica, California, was developed by BRIDGE in partnership with a private firm. Chevron Corporation purchased tax credits, allowing very-low-income rents. In 1985, voters approved a ballot measure to exempt the development from the city's growth control ordinance. This four-acre development is across the street from a shopping center and convenient to neighboring senior projects. Tax-exempt, low-floater, mortgage revenue bonds, coupled with Low Income Housing Tax Credits (LITCs), ensure long-term affordability for the projects resident senior citizens.

credit (LITC). The LITC provides a tax credit to investors for the rehabilitation or construction of housing for low-income persons. States have also used tax-exempt Mortgage Revenue Bonds (MRBs) to provide below-market financing for multifamily units.[40] The LITC has become the primary vehicle for financing low-income housing. Currently, the LITC is used to finance 94 percent of the nation's affordable housing and "represents an amazing 50 percent of all multifamily housing construction."[41] The LITC contains a sunset provision requiring that the credit be renewed every year.

Authority for the LITC lapsed on June 30, 1992.[42] On July 2, the House approved a comprehensive economic development bill (H.R. 11) that includes a permanent extension of the LITC and the MRB and Mortgage Credit Certificate programs, and creates 50 enterprise zones. The legislation would authorize HUD and the Secretary of Agriculture to designate 25 enterprise zones in urban areas and 25 in rural areas. In order to receive enterprise zone designation, states or local governments must prepare an action plan that includes not only economic development assistance, but also a number of housing initiatives, such as reductions in tax rates or fees, increased efficiency in the delivery of public services, and incentives for use of the LITC.[43]

THE COSTS OF REFORM

The literature on deregulation suffers from a lack of analysis of the long-term effects of growth management on individual housing-related costs, such as utility costs and property taxes. Largely ignored in the affordable housing debate is that the elimination of growth controls and other limitations on land speculation create equal, if not greater, costs for the housing consumer in the form of increased public expenditures for infrastructure to serve leapfrog development and costly repairs to substandard subdivisions.[44] In testimony to the Commission on Regulatory Barriers to Affordable Housing, an official from Fairfax County, Virginia, reported that a $60 million effort was currently underway to repair subdivisions approved prior to the advent of the county's subdivision regulations.[45]

The greatest shortcoming of the economic literature is its exclusive focus on the *production* stage rather than the entire life-cycle of housing occupancy. A more useful analysis would focus on the entire housing consumption life cycle, from the acquisition and permitting stage through occupancy and disposition.[46] Land-use controls requiring that housing units, and the neighborhoods in which they are located, are of high quality can reduce capital maintenance costs normally incurred during the occupancy stage of housing consumption. These include increased financing costs for the construction of urban infrastructure and its extension to outlying areas, the maintenance of substandard infrastructure and housing units, and increases in hazard and environmental mitigation costs resulting from the destruction of environmentally sensitive lands. The extent to which such costs are avoided is difficult to identify and measure, and would involve such unsavory exercises as the comparison of regulatory costs to the benefit of saving lives.[47]

On page 10 of the NIMBY Report, the commission argues that the provision of housing assistance to local governments that maintain restrictive land-use controls is wasteful, inequitable, and nonproductive. Accordingly, the commission recommends that NAHA be amended to condition federal housing assistance on the implementation of "barrier-removal strategies" and mandatory state review of, and comment on, those strategies. It recommends similar conditions be applied to a local government's mortgage revenue bond authority and low-income housing tax allocation authority.

This recommendation suffers from several major drawbacks. First, several empirical studies have concluded that restrictive land-use controls do not eliminate low- and moderate-cost housing *even where housing prices are rising in the aggregate.*[48] For example, a recent study of the Boulder, Colorado, growth control system, which limits the level of building permit issuance to historic growth rates, found that the production of moderate-cost housing in Boulder kept pace and, in some respects, exceeded regional levels following the enactment of the city's growth controls, despite overall increases in housing costs.[49]

The commission ignores the fact that many local governments with restrictive land-use and growth strategies have also been leaders in the provision of low- and moderate-income housing. Ramapo, New York, which adopted the nation's first adequate public facilities ordinance in 1969, is illustrative. The Ramapo plan tied development approval to the availability of public facilities and services provided for in an 18-year capital improvements program. The plan was implemented through a special-use permit procedure that conditioned development approval on the availability of sanitary sewers, drainage facilities, park and recreation facilities, secondary and collector roads, and fire houses.[50] The zoning ordinance was upheld by the New York State Court of Appeals in a landmark decision, *Golden v. Planning Board of the Town of Ramapo.*[51]

The Ramapo plan is often cited as an example of exclusionary zoning. In fact, however, the town created a public housing authority while the plan was under consideration, which produced a 300-dwelling-unit, low-income housing project—one of the first of its kind in the New York suburbs. Because the provision of expensive capital facilities to accommodate new growth imposed a substantial burden on existing residents, the New York Court of Appeals specifically found that the ordinance was inclusionary rather than exclusionary.

A second major drawback of the barrier-removal recommendation is the failure to provide useful alternatives for the provision of public facilities, control of traffic congestion, protection of environmental and agricultural resources, and protection of neighborhoods. Deregulation is no substitute for sound, intelligent planning. While some commentators have advocated the abolition of zoning in favor of restrictive covenants and nuisance litigation,[52] these alternatives would be difficult to enforce and would result in haphazard development patterns.[53]

In fact, there is little solid evidence that such deregulation will deliver housing to low- and moderate-income persons. The use of restrictive covenants to exclude subsidized housing and modular and manufactured houses from suburban subdivisions is a common practice, and is almost universally upheld by the courts.[54] Moreover, only persons with sufficient income to muster the legal resources to fight violations of the covenants could benefit from such a system. Clearly, deregulation would provide little comfort to advocates of low- and moderate-income housing.

The final drawback of the commission's barrier-removal strategy is the failure to define what is meant

The greatest shortcoming of the economic literature is its exclusive focus on the production stage rather than the entire life cycle of housing occupancy. A more useful analysis would focus on the entire housing consumption life cycle, from the acquisition and permitting stage through occupancy and disposition.

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by the use of the term "removal." Does the *removal* of a *regulatory barrier* mean the absolute repeal of restrictive regulations, or simply the modification of such regulations to accommodate low- and moderate-income housing? The report provides little insight as regards this question. Certainly, a blanket condition requiring barrier-removal strategies would open the door to unprecedented intrusion by a single-purpose federal agency into state and local comprehensive planning strategies. HUD would be well advised to clarify this issue. Pending such clarification, this PAS Report will provide an overview of how legitimate comprehensive planning policies can be implemented without abrogating the production of low- and moderate-income housing.

The commission might have proposed a better approach by advocating the use of federal assistance to forge a partnership with those communities that couple tight regulatory controls with innovative housing production programs, such as inclusionary zoning. Declining federal subsidies, coupled with the persistence of the affordability problem, have spawned a number of creative responses by state and local governments. These initiatives range from state lending and development programs based on the traditional federal paradigm[55] to innovative financing and ownership programs, such as housing trust funds, community development corporation support, and community land trusts.[56] As the state and local role in housing production and preservation becomes more significant, increasing attention will be given to how land-use controls not only deter but also how they can stimulate low- and moderate-income housing production and preservation.

FIRST-GENERATION REFORM EFFORTS

As the relationship between land-use controls and their exclusionary side-effects became better understood, a variety of reform efforts emerged from the courts and the legislatures. This first wave of challenges and changes to land-use regulations has formed the basis for many of the local and state affordable housing programs now active.

Judicial Responses: Regional General Welfare

Significant advances in the area of regulatory reform were initially a result of case law in exclusionary zoning cases, which relied primarily on principles of state constitutional law.[57] Exclusionary zoning litigation was of limited utility in forcing local governments to fashion permanent reform, however, since relief was primarily limited to the parties and issues before the court. In addition, access to the federal court system was limited by the application of strict standing requirements, which excluded nonresidents affected by exclusionary zoning regulations.[58] Therefore, in the 1970s, the state courts, led by the New Jersey Supreme Court, began to develop standards requiring local governments to look beyond single issues and aspects of their zoning regulations, and to develop comprehensive regulatory relief designed to accommodate the needs of the regional housing market. Accordingly, the doctrine of "regional general welfare" emerged in several states as an effort to implement lasting reform.

A number of states have endorsed this doctrine, which provides that the public interests furthered by local land-use regulation must include those of the region as well as the local government. Accordingly, local governments cannot use their land-use controls to arbitrarily exclude low-income persons from their jurisdictions, and measures must be taken to eliminate the exclusionary effects of local land-use controls. The most far-reaching holding was the New Jersey Supreme Court's decision in *Southern Burlington County NAACP v. Township of Mt. Laurel*, which mandated inclusionary zoning, created a special judicial panel to hear exclusionary zoning cases, and granted site-specific relief (known as "builder's remedies") to successful plaintiffs.[59] Regional general welfare courts have allowed local governments to balance housing needs with other comprehensive planning policies by upholding restrictive regulations where the regional fair share has been accommodated,[60] or where the local government is not a logical place for development because of environmental or public facility constraints.[61]

Legislative Responses: Anti-Exclusionary Zoning Legislation

First-generation legislative responses to exclusionary land-use controls were generally designed to remove parochial considerations from the development approval process, to encourage procedural and substantive reform, and to require the consideration of regional interests in the local legislative process. One example was the use of Title VIII of the Civil Rights Act of 1968 to attack local policies designed to concentrate minorities to limited geographic areas.[62] More recently, the state environmental quality review process has been invoked to invalidate local ordinances with potential exclusionary effects.[63] First-generation legislative reform efforts are primarily *reactive* in nature, built on case-by-case challenges to land-use controls rather than on advance planning that integrates affordable housing with other community goals and objectives. Moreover, those efforts are primarily limited to trimming the excesses of suburban zoning rather than the use of comprehensive regulatory and financial strategies designed to see low- and moderate-income housing through to construction.

Attempts to override local autonomy have proven controversial. Formation of the New York State Urban Development Corporation was one of the first attempts by a state agency to break suburban barriers to affordable housing. This state agency was empowered

to directly produce housing for any income group and to override local land-use regulations.[64] The override feature was strongly opposed by suburban jurisdictions and was modified in 1973.[65] An advisory commission to the American Bar Association on housing issues reported that the corporation produced over 30,000 dwelling units during its first six years of existence. However, an overcommitment of short-term construction borrowing and the suspension of the Section 236 multifamily housing program by the Nixon Administration in 1973 led to major financial difficulties. Accordingly, many recent state-level housing production strategies rely on local flexibility in the allocation of housing assistance. The Housing Trust Fund programs (discussed below) largely rely on local government discretion in the allocation of funds, subject to general criteria.

The Massachusetts "anti-snob" zoning law[66] has proven more successful. The law combines anti-parochialism with permit streamlining to facilitate the production of affordable housing. The permitting process for low-income housing developments is streamlined by: 1) authorizing low-income developments to apply for a comprehensive permit from the local Board of Appeals in lieu of separate applications to local boards; and 2) providing that the failure of the local board to render a decision within 40 days results in deemed approval. The denial of project approval or imposition of conditions that would render the development economically infeasible may be appealed to a state agency, thereby circumventing local bias against low-income housing. The anti-snob zoning law was upheld by the Massachusetts Supreme Court, which ruled that the law did not violate home rule, did not result in invalid spot zoning, and was not void for vagueness.[67]

Connecticut and Rhode Island have recently passed legislation similar to that of Massachusetts.[68] In Connecticut, the denial or conditional approval of a proposed affordable housing project is appealed to a special judicial panel rather than to a state agency. Thus, the Connecticut legislation combines the Massachusetts approach with the judicial remedies established by the New Jersey Supreme Court in *Mt. Laurel*. Connecticut municipalities may avoid the procedure through involvement in a regional fair-housing compact or a state-approved housing development program. The Rhode Island legislation streamlines local review by allowing the submission of a single application to a zoning board of review, which coordinates review and comment with other local agencies. The procedure applies only to rental housing. Applicants must provide assurances that the units will remain affordable for a period of 30 years. The denial of permit approval or imposition of conditions that would render construction or operation infeasible may be appealed to a state review board.

California, with its limited land supply and considerable antigrowth activism, has adopted a patchwork of legislation discouraging local governments from turning back their fair share of regional housing. The legislation was prompted by the California Supreme Court's decision in *Associated Home Builders v. City of Livermore*,[69] which required local land-use controls to reflect a balance between regional housing needs and environmental/public facilities policies. Local governments are directly prohibited from denying development approval to low- and moderate-income projects, or from imposing conditions that would render construction infeasible, unless specific findings are made pertaining to local housing obligations, countervailing public policy or safety concerns, or superseding state or federal legislation.[70] The policy does not apply to certain agricultural conservation lands or to the recently adopted Transportation Congestion Management Program.

The California legislature has further heightened the difficulty of imposing growth controls by shifting the burden of proof in litigation to local governments that ration building permits. Section 669.5 of the state's Evidence Code creates a rebuttable presumption that growth-control ordinances establishing numeric limits on residential construction have an "impact on the supply of residential units" in the region, placing the burden of proof on local governments to justify such ordinances. Sections 66412.2 and 65302.8 of the state code require local governments to justify numeric limitations on housing units with specific findings pertaining to their regional share of housing needs, a description of programs designed to accommodate those needs, available fiscal and environmental resources, and the public health, safety, and welfare justification for the ordinance. While this increases the difficulty of adopting and defending such ordinances, several local governments have successfully resisted challenges under these provisions.[71] In a recent decision, a trial found that growth limitations in Oceanside, California, had not prevented the city from accommodating its regional fair share of housing needs, and that future growth limitations were justified by infrastructure and environmental concerns.[72]

GUIDELINES FOR REFORM

There are four major issues that must be addressed in coming to grips with the relationship between land-use regulation and affordable housing in the country. The sections below briefly discuss each of these, offering suggestions as to what can be done and where further research is needed before any radical deregulation movement begins.

Targeted Modification of Regulatory Restrictions

As is discussed throughout this report, development regulations influence housing costs in a number of ways, many of which can be remedied through minor adjustments in the regulatory framework. Moreover,

local governments can employ such modifications as part of an overall program to encourage the production of affordable housing. However, the modification of regulatory restrictions will not create an incentive to produce housing available to low- and moderate-income persons unless the regulatory framework remains intact. Developments not intended for occupancy by low- and moderate-income persons should not be subject to these reform efforts.

From a technical perspective, a significant outgrowth of regulatory reform efforts has been a renewed emphasis on the comprehensive plan as the basis for land-use control. The NIMBY Report, despite its heated rhetoric, speaks favorably of the mandatory comprehensive planning legislation of states such as California, Florida, Maine, New Jersey, Oregon, and Vermont. By tailoring regulatory reform to goals, objectives, and policies contained in the comprehensive plan, the community can ensure that environmental and neighborhood values are not sacrificed.

In addition, reform efforts are most effective when targeted to particular areas of concern in the unique market in which the jurisdiction lies. For example, if land costs are high, affordable housing can be addressed through the selective application of density increases, while regulatory streamlining can be used to alleviate the extended carrying costs incurred by lengthy approval processes. These cost categories and appropriate regulatory responses are summarized in Table 1.

While land-use reforms should be carefully targeted on a geographic and project-category basis, limited reforms are generally insufficient to provide significant incentives for the production of affordable housing. The New Jersey experience with regional general welfare indicates that regulatory reform, by itself, simply does not produce affordable housing.[73] Density bonus measures often remain unused as developers opt to trade off lower densities for higher-cost housing products.[74]

There are several reasons why incentives tend to remain unused. First, in order to genuinely encourage the production of affordable housing, density bonuses must be coupled with additional financial and regulatory incentives in order to render a project financially feasible. One regulatory incentive is, in many cases, insufficient. Second, many developers operating in suburban areas do not consider themselves to be in the low-income housing business. The production of low-income housing is generally seen as a function of the government and nonprofits. Finally, few jurisdictions have mandatory inclusionary zoning, allowing the incentives only as an *optional* provision that, in many instances, requires an additional layer of review and approval. Requiring the production of affordable housing can prove a more effective, although more controversial, inclusionary zoning instrument.

TABLE 1. DEVELOPMENT COSTS AND PUBLIC RESPONSES

Cost Input	Public Response
Land Cost	Increase density Sale/grant of publicly owned property
Carrying Costs Interest Property taxes	Permit streamlining Subsidies/Low-interest loans
Hard Costs Construction costs Site preparation costs Off-site exactions	Zoning for manufactured housing Accessory dwelling units Cluster/zero-lot line standards Modification of zoning requirements governing: street widths; off-street parking; lot coverage; sidewalks; and curb and gutter Targeted exemptions
Facilitating the development process	Regulatory incentives Early vesting and development agreements Inclusionary zoning Housing trust funds Public-Private partnerships

The Cost of Land

The cost of land and investment capital are the major determinants of housing costs in modern real estate markets.[75] Approximately 25 percent of housing costs are attributable to land costs in most real estate markets. Unlike capital costs, land costs are uniquely affected by local government action in the area of land-use control. While some of this cost is undoubtedly attributable to land-use controls that restrict the supply of land available for housing development, a major component of this cost is due to land speculation.[76] It was reported in San Diego's 1980 Housing Element that the speculative purchase of residential dwelling units contributed to a 112 percent rise in housing costs from 1976 to 1980.[77] According to that document:

> The *Wall Street Journal* estimated that between 20 and 40 percent of the new homes purchased in California (as much as 80 percent in new developments) had been bought by speculators. In Orange County,

the Federal Home Loan Bank of San Francisco estimated that speculators purchased 20 percent of the total housing stock sold in Orange County in 1976, representing more than a year's supply of new home demand.

The use of land-use controls to selectively discourage land speculation and to contain housing costs is largely ignored in literature critical of growth controls.

Cost of Capital: Providing Dollars

Unfavorable financial conditions for the construction of housing affordable to low- and moderate-income families are often so severe as to offset any benefits that might accrue from the modification of land-use controls. Because low-income housing is expensive to produce and to maintain, the availability of low-cost financing, grants, and other funding sources is critical. Unfortunately, as has been noted elsewhere in this report, changes in federal tax legislation and cutbacks in federal funding during the 1980s severely hampered the production of low-income housing and reduced incentives for private investment.

National and regional restrictions on municipal and infrastructure finance have necessitated the use of impact fees and development exactions and have created unintended disincentives for the production of affordable housing. This is particularly true in California, where the effect of property tax limitations obviate the production of affordable housing even in pro-growth jurisdictions. For instance, Proposition 13, which was recently upheld by the United States Supreme Court,[78] provides for reassessment of property values only when a property is sold. Otherwise, tax increases are limited to two percent per year—resulting in a two-tiered property tax system substantially favoring those residents owning property prior to the advent of Proposition 13. This has created an enormous disincentive for the production of smaller homes:

> Proposition 13 has grown to "create a feudal class of people who will go into the next century not paying any higher taxes, simply because they were lucky enough to own property at the right time." This policy has led to an overconsumption of residential space in California that has exacerbated the affordable housing crisis. Older residents, for instance, hang on to housing that is often too large for their needs, fearing a higher tax burden even if they move to a smaller home. This has made smaller homes less attractive to construct, resulting in the freezing out of new families and first-time homebuyers from the California housing market.[79]

Local governments have developed creative programs designed to respond to federal housing cutbacks, and the HOME and HOPE programs created by NAHA provide new federal monies for low-income housing.[80] The HOME Investment Trust Fund (Title II) is a block grant program for participating jurisdictions for rehabilitation, new construction, and tenant-based rental assistance.[81] HOME funds may be applied to equity participation, loans (interest-bearing or non-interest bearing), or interest subsidies. Purposes of the HOME program include expanding the supply of affordable housing and facilitating the capacity of state and local governments and nonprofit organizations to create affordable housing. At least 15 percent of the available funds must be set aside for nonprofit community housing development organizations (CHDOs). Model programs established under Title II include rental housing production, rental rehabilitation, sweat equity, second mortgage assistance for first-time homebuyers, and *in rem* conversions. However, the emphasis of the program is on moderate rehabilitation rather than new construction, with only 30 percent of eligible communities guaranteed certification to use funds for new construction.[82] New construction funds are generally limited to areas experiencing housing shortages, neighborhood revitalization efforts, and special needs housing (housing for large families, units for disabled persons, and single-room occupancy units).

The Homeownership and Opportunity Through HOPE Act (Title IV) amends the United States

Contra Costa County and the City of Pinole, California, granted a substantial density bonus and issued tax-exempt bonds to make it possible for lower-income first-time buyers to purchase a unit in this mixed-income project, Willowbrook Condominiums; 51 of the 210 units were affordable. Prices for the affordable units ranged from $56,000 to $92,000 and were available with county Mortgage Credit Certificates to families that earned from $23,000 to $44,000 annually. The project features a pool, spa, and creekside habitat restoration.

Housing Act of 1937 to authorize the creation of ownership programs for public and Native American housing tenants.[83] Assistance programs must involve the acquisition of at least one-half of the public housing units in a project by eligible tenants or other low-income families. Ownership arrangements may include fee simple ownership or innovative arrangements such as cooperative ownership (including limited equity cooperative ownership) or condominium ownership. The program includes resale restrictions designed to ensure continued availability of the units to low-income families and protection and relocation assistance for families choosing not to purchase units. Separate programs are established for public housing (HOPE I), foreclosed or distressed federal, state, or local government multifamily projects (HOPE II), and publicly held single-family units (HOPE III). The HOPE program is the cornerstone of Secretary Jack Kemp's "empowerment" policy to enable low-income residents of public housing projects and other federally assisted housing to achieve self-reliance through home ownership.

The 1991 appropriations under Cranston-Gonzalez included $1.5 billion for the HOME programs, including a waiver of state matching requirements, while the HOPE program received only 40 percent of its authorized level, or $361 million.[84]

Both programs contain matching requirements for participating jurisdictions, which may include fee and tax waivers, land donations, and infrastructure commitments.[85] The matching requirement under the HOME program is $4 of federal assistance for every dollar of local assistance for rental assistance and housing rehabilitation, 3-to-1 for substantial rehabilitation, and only 2-to-1 for new construction. A 4-to-1 matching requirement applies to implementation grants administered under the HOPE program. Local governments have used real estate transfer taxes, linkage fees, and other innovative mechanisms to produce revenue for housing, while housing trust funds have provided an effective mechanism for collecting and earmarking these monies.

Packaging the Deal: Public-Private and State-Local Partnerships

A variety of state and local innovations have provided new opportunities for the production of low- and moderate-income housing through a partnership arrangement. These innovations are buttressed by the availability of the national HOME Investment Trust Fund created by NAHA. During the 1990s, the local land-use regulatory process will be increasingly viewed as a mechanism for facilitating, rather than deterring, the availability of low- and moderate-income housing. Innovations like development agreements and early vesting provisions can provide regulatory incentives for low-cost housing production, without jeopardizing local environmental or quality-of-life objectives and local market risk. The agreements eliminate market risks created by the unpredictable approval process, embody the obligations of the public and private sectors in a legally binding document, and give both parties a stake in the production of affordable housing.

The balance of this report describes how local governments are using land-use controls to provide low- and moderate-income housing without jeopardizing the public policies that lead to their implementation. Chapter 2 describes the proactive, supply-side approach, which employs regulatory controls such as inclusionary zoning, linkage fees, housing trust funds, and tax increment financing. These measures rely on local police powers to ensure that new development does not crowd out opportunities for the construction of affordable housing (inclusionary zoning, linkage) and on local revenue powers to finance the production of housing. The preservation of the existing supply of low- or moderate-income housing is a cost-effective solution that can also produce efficient patterns of land development. Chapter 2 also describes how local governments can use land-use controls to promote infill development or to discourage the elimination of single-room-occupant housing or other forms of low-income shelter.

Chapter 3 focuses on the reactive, demand-side measures favored by the NIMBY Report. These include reforms in zoning and subdivision standards, the integration of factory-built housing or accessory apartments into a community, and adjustments to growth management or environmental regulations that can be used to transform a restrictive building environment into a tool for the provision of decent, low- and moderate-income shelter. The chapter describes how infrastructure exactions and impact fees can be modified to accommodate low- and moderate-income housing. It concludes with a dis-cussion of procedural reforms that can be used to increase certainty in the approval process and describes how flexible mechanisms, such as development agreements, can significantly expand a local government's capacity to accommodate housing opportunities.

Providing a role for comprehensive planning in the housing delivery system is the most effective solution to countervailing pressures for deregulation or the foreclosing of housing opportunities through inflexible regulations. Chapter 4 addresses recent state comprehensive planning legislation, which attempts to strike a balance between the implementation of local environmental, community character, and public facilities goals and the provision of affordable housing. The chapter focuses on trends in local planning authority and regulatory techniques, and provides a useful framework for impending federal housing assistance reforms.

Chapter 1. Notes

1. See, for example, Frank Popper, *The Politics of Land-Use Reform* (Madison, Wisc.: University of Wisconsin Press, 1981); Orlando Delogu, "Local Land Use Controls: An Idea Whose Time Has Passed," *Maine Law Review* 36 (1984): 261.

2. For an example of the former, see Allan Mallach, "The Fallacy of Laissez-Faire: Land-Use Deregulation, Housing Affordability and the Poor," *Washington University Journal of Urban and Contemporary Law* 30 (1986): 35. For an example of the latter, see *The Report on the President's Commission on Housing* (U.S. GPO, 1982) (William McKenna, Chair), which urged the courts to revisit the presumption of validity for zoning ordinances established in *Village of Euclid v. Amber Realty*, 272 U.S. 365 (1926).

3. Advisory Commission on Regulatory Barriers to Affordable Housing, *"Not in My Back Yard": Removing Regulatory Barriers to Affordable Housing* (Washington, D.C.: U.S. GPO, 1991).

4. *The Report on the President's Commission on Housing* (U.S. GPO, 1982) (William McKenna, Chair). In testimony before Congress concerning the 1991 NIMBY Report, Chairman Kean indicated that the Commission does not advocate "a removal of all controls." *Report by the Advisory Commission on Regulatory Barriers to Affordable Housing: Joint Hearing before the Subcommittee on Policy Research and Insurance, and the Subcommittee on Housing and Community Development of the Committee on Banking, Finance, and Urban Affairs*, 102d Cong., 1st Sess. 4, 5 (No. 102-57, 1991) [hereinafter "Joint Hearing"].

5. U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *The President's National Urban Policy Report* (Washington, D.C.: U.S. GPO, Dec. 20, 1991); "HUD Releases Biennial Report, Calls Efforts 'New War on Poverty,'" *Housing and Development Reporter*, January 6, 1992.

6. U.S. Department of Commerce, *Statistical Abstract of the United States*, 110th edition, 1990, 441. Housing costs rose six percent during 1984-1987, while total consumer expenditures rose by only 3.6 percent.

7. U.S. Department of Commerce, *Statistical Abstract of the United States*, 111th edition, 1991, 732.

8. Michael Stone, *One-Third of a Nation: A New Look at Housing Affordability in America* (Washington, D.C.: Economic Policy Institute, 1990).

9. Joint Center for Housing Studies, *The State of the Nation's Housing* (Cambridge, Mass.: Joint Center, 1991).

10. 272 U.S. 365 (1926)

11. S. Mark White, "The National Affordable Housing Act and Comprehensive Planning: An Overview and Analysis," *Proceedings of 1992 Institute on Planning, Zoning, and Eminent Domain*, Secs. 4.01-4.09, November 20-22, 1991, Southwestern Legal Foundation.

12. See, for example, *Ybarra v. Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974); *Steel Hill Development v. City of Sanbornton*, 469 F.2d 956 (1st Cir. 1972); *Hay v. Township of Groer*, 296 Minn. 1, 206 N.W.2d 19 (1973); *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975); *DeCaro v. Washington Township*, 21 Pa. Cmwlth. 252, 344 A.2d 725 (1975); *County of Ada v. Henry*, 105 Idaho 263, 668 P.2d 994 (1983); *Still v. Board of County Commissioners*, 42 Or. App. 115, 600 P.2d 433 (1970); *National Land and Investment Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965), which invalidated a zoning regulation mandating four-acre minimum residential lots; *In re Appeal of Kit-Mar Builders*, 439 Pa. 466, 268 A.2d 765 (1970), which invalidated two- and three-acre minimum lot size requirements, but compare *Caruthers v. Board of Adjustment*, 290 S.W.2d 340 (Tex. Civ. App. 1956), which upheld a 40,000-square-foot minimum lot size; *Thompson v. City of Carrollton*, 211 S.W.2d 970 (Tex.Civ.App.-Texarkana 1948, no writ), which upheld 900-foot floor area minimum, minimum house size. See also Norman Williams, *American Land Planning Law*, Secs. 63.01-63.13 (1987); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978), concerning a violation of Title VIII of Fair Housing Act.

13. See, for example, *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975), which found a ban on apartment buildings invalid when it impedes a jurisdiction's ability to accommodate regional housing needs; *In re Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970); and *Township of Williston v. Chesterdale Farms*, 7 Pa. Cmwlth. 453, 300 A.2d 107 (1973)

14. See, for example, *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973) and *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983).

15. See J. Kushner, *Fair Housing: Discrimination in Real Estate, Community Development, and Revitalization* (Colorado Springs, Colo.: Shepard's, McGraw-Hill, 1983), Sec. 7.08.

16. *Associated Home Builders v. City of Livermore*, 18 Cal.3d 582, 135 Cal.Rptr. 41, 55, 557 P.2d 473 (1976).

17. See, for example, *DeCaro v. Washington Township, Berks County*, 21 Pa.Cmwlth. 252, 344 A.2d 725 (1975).

18. National Commission on Urban Problems, *Building The American City*, H.R. Doc. No.34, 91st Cong., 1st Sess. (1968) [hereinafter, Douglas Commission Report].

19. See *NIMBY Report*, 9-2 to 9-3, citing National Housing Task Force, *A Decent Place to Live* (March 1988); *The Report of the President's Commission on Housing* (U.S. GPO, 1982); U.S. Department of Housing and Urban Development, *The President's National Urban Policy Report* (1984); U.S. Department of Housing and Urban Development, *Final Report on the Task Force on Housing Costs* (1978); and National Commission on Urban Problems, *Building the American City* 211-17, 235-53 (91st Cong. 1st Sess. 1968).

20. Pub. L. No. 101-625, 104 Stat. 4079, *codified at* 42 U.S.C., Secs. 12701 *et seq.* (1990).

21. See Sec. 105(a), which makes preparation of CHAS a condition to receiving direct assistance under Act, and 217(c)(3), which allows a direct reallocation of unused HOME investment funds.

22. See, for example, National Housing Task Force, *A Decent Place to Live* (March 1988); *The Report of the President's Commission on Housing* (U.S. GPO, 1982); U.S. Department of Housing and Urban Development, *The President's National Urban Policy Report* (1984); U.S. Department of Housing and Urban Development, *Final Report on the Task Force on Housing Costs* (1978); and National Commission on Urban Problems, *Building the American City* 211-17, 235-53 (91st Cong. 1st Sess. 1968).

23. See the Current Developments Section in *Housing & Development Reporter*, June 11, 1990.

24. U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *The President's National Urban Policy Report* (Washington, D.C.: U.S. GPO, Dec. 20, 1991): 14-18. HUD's Fiscal Year 1993 budget includes its recommendation to tie federal funds to the implementation of local barrier removal strategies, including, through the CHAS approval requirement, the availability of mortgage revenue bond and low-income housing tax credit authority. These recommendations are bolstered by a request for $10 million in Community Development Block Grant monies to support barrier removal programs, including authority to accept a "substantially equivalent" barrier removal plan as a proxy for the existing CHAS requirement. The agency has proposed legislation establishing an Interagency Affordable Housing Review Board and a Regulatory Reform Clearinghouse, and $1 million has been awarded to the National Association of Homebuilders to develop model state standards.

25. Letter from Jack Kemp, Secretary, United States Department of Housing and Urban Development, to the Honorable Thomas Foley, Speaker of the United States House of Representatives (May 8, 1992).

26. According to some observers, the Commission's structure evinces a greater concern for the economic health of homebuilders and right-wing ideology than the production of affordable housing. The Commission was chaired by former New Jersey governor Thomas Keane, whose "enthusiasm" for low-income housing has been described as "marginal" by Peter Buchsbaum, "No Wrong Without a Remedy: The New Jersey Supreme Court's Effort to Bar Exclusionary Zoning," *Urban Lawyer* 17 (1985): 59, 67. During his administration, Governor Keane advocated the abolition of the State Division of State and Regional Planning, which was responsible for preparing and updating the New Jersey State Development Guide Plan—the basis for determining municipal fair-share housing obligations in that state. See also *Hills Dev. Co. v. Bernards Township*, 103 N.J. 1, 510 A.2d 621 (1986), which endorsed the use of the State Development Guide Plan to determine municipal fair-share obligations. The balance of the Commission consisted primarily of representatives of the development industry or commentators who had already endorsed conclusions similar to what the Commission ultimately reached. One member of the Commission reports that the representatives from the public sector or low-income-housing advocacy groups "rarely attended meetings and exerted—with one exception—little or no influence on the commission's findings." Anthony Downs, "The Advisory Commission on Regulatory Barriers to Affordable Housing: Its Behavior and Accomplishments," *Housing Policy Debate* 2 (1991): 1095, 1099. One of the few low-income advocates on the Commission later criticized the Commission recommendations on environmental and rent controls, and expressed disappointment with its recommendation to withold housing money from those jurisdictions continuing these practices. Gail Cincotta, "Viewpoint," *Planning*, September 1991, 46. While there is nothing wrong with including developers on such a committee, their overrepresentation undermined the divergence of views that could have produced a more effective and balanced report.

27. "There Is a Limit to What We Can Absorb," *Time*, November 18, 1991 (interview with Governor Pete Wilson). For a summary of environmental and social problems occasioned by California's rapid growth, see "The Endangered Dream," *Time*, November 18, 1991, 42.

28. Most of the literature that is critical of the effect of growth controls on housing costs acknowledges that documenting that effect on the cost and supply of developable land is extremely difficult. See, for example, Bernard Frieden, *The Environmental Protection Hustle* (Cambridge, Mass.: MIT Press, 1979), 4.

29. Ronald Silverman, "Housing for All Under Law: The Limits of Legalist Reform," *UCLA Law Review* 27 (1979): 104-107; Allan Mallach, "The Fallacy of Laissez-Faire."

30. Howard H. Hiatt, *America's Health in the Balance: Choice or Change?* (New York: Harper and Row,1987).

31. See Cooper, "Suburban Homes," *Congressional Quarterly Editorial Research Reports*, September 25, 1987, 505; Philip Langdon, "In Elite Communities, A Torrent of Teardowns," *Planning*, October 1991, 25; and J. Paul Mitchell, "The Historical Context for Housing Policy," in *Federal Housing Policy & Programs* (1985): 3, 14, which documents that the average house size increased from 800-1,000 square feet in 1940s to 1,500-2,000 square feet in 1970s. See also, *Suffolk Housing Services v. Town of Brookhaven*, 70 N.Y.2d 122, 517 N.Y.S.2d 924, 511 N.E.2d 67 (1987), in which testimony attributed the lack of multifamily housing construction to lack of developer interest caused by increasing costs and economic stagnation, rather than local zoning ordinances.

32. Madelyn Glickfeld and Ned Levine, *Regional Growth . . . Local Reaction: The Enactment and Effects of Local Growth Control and Management Measures in California* (Cambridge, Mass.: Lincoln Institute of Land Policy, 1992): 53-56.

33. See, for example, Peter M. Zorn, David E. Hansen, and Seymour I. Schwartz, "Mitigating the Price Effects of Growth Control: A Case Study of Davis, California," *Land Economics* 42 (February 1986): 46, 47.

34. E. Jay Howenstine, *Attacking Housing Costs: Foreign Policies and Strategies* (New Brunswick, N.J.: Rutgers University, Center for Urban Policy Research, 1983): 59.

35. Bruce Lindeman, "Anatomy of Land Speculation," *Journal of the American Institute of Planners* 40 (1976): 142, 145.

36. Ibid. 149-50.

37. See, for example, *Brownfield Subdivision, Inc. v. McKee*, 61 Ill.2d 168, 334 N.E.2d 131 (1975) and *Moore v. McDaniel*, 48 Ill.App.3d 152, 5 Ill.Dec. 911, 362 N.E.2d 382 (1977).

38. But see *Roy v. DuCote*, 399 So.2d 737 (La. App. 1981), in which a restrictive covenant designed to exclude federally subsidized housing was ruled unconstitutional.

39. Robert K. Landers, "Low-Income Housing," *Congressional Quarterly Editorial Research Report*, May 8, 1987, 209, 216.

40. Michael A. Stegman, *Housing Finance and Public Policy: Cases and Supplementary Readings* (New York, N.Y.: Van Nostrand Reinhold Co., 1986), 133.

41. "Housing Credit in Jeopardy," *City & State*, September 23-October 6, 1991, 1.

42. H.R. 3909, P.L. 101-___, signed by the President on December 31, 1991, had extended the credit for six months. "Eleventh-Hour Legislation Extends Tax Credit for Another Six Months," *Housing and Development Reporter*, Dec. 9, 1991.

43. H.R. 11, *Congressional Record* 138, H5864 (July 2, 1992); "Housing Tax Bill Would Provide 50 Enterprise Zones, Permanent Tax Extensions, Passive Loss Relief," *Housing and Development Reporter* (July 6, 1992).

44. In a widely cited study, the Real Estate Research Corporation, in 1974, noted that the cost of providing infrastructure to low-density, outlying developments increased road and utility costs by 15 percent, land costs by 20 percent, and other governmental services by seven to eight percent—all of which are borne by the housing consumer. Real Estate Research Corporation, *The Costs of*

Sprawl (1974), 8. High-density development achieved dramatic savings when compared to low-density leapfrog developments, including 56 percent in total capital costs, 43 percent in land costs, 11 percent in operating and maintenance costs, a 50 percent reduction in air pollutants, and a 44 percent reduction in energy consumption. See also, Miller, "Assessing Residential Land Price Inflation," in Frank Schnidman and Jane A. Silverman, editors, *Housing Supply and Affordability* (Washington: ULI, 1983), 97, 101. A recent economic study performed by Rutgers University concluded that New Jersey's interim land-use plan, which discourages development in outlying areas, provides for strong environmental protection policies, and encourages the use of impact fees, would save the state $740 million in road costs, encourage the use of mass transit, reduce water and sewer infrastructure costs by $440 million, and result in lower housing costs over the next 20 years. Rutgers University, Center for Urban Policy Research, *Impact Assessment of the New Jersey Interim State Development and Redevelopment Plan, Report 2: Research Findings* (New Brunswick, N.J.: February 28, 1992): xiv-xviii.

45. "Federal Government Imposes Greatest Barriers to Affordable Housing, Panel Told," *Housing and Development Reporter*, October 15, 1990.

46. Florida Department of Community Affairs, *The Impact of Florida's Growth Management on the Affordability of Housing* (September 1985), 198. While the Department of Community Affairs' report makes this important point, the survey is limited to impact fees and the methodology assumes that the full cost of the fees are passed on to the housing consumer. There is no consensus as to whether the full cost of impact fees are indeed borne by the housing consumer. Therefore, this study is of limited utility in quantifying the effects of growth management on housing costs.

47. For a comparison of cost-benefit analyses in environmental decision making, see David Moreau, Eric Hyman, Bruce Stiftel, and Robert Nichols, *Elicitation of Environmental Values in Multiple Objective Water Resource Decisionmaking* (Univerity of North Carolina, Dept. of City and Regional Planning, May 1981).

48. Thomas I. Miller, "Must Growth Restrictions Eliminate Moderate-Priced Housing?," *Journal of the American Planning Association* 52 (Summer 1986): 319; Glickfeld and Levine, *Regional Growth . . . Local Reaction.*

49. Miller, "Must Growth Restrictions Eliminate Moderate-Priced Housing?," 322-23. Boulder has also pursued innovative inclusionary zoning and financing programs designed to produce low- and moderate-income housing that have proven very successful. See S. Mark White, "Using Fees and Taxes to Promote Affordable Housing," *Land Use Law and Zoning Digest* (September 1991), which describes a housing excise tax program.

50. Robert Freilich, "Development Timing, Moratoria, and Controlling Growth," paper presented at the Institute on Planning, Zoning, and Eminent Domain, 1974. The states of Florida and Washington have since adopted legislation requiring local governments to establish adequate public facilities that provide for the timing and sequencing of development in accordance with locally adopted capital improvements programs. In Florida, this concept is known as "concurrency." Florida Statutes Secs. 163.3177(10)(h), 163.3202(2)(g); Fla. Admin. Code Sec. 9J-5.0055; Wash. Rev. Code Sec. 36.70A et seq.

51. 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291, *app. diss'd*, 409 U.S. 1003 (1972).

52. Robert Ellickson, "Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls," *University of Chicago Law Review* 40 (1973): 681; Douglas Kmiec, "Land Use Deregulation: An Alternative Free Enterprise Development System," *1983 Zoning and Planning Law Handbook*, 309; Bernard Siegan, *Land Use Without Zoning* (Lexington, Mass.: Lexington Books, 1972); Bernard Siegan, "Non-Zoning in Houston," *Journal of Law and Economics* 13 (1970): 71.

53. Jan Krasnowiecki, "Abolish Zoning," *Syracuse Law Review* 31 (1980): 719.

54. See note 37 above and accompanying text.

55. Michael Stegman and David J. Holden, "States, Localities Respond to Federal Housing Cutbacks," *Journal of State Government* 60 (May/June 1987): 110.

56. Mary Nenno, "State and Local Governments: New Initiatives in Low-Income Housing Preservation," *Housing Policy Debate* 2 (1990): 467; "Local Public Private Initiatives Fill Void Left by Federal Cutbacks in Housing," *Housing and Development Reporter*, October 29, 1990, 505. See also the section in Chapter 2 of this report on housing trust funds. "Community Land Trusts Grow, Make Housing More Affordable," *Housing and Development Reporter*, October 14, 1991, 431; Institute for Community Economics, *The Community Land Trust Handbook* (1982). See also Connecticut Housing Land Bank and Land Trust Program, Conn. Gen. Stat. Ann. Secs. 214b-214e (1989), as amended by 1991 Connecticut Laws, P.A. 91-182, S.H.B. 7067; and Maine Rev. Stat. Ann. Secs. 5021-5025, which established an Office of Nonprofit Assistance to monitor and assist homestead land trusts.

57. Mary Brooks, *Exclusionary Zoning*, PAS Report No. 254, (Chicago, Ill.: ASPO, 1970); Richard Fishman, ed., *Housing For All Under Law: New Directions in Housing, Land Use, and Planning Law* (Cambridge, Mass.: Ballinger,1978); Paul Davidoff and Linda Davidoff, *Fair Housing and Exclusionary Land Use*, ULI Research Report No. 23 (Washington, D.C.: ULI, 1974).

58. Robert H. Freilich and G. Allen Bass, "Exclusionary Zoning: Suggested Litigation Approaches," *Urban Lawyer* 3 (1971): 344, 346-47. Access to the federal courts has been inhibited in exclusionary zoning cases due to restrictive rules governing standing. In *Warth v. Seldin*, 422 U.S. 490 (1975), the United States Supreme Court denied standing to nonresidential low- and moderate-income persons, adjoining municipal taxpayers, a homebuilders association, and a development corporation to challenge a local zoning ordinance imposing lot size, setback, and floor-area requirements that effectively excluded low- and moderate-income persons from residing in the community. Standing in the federal courts has been limited primarily to site-specific relief for specific development proposals and ancillary claims by prospective tenants. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), *on remand*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978), *on remand*, 469 F.Supp. 836 (Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980). However, the court in *Arlington Heights* upheld the municipality's refusal to rezone a tract from single-family to multifamily, holding that the equal protection clause requires proof of discriminatory *intent* rather than a mere discriminatory *effect*.

Many state courts have, in fact, liberalized their standing rules in order to effectuate access to the courts for plaintiffs in exclusionary zoning cases alleging violation of *state* constitutional provisions. See *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713, 717 n.3 (N.J.), *appeal diss'd and cert. denied*, 423 U.S. 808 (1975); *Urban League v. Mayor & Council*, 359 A.2d 526 (N.J. Super. Ct. Ch. Div. 1977); *Urban League v. Township of Mahwah*, 370 A.2d 521 (N.J. Super. Ct. App. Div. 1977); *Suffolk Housing Services, Inc. v. Town of Brookhaven*, 397 N.Y.S.2d 302 (N.Y. Sup. Ct. 1977).

59. *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied*, 423 U.S. 808 (1975) (*Mt.*

Laurel I); 92 N.J. 158, 456 A.2d 390 (1983) (*Mt. Laurel II*). See also *Britton v. Chester*, 595 A.2d 492 (N.H. 1991); *Associated Homebuilders v. City of Livermore*, 18 Cal.3d 582, 135 Cal.Rptr. 4, 557 P.2d 473 (1976); *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975); *National Land & Investment Co. v. Kohn*, 215 A.2d 597 (Pa. 1965); and *Board of Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959).

60. See, for example, *Suffolk Housing Services v. Town of Brookhaven*, 70 N.Y.2d 122, 517 N.Y.S.2d 924, 511 N.E.2d 67 (1987).

61. See *In re Appeal of Shore*, 496 A.2d 876 (Pa. Cmwlth. 1985), in which a total exclusion of manufactured homes was upheld; and *Hills Dev. Co. v. Bernards Township*, 103 N.J. 1, 510 A.2d 621 (1986), which upheld state legislation authorizing local governments to phase-in regional fair-share obligations so as to avoid overburdening public facilities and services.

62. 42 U.S.C. Secs. 3601-3631; see *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 2821 (1988); *Spallone v. United States*, 109 S.Ct. 14 (1988)(memorandum decision); *Town of Huntington v. Huntington Branch, NAACP*, 844 F.2d 926, rev. denied, 109 S.Ct. 276 (1988); *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981), cert. denied, 102 S.Ct. 1972 (1982); *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975); *Hills v. Gautreax*, 425 U.S. 284 (1976).

63. See, for example, *Ginsburg Dev. Corp. v. Town of Cortland*, 565 N.Y.S.2d 371 (N.Y.Sup. 1990), in which a hillside protection ordinance with alleged exclusionary effects was invalidated for failure to follow mandatory SEQA review.

64. See Mckinney's Unconsolidated Laws, Secs. 6251-6265 (1979 & Supp. 1991); William K. Reilly and S.J. Schulman, "The State Urban Development Corporation: New York's Innovation," *Urban Lawyer* 1 (1969): 129; Richard Babcock and Fred Bosselman, *Exclusionary Zoning: Land-Use Regulation and Housing in the 1970s* (New York: Praeger, 1973), 203-8.

65. Richard Fishman, ed., *Housing For All Under Law*, 506. See also *Floyd v. New York State Urban Development Corp.*, 33 N.Y.2d 1, 347 N.Y.S.2d 161, 300 N.E.2d 704 (1973), which upheld the constitutionality of the override feature.

66. Mass. Gen. Laws, ch. 40B, (1979 & Supp. 1991).

67. *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 294 N.E.2d 393 (1973).

68. Conn. Gen. Stat. Ann. Sec. 8-30g (Supp. 1991); 1991 Rhode Island Laws, Ch. 91-154. See *TCR New Canaan, Inc. v. Planning & Zoning Comm'n of Town of Trumbull*, 1992 WL 48587 (Conn. Super. 1992), which considered whether legislative actions, such as rezonings, are subject to heightened standard of review and affordable housing appeals procedure; *Lantos v. Town of Newtown Planning and Zoning Commission*, 1992 WL 50082 (Conn. Super. 1992), which ruled that applicants must include assurances for construction of affordable housing in order to use housing appeals procedure.

69. 18 Cal.3d 582, 135 Cal. Rptr. 41, 557 P.2d 473 (1976).

70. Gov't Code Sec. 65589.5 (West Supp. 1991).

71. See *Building Industry Ass'n v. Superior Court*, 211 Cal.App.3d 277, 259 Cal.Rptr. 325 (1989); *Building Industry Association v. City of Camarillo*, 41 Cal.3d 810, 718 P.2d 68, 226 Cal.Rptr. 81 (1986); and *Lee v. City of Monterey Park*, 173 Cal.App.3d 798, 219 Cal.Rptr. 309 (2d Dist. 1986).

72. *Building Industry Ass'n v. City of Oceanside*, Nos. N37638, N37196 (Aug. 6, 1991).

73. Joint Hearing (see note 4), testimony of John Payne, Associate Dean and Professor of Law, Rutgers Law School, 95-110.

74. Robert A. Johnston, Seymour I. Schwartz, Geoffrey A. Wandesforde-Smith, and Michael Caplan, "Selling Zoning: Do Density Bonus Incentives for Moderate-Cost Housing Work?," *Land Use Law and Zoning Digest* (August 1990):3.

75. Harold A. McDougall, "Affordable Housing for the 1990s," *Journal of Law Reform* 20 (1987): 727, 730.

76. See Feagin, "Urban Real Estate Speculation in the United States: Implications for Social Science and Urban Planning," in R. Bratt, C. Hartman, and A. Meyerson, *Critical Perspectives on Housing* (Philadelphia: Temple University Press, 1986), 99, 105–108, 112–14; and M. Clawson, *Suburban Land Conversion in the United States* 134-37 (1971).

77. City of San Diego, California, Housing Element (Aug. 1980), 120.

78. *Nordlinger v. Hahn*, ___ U.S. ___, 60 U.S.L.W. 4563 (1992).

79. "California's Proposition 13 Faces Serious Challenge," *Public Investment*, September 1991, 4.

80. Public Law No. 101-625, 104 Stat. 4079, *codified at* 42 U.S.C., Secs. 12701 *et seq.* (1990). For an overview of the HOME and HOPE programs, see Charles Edson, "The National Affordable Housing Act: Historic Legislation," *Housing and Urban Development Law* (Winter-Spring 1991): 3-4; Molly Sellman and Marjorie Whitney, "The Cranston-Gonzalez National Affordable Housing Act," *Land Use Law and Zoning Digest* (May 1992): 3-7; White, "The National Affordable Housing Act and Comprehensive Planning," Sec. 4.01[2].

81. Public Law No. 101-625, Secs. 201-226, 42 U.S.C., Secs. 12701 *et seq.*

82. Public Law No. 101-625, Sec. 212.

83. Public Law No. 101-625, Secs. 441-448, 42 U.S.C., Secs. 1437 *et seq.*

84. H.R. 2519, Public Law No. 102-139 (Oct. 28, 1991).; H. Rep. No. 102-226. For the HOPE program, this figure includes $161 million for public housing, $95 million apiece for multifamily and single-family housing, and $10 million for elderly housing. Assuming that each unit could be purchased at a cost of $50,000, and excluding administrative expenses and relocation costs for displaced tenants, this would result in the purchase of only 7,220 units—144 per state. An additional $3.4 billion was allocated to the community development block grant program.

85. Public Law No. 101-625, Secs. 220, 411 (adding sections 302(c), 423(c), and 443(c) to Title III of the Housing Act of 1937).

Chapter 2. Affirmative Measures: Using Land-Use Controls to Provide Affordable Housing

The NIMBY Report, in its Recommendation 8-4, explicitly recognizes that employers and private industries have a direct stake in the production of decent, affordable housing. In order to establish a workable and legally defensible inclusionary zoning or linkage program, a causal connection between new development and the provision of affordable housing must be established. Where careful studies have been undertaken to establish the nexus between new development and housing needs, courts are increasingly willing to approve such programs.

Affirmative measures generally require some contribution by new development to the supply of affordable housing. This often takes one of several forms:

- Inclusionary zoning or land-use policies that require or induce developers to set aside a portion of residential projects for low- and moderate-income housing; or
- Linkage policies, which require that new development that creates a need for affordable housing construct or rehabilitate housing units or pay a fee into a housing trust fund.

INCLUSIONARY ZONING

According to the seminal work on inclusionary zoning, an inclusionary zoning ordinance is a policy that either ties development approval to, or creates regulatory incentives for, the provision of low- and moderate-income housing as part of a proposed development.[1] Several states now expressly authorize mandatory or optional inclusionary zoning.[2] Curiously, on pages 2-7 to 2-8 of the NIMBY Report, inclusionary zoning is dismissed as an attempt by local governments with restrictive land-use controls to rationalize their effect on affordable housing. Despite evidence that inclusionary zoning programs have produced more housing in areas where they are used than have federal housing programs,[3] the effectiveness of such programs is not discussed. Instead, the NIMBY Report relies on a dubious equity rationale in its criticism of inclusionary zoning. Given its ostensible concern with the effect of land-use controls on the *supply* of affordable housing, the report's conclusions are puzzling. The production of an adequate supply of low- and moderate-income dwelling units through inclusionary zoning, even where growth controls are in effect, speaks to the usefulness of the technique rather than to exclusionary motives.

The economic literature has raised several objections to inclusionary zoning that were ignored by the NIMBY Report. First, the primary objection to inclusionary housing programs is that any losses incurred on set-aside units are either absorbed by the developer or passed along to purchasers of market-rate units in the form of higher housing costs.[4] This scenario is considered undemocratic by detractors of inclusionary zoning, since it is generally assumed that owners of undeveloped land or potential purchasers of homes in new subdivisions are nonresidents and, therefore, cannot participate effectively in the political process leading to the adoption of an inclusionary zoning scheme. Second, detractors argue that inclusionary zoning impedes the "filtering" process through which new construction is purchased and occupied by residents of the existing housing stock, thereby freeing existing housing for purchasers at the lower end of the income scale.[5] Finally, it is asserted that units produced through an inclusionary zoning program can only become available to a limited number of needy beneficiaries. To the extent that inclusionary zoning programs discourage new development by adding to development costs or delay, therefore, the programs could harm the very class of persons they are designed to benefit. For the reasons discussed below, these arguments do not undermine the legitimacy of inclusionary zoning.

First, the argument that owners of market-rate units bear the cost of subsidized units is simplistic. According to conventional economic theory, developers can only shift regulatory costs to homeowners where the demand for housing is inelastic or price insensitive. Where the demand for housing is elastic—or sensitive to changes in price—and substitute housing is available in jurisdictions without inclusionary zoning, builders will be unable to pass on the costs to market-rate homeowners.[6] To the extent that the demand elasticity of housing precludes higher prices, the cost of inclusionary zoning is either reflected in lower developer profits or lower land costs.[7] While diminish-

ing profitability or land costs are hardly desirable results, these concerns are often outweighed by the need to provide affordable housing.

Second, shifting some of the burden of providing low-income housing to developers or landowners is not unfair. Placing the burden of inclusionary zoning on landowners or developers is justifiable under Georgian analyses or "beneficiary pays" principles, which support the shifting of infrastructure costs and other public expenditures to those who benefit from such expenditures. Accordingly, inclusionary zoning cannot be characterized as a burden on a narrow class of persons. The late Donald Hagman, a noted land-use scholar, argued that, because all land in a community is subject to development or redevelopment, all landowners theoretically bear the burden of inclusionary zoning. Not only does this result in a broader allocation of the burden than is generally assumed, but it also undermines the assumption that developers and occupants of new housing cannot participate effectively in the political process. Therefore, the characterization of inclusionary zoning as a cost-shifting device in which general societal burdens are borne by a small, discrete class of landowners is unconvincing.[8]

The argument that developers, owners of raw land, and purchasers of market-rate homes in new subdivisions are politically powerless is absurd. Developers and builders have powerful lobbies and are typically well represented at public hearings on the adoption of restrictive land development regulations. In California, developers have successfully resisted attempts to adopt development controls through the initiative process and have consistently outspent their opponents.[9] Finally, purchasers of market-rate homes in new subdivisions are not necessarily *new residents* of a community. In fact, the argument that inclusionary zoning impedes the filtering process assumes that purchasers of new homes are *by definition* former residents of existing housing within the community. Consequently, these residents have had ample opportunity to participate in the political process.

The argument that inclusionary zoning impedes the filtering process has serious problems. First, to say that inclusionary zoning discourages new development is simplistic and unsupported by empirical evidence. Those communities that have the widest experience with inclusionary zoning regulations, such as Montgomery County, Maryland, and Orange County, California, are also among the fastest-growing housing markets in their respective regions.[10] As has been shown by the mixed success of enterprise zones in this country, government regulations are only one small factor in the decision to develop in a community.[11] However, a community's regulatory structure can reach a point at which it becomes unconstitutional and unworkable, thereby discouraging development and inviting legal challenges. These issues are properly viewed as matters of system design rather than an indictment of the technique itself and are dealt with in the discussion of inclusionary zoning system design that follows.

Second, filtering cannot deliver decent housing to all economic segments of the community, especially where the number of low- and moderate-income families exceed the number of units made available for resale by purchasers of new units. The chain of transfer between affluent homeowners and low-income persons is spatially fragmented, and the time lag for the construction of a market-rate unit to its availability for a low-income family is extremely lengthy.[12] These factors militate against the exclusive reliance on filtering as a tool of low-income housing policy.[13]

Third, filtering is responsible for only a fraction of housing needed within a community. In particular, filtering can produce only a small fraction of housing available for occupancy by low-income persons, and an even smaller fraction of those units which are not classified as substandard.[14] Indeed, existing housing generally *appreciates* in value, which undermines the market's ability to deliver such units to low-income families. A significant proportion of housing costs, including property taxes, insurance, maintenance, and landlord or developer profits bear no relationship to the supply of housing.[15] Moreover, the filtering process is slow and inefficient, especially for those units that will eventually trickle down to the poorest of the poor. Accordingly, the most successful housing programs generally view filtering as only one component of their housing production strategies.

Finally, the fact that inclusionary zoning units can only reach a portion of their intended beneficiaries is an argument for greater subsidies and more comprehensive program design. Federal housing assistance programs have long been criticized on the grounds that only a portion of those eligible actually receive assistance.[16] It is true that, in many communities, inclusionary zoning can only meet a portion of total housing needs. However, addressing part of the problem is preferable to failing to address the problem at all. This argument does not, therefore, undermine the utility of inclusionary zoning as one tool in a community's total housing assistance program.

Mandatory Inclusionary Zoning

The most important policy issue in the design of an inclusionary zoning ordinance is whether the program will be mandatory or, rather, an option that developers may choose in exchange for regulatory incentives. Mandatory inclusionary zoning ordinances are those that require developers to set aside a designated proportion of housing for low- and moderate-income persons. In 1973, the Virginia Supreme Court in *Board of Supervisors of Fairfax County v. DeGroff Enterprises*[17] rejected a mandatory set-aside ordinance as beyond the scope of the state zoning enabling legislation and

as a taking of private property. The Fairfax County ordinance required developers in five zoning districts to set aside 15 percent of all residential units in new developments as low- or moderate- income housing, as a condition of rezoning or site plan approval. The *DeGroff* court reasoned that an ordinance employed to achieve socioeconomic goals exceeded the authority conferred under the zoning enabling legislation to regulate land.

DeGroff relied heavily on an earlier case that had invalidated a large-lot zoning ordinance designed to *exclude* low- and moderate-income persons, therefore concluding that a zoning ordinance can be neither exclusionary nor inclusionary.[18] Because all zoning has socioeconomic effects, this distinction has been criticized as artificial.[19] *DeGroff* has not been followed outside of Virginia and was expressly rejected in the leading case of *Southern Burlington County NAACP v. Township of Mt. Laurel*.[20] The Virginia state legislature now authorizes inclusionary zoning as an optional, incentive-based mechanism, which effectively overturns the *DeGroff* court's socioeconomic zoning rationale.

The court's ruling that the ordinance effectuated a taking of private property is suspect. Mandatory inclusionary zoning is generally susceptible to challenge as a regulatory taking, which involves a case-by-case analysis of the public purposes underlying the regulation and the economic impact on private landowners, or as a permanent physical occupation, which is compensable *per se*. The United States Supreme Court has also ruled in *Lucas v. South Carolina Coastal Council*[21] that a regulation denying all use of private property is a *per se* taking. A detailed analysis of the takings question is beyond the scope of this report. However, the United States Supreme Court in *Yee v. City of Escondido*[22] has recently affirmed the general rule that the mere regulation of the economic relationship between housing providers and housing consumers through rent controls or other forms of housing regulation does not effectuate a physical occupation, and other courts have upheld inclusionary ordinances under regulatory takings challenges. (See discussion below.) The Court did not address the question of whether mandatory set-asides, as opposed to the regulation of rents charged to preexisting tenants (who have entered into leaseholds voluntarily), would be classified differently. It is likely, however, that a court could simply classify the set-aside as a regulation of the use to which such units may be put, rather than a forced transfer of occupancy to low- or moderate-income persons, if the regulations involve only a temporary regulation of sales or rental prices.

A mandatory ordinance could also be challenged as an unlawful exaction under *Nollan v. California Coastal Commission*[23] and similar decisions by state courts requiring a rational nexus between purposes and effects of development exactions. However, inclusionary zoning ordinances are typically characterized as a form of zoning district governing the use to which property may be put, rather than as exactions.[24] Unlike infrastructure exactions, which typically involve the transfer of land for roadways, open space, or utility rights-of-way to public ownership, developers maintain ownership and economic gains in the form of rents, sales transactions, and government assistance for inclusionary units. Inclusionary requirements are generally susceptible to challenge under exactions standards only where the developer is required to construct or to fund units off site, as under a linkage program.[25]

Courts in states with strong regional general welfare doctrines have been receptive to, and have even encouraged the use of, mandatory inclusionary zoning. In its landmark decision in *Mt. Laurel*, the New Jersey Supreme Court imposed a mandatory obligation under the state constitution for all local governments to employ affirmative measures for the production of affordable housing (e.g., mandatory set-asides) where the removal of regulatory barriers would not suffice. In *In re Egg Harbor Associates*,[26] the court upheld a condition attached to a development permit by a state environmental agency requiring the developer to set aside 10 percent of a project's residential units for low-income housing and 10 percent for moderate-income housing. The court found that the condition was authorized by the state enabling legislation and did not amount to a taking of private property.

In states without judicially mandated regional general welfare requirements, courts have supported inclusionary zoning requirements where expressly authorized or where authorization is implied in the state enabling legislation. In *Iodice v. City of Newton*,[27] a Massachusetts court upheld a condition to the issuance of a special-use permit requiring that 10 percent of the proposed development be operated as low- and moderate-income housing. The Massachusetts statutes expressly authorized the imposition of set-aside requirements for special-use permits.

The mandatory approach is advantageous to the incentive-based approach where it appears that incentives will not be used by developers. The major policy issues associated with designing a mandatory program are:

- Structuring the program in such a manner as to ensure that developers receive an adequate return on their investments; and
- Ensuring that developers' obligations to construct the units and to make them available to low- and moderate-income persons are enforced.

Guaranteeing adequate rates of return can be dealt with through adjustments in the set-aside requirement and through the creation of additional regulatory incentives.

Program requirements contain three major ele-

ments: the number or percentage of units that must be set aside for low- and moderate-income housing (the "set-aside requirement"); the population to which the units must be made available (the "target population"); and the standards to which the units must be constructed. Most communities employing inclusionary zoning programs contain set-aside requirements ranging from five to 25 percent.

The severity of the requirement—from a developer's perspective—is governed primarily by the target population to be served, especially if set-aside units are required to be built to the same level of quality as the market-rate units. Developers generally perceive the construction of low-income units as the most restrictive requirement since rental or sales prices are generally lower, and because the income mix between the occupants of low-income units and market-rate units is potentially wider. Accordingly, many jurisdictions primarily limit the set-aside requirement to moderate-income units or establish a lower set-aside percentage for low-income units. In Orange County, California, the set-aside requirement is divided between three income categories. Of the 25 percent set-aside requirement, 10 percent applies to units for persons of 80 percent or less of median income; 10 percent applies to persons between 81 percent and 100 percent of median income; and only 5 percent applies to persons between 100 percent and 120 percent of median income. Additional considerations in establishing the appropriate set-aside quotas are discussed below.

The integration of inclusionary units with market-rate units raises sensitive issues about project design and adequate access to services by occupants of the inclusionary units. Many communities avoid the issue altogether by allowing the developer to construct the units off site. Others allow the developer to maintain an exterior compatible with surrounding units while relaxing interior standards for the inclusionary units in order to preserve the marketability of the market-rate units and simultaneously reduce the cost of producing the inclusionary units.

The effectiveness of any inclusionary program—whether mandatory or incentive-based—depends upon how it is enforced. Most local governments employ deed restrictions and other property interests to ensure that the units remain affordable over time. (See the section below on enforcement.) However, in order to ensure that the units are constructed, local governments can use phased approval procedures or performance bonds, escrows, or other financial guarantees. During the permitting process, local governments could use an approach suggested by the *Mt.Laurel* court:

> Municipalities . . . should require that a developer phase-in the lower income units as the development progresses. That is, if a developer is required to set aside 20 percent of a development for lower-income units, 20 percent of *each* stage of the development should be lower income, to the extent this is practical.[28]

Development agreements and public-private partnership arrangements are other innovative mechanisms for enforcing developer obligations while giving the developer a stake in seeing that the units are produced. These mechanisms are discussed in Chapter 3.

Finally, local governments must address whether additional regulatory benefits should be provided in order to "compensate" developers for the hardship of providing low- and moderate-income dwelling units.[29] Compensation might include increases in density, allocations of infrastructure capacity, reductions in site development standards (e.g., in setbacks and the parking requirements), or allowing mixed-use zoning. Appropriate incentives will depend upon the local situation.

Incentive-Based Inclusionary Zoning

An incentive-based ordinance allows increased density or other regulatory incentives as a quid pro quo for the provision of low- and moderate-income housing. Either out of an abundance of caution or as a result of political compromise, the incentive model seems to be the trend in state enabling legislation. One example is in Virginia, where inclusionary zoning has not been well-received by the judiciary. While the *DeGroff* case (discussed above) invalidated a mandatory inclusionary zoning ordinance, the state now authorizes inclusionary zoning and the designation of geographic areas for the promotion of affordable housing. The legislation allows local governments to grant density bonuses in exchange for the inclusion of affordable housing units in proposed developments.[30]

According to the law, certain local governments are empowered to implement an "affordable housing dwelling unit program" in which density bonuses may be given in exchange for the provision of moderate-income housing. The inclusionary program requirements may be applied to applicants for rezoning; requests for special exceptions; or site plan/subdivision applications that exceed 50 dwellings at densities exceeding one unit per acre and are served by central sewer. Developers must receive:

- A 20 percent increase in density in exchange for making 12.5 percent of the total approved single-family attached or detached units affordable housing; or
- A 10 percent increase in density for "nonelevator" multifamily dwelling units (those with a proposed height of four stories or less) in exchange for making 6.5 percent of the total dwelling units affordable housing.

Local housing authorities may be given an exclusive right to purchase or lease set-aside sales units and to control resale and re-lease prices for a period of 50 years. Set-aside price limitations must allow developers to recover construction costs and other allowances, as determined by the inclusionary zoning ordinance, exclusive of land costs or other costs not authorized by the ordinance. The ordinance may require the concurrent marketing of market-rate and set-aside units. Set-aside units must be processed within 280 days.

California legislation requires density bonuses and other regulatory incentives for developers who set aside a portion of the housing units within a project for low-income persons.[31] The density bonus may be granted only where a developer sets aside 20 percent of total dwelling units for low-income households (50 to 60 percent of area median income); 50 percent of total dwelling units for very-low-income households (less than 50 percent of area median income); or 50 percent of total dwelling units for elderly persons. The burden is on the housing developer to demonstrate that the regulatory incentives are needed to make the housing units economically feasible. Regulatory incentives that may be granted in order to encourage the production of affordable housing include:

A density bonus of 25 percent over the otherwise maximum residential density; and

Additional regulatory incentives, such as: 1) a reduction in site development/zoning code standards (e.g., setback requirements, square-footage requirements, and parking requirements); 2) mixed-use zoning approval; or 3) other incentives (e.g., such as the waiver of fees or dedication requirements).

System Design Considerations

In designing a mandatory set-aside ordinance, overall project development standards and approval processes should be carefully tailored in order to maintain the workability and political acceptability of the program, guarantee sensitive project design, and avoid constitutional challenges. In the leading work on inclusionary zoning, Allan Mallach identifies several issues pertaining to the effectiveness of an inclusionary zoning scheme, including identification of the appropriate numerical set-aside requirement; the establishment of appropriate design requirements for set-aside units; use-to-use relationships between set-aside units and market-rate units; and streamlining the development approval process.[32]

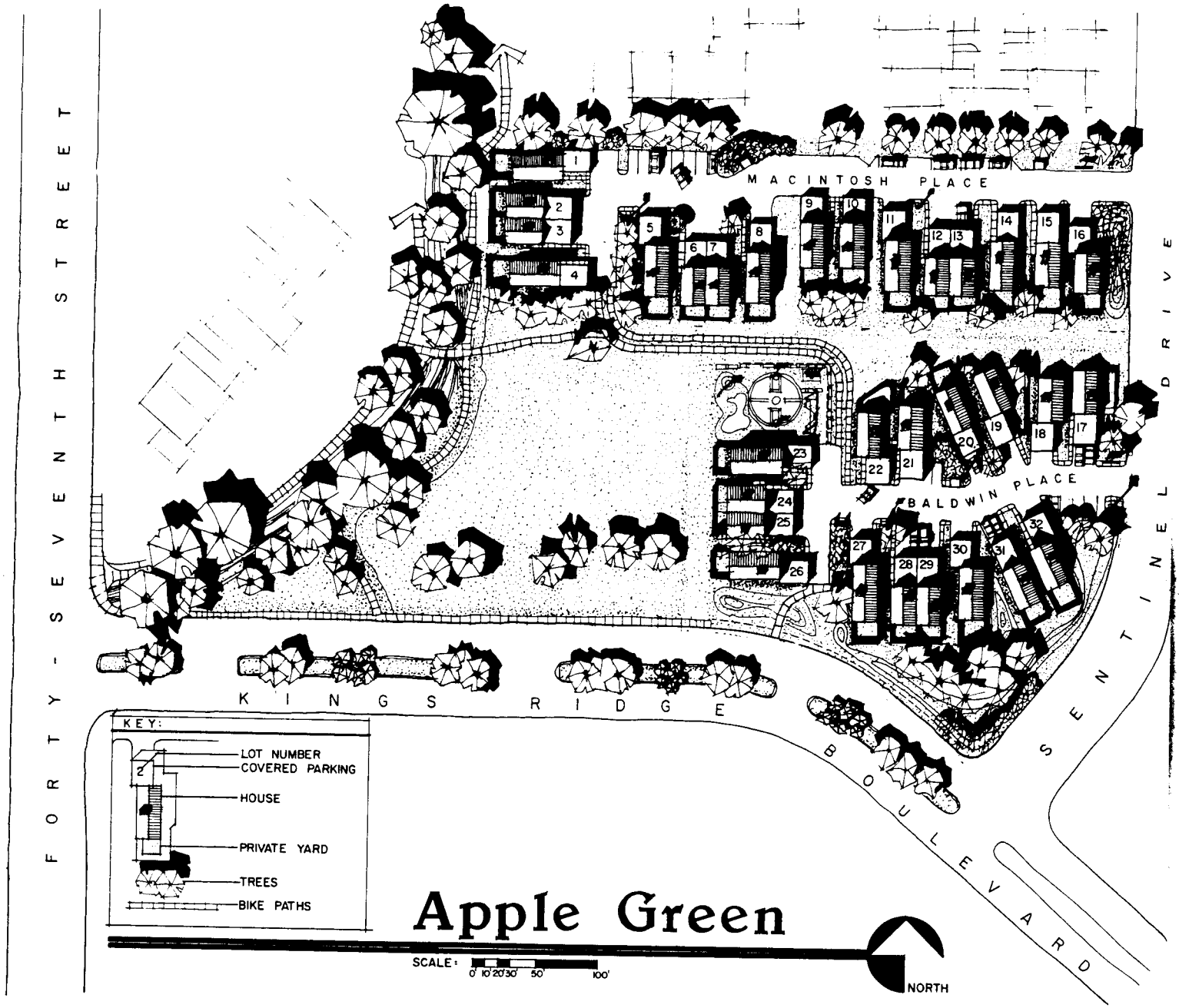
Set-aside quota. The quota is generally established as a proportion of total dwelling units within a project. If this number is too high, developers may have to increase market-rate unit costs in order to recover their losses on set-aside units; if the number is too low, the program may fall short of its goals. Identifying the correct number depends on a variety of subjective factors, and the precise number is difficult to identify.

Communities might be better off to establish a level-of-service (LOS) standard that establishes community need for low- and moderate-income dwelling units as a proportion of total dwelling units, based upon internal growth needs and regional housing markets. LOS standards are commonly used to identify developer responsibilities and community fiscal obligations for infrastructure, such as roads, parks, and water/sewer facilities. The LOS standard would have a numerical element (i.e., the number of dwelling units needed) and a temporal element (i.e., the period of time over which the units would be produced, based upon fiscal and environmental constraints). LOS standards are useful because they can be easily translated into quantifiable standards for development approval purposes and they enhance the legal defensibility of the entire system.

Most importantly, LOS standards allow the community to identify the proportion of housing assistance that should be generated by nonregulatory mechanisms (e.g., federal transfer payments, property taxes, and other local financial tools), municipally owned property, and joint ventures with private developers. Too often, the failure to identify appropriate standards forces developers to remedy *existing* community deficiencies in low- and moderate-income housing as well as to mitigate incremental needs created by new development. Carefully designed standards can be used to avoid this inequity. The experience of Boulder, Colorado, which segregated communitywide obligations from developer responsibilities in crafting a development excise tax is instructive.[33] The city identified the total percentage of its housing stock that should be subsidized, based upon a regional comprehensive plan. By comparing the existing percentage of the city's housing stock that was assisted to the percentage that should be subsidized (as specified in the comprehensive plan), the city was able to calculate the number of dwelling units needed to maintain its existing level of service and those units needed to reach the desired goal. Additional legal considerations governing the establishment of carrying-capacity standards are discussed in the section in this chapter on linkage.

Unit design/compatibility and fit. The zoning code should establish flexible design standards for set-aside units, rather than requiring identical exterior and interior features for both market-rate and set-aside units. For example, some communities require inclusionary units to contain the same number of bedrooms as market-rate units but authorize lower interior amenity levels.

Spatial relationships. The community must consider the spatial relationship between set-aside and market-rate units. Options range from requiring all set-aside units to be dispersed within the develop-



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The Apple Green project in Boulder, Colorado, was subsidized by the sale of credits that the city granted to the developer for building affordable housing. The credits were sold to other builders to meet their mandated low- and moderate-income requirements on other projects.

ment, allowing set-aside units to be clustered on-site, or allowing units to be provided off-site. The type of flexibility afforded under this standard will depend upon whether the program has as one of its goals the *integration* of affordable housing with market-rate housing or simply the production of housing within the community. For example, Orange County, California, allows inclusionary units to be provided off site (through either in-kind construction or the payment of a fee in lieu of construction) on the grounds that the objective of the ordinance is to achieve a balance between low- and moderate-income housing on a *communitywide* rather than a *project-specific* basis.

Process orientation. Under incentive-based systems, the approval process must be predictable and streamlined in order to encourage the use of the program by developers. Vague standards or lengthy approval processes will discourage the use of inclusionary incentives, thereby undermining the effectiveness of the program. Even under a mandatory system, lengthy approval processes can discourage development and increase project risk, which can curtail the level of development occurring within the jurisdiction. For example, developers could be granted a density bonus as of right where a specified number of low- and moderate-income units are provided under the ordinance. The density entitlement could vary by the number of affordable units provided, whether those units are made available to low, very-low-, or moderate-income households, or it could be based on a sliding scale that takes into consideration both the quantity and type of housing provided.

Other incentives or flexibility measures. Mallach identifies several additional measures that may be incorporated to enhance the flexibility of an inclusionary zoning program, thereby encouraging its use and strengthening its political acceptability. These include the authority to satisfy inclusionary obligations by constructing units off site, paying fees in lieu of construction, allowing developers to transfer credits for the production of units in excess of inclusionary requirements, and allowing developers to donate land to a local housing authority or nonprofit corporation for the construction of housing.

Table 2 illustrates the key provisions of several inclusionary housing programs.

Enforcing Inclusionary Obligations

Inclusionary zoning obligations must be carefully enforced in order to ensure that dwelling units become available to the low- and moderate-income persons that are the target group for the ordinance and that those units remain available to such persons over time. Income restrictions under inclusionary housing programs are generally enforced through the use of deed restrictions. While deed restrictions may be challenged as an unlawful restraint on alienation (i.e., the conveyance of property to another party), one commentator suggests that the preemptive right, statutory requirement, and rule of reasonableness exceptions to the rule against restraints on alienation would apply to deed restrictions in this context, so long as the restrictions are appropriately drafted.[34] Property law also recognizes an exception where the social objectives of the restriction outweigh the social injustice of restraining the alienation of property.[35] The preemptive right exception applies where, instead of imposing a disabling restraint, the grantee is given a right to purchase the property. The statutory requirement exception authorizes restraints required by state legislation. The reasonableness exception requires that restraints must be limited to a reasonable period of time. Consequently, most deed restrictions in inclusionary housing programs contain a "right of first refusal" requiring the occupant to offer the unit to the local government within a specified period of time prior to selling the unit.[36]

Easements could also be used to limit conveyances to persons outside the class of intended beneficiaries. Some courts have hesitated to enforce easements that are not appurtenant to an interest in real property (i.e., where the easement is held *in gross*). Most courts have begun to relax these restrictions, and many states have adopted legislation facilitating the creation of conservation easements and other instruments held by local governments designed to achieve public purposes.[37]

Some observers have cautioned that the use of deed restrictions could impede efforts to secure favorable financing terms. Several federal agencies have indicated a reluctance to purchase or to insure mortgages subordinated to other designees or in which the property is subject to a prior lien.[38] HUD's current policy is that all property interests secured by FHA-insured mortgages should be freely alienable. However, proposed amendments to the single-family mortgage insurance program would create an exception for restrictions that are part of a state or local program to produce housing affordable to low- and moderate-income persons, so long as the restriction terminates when the property is foreclosed or the mortgage is assigned to HUD.[39] The policy would apply to all restrictions on alienation, including due-on-sale clauses, rights of first refusal, owner-occupancy requirements, and government restrictions.

The California density bonus statute, which requires local governments to "ensure [the] continued affordability" of units in projects benefiting from density bonuses, provides an example of authority to employ deed restrictions for this purpose.[40] The legislation requires developers receiving density bonuses to grant deed restrictions for periods of at least 30 years, or longer periods where required by mortgage insurance programs.

Recent legislation adopted in Maine and Rhode Island expressly authorizes the use of restrictive covenants designed to allow local governments or

TABLE 2. INCLUSIONARY HOUSING PROGRAMS

Jurisdiction	Plan Type	Applicability	Set-Aside Requirement	Affordability Control	Bonus/Flexibility Provisions
Boulder, Colo.*	Mandatory	All residential developments exceeding more than one dwelling unit	15% for moderate-income sales or rental; 7.5% for low-income sales or rental Units must be provided on-site in order to implement policy of dispersing units throughout city.	Written agreement between developer and city involving resale restrictions of 10 years for moderate income units and 5 years for low-income units.	Projects less than 10 units may make cash payment in lieu of construction. Alternative programs may be approved, including credits for more than 25 units and transfer of obligations to other sites.
Dallas, Tex.**	Voluntary, although developments with 50+ units/acre in some districts must employ set-aside.	Developments in areas of nonminority concentration..	20% qualifying subsidized housing units for specified zoning districts; PUDs may be conditioned on 10% set-aside.	Housing agreement containing deed restriction.	Density increases from 20 to 30, 20 to 40, and 10 to 15 units in designated multifamily zoning districts. Density increases from 15 to 20, 20 to 25, 45 to 75, and 60 to 100 in certain multifamily districts where development contains mixed uses. Off-site construction within three miles of development or $10,000 in-lieu fee allowed as alternatives. 20% FAR bonus of 500 sq. ft. for each affordable unit recommended by staff.
Davis, Calif.	Mandatory	Rental housing exceeding five units	*For-sale units*: 25% through combination of on-site construction, land dedication, and reservation of units for self-help housing. *Rental units:* 24–35% for low income, very low income, depending on project size, through on-site construction and land dedication.	Property conveyed through land dedication may be conveyed to third parties such as noprofit housing corporations, community-based mutual housing associations, or housing cooperatives.	One-for-one density bonus for construction of on-site affordable units or land dedication (calculated at 15 units per acre). Individualized programs with developers may be used in place of fixed standards. In-lieu fees may be used for small developments.
Hilton Head Island, S.C.	Voluntary	Residential overlay zone	No explicit set-aside requirement established. Projects may not exceed 50 units.	Legal agreement must be recorded, which is enforced by mortgagor or on annual basis by town.	Up to 15 units/acre for low income and 12 units/acre for moderate income, plus 20% departure from design and performance standards.
Montgomery County, Md.	Mandatory	Developments of 50+ units	12.5–15% moderate income	Applicant must enter into written agreement with the county. Development must be staged in such a manner that market-rate units are not approved prior to offering units for purchase or sale. Price controls must be in effect for 20 years. Local Housing Authority must be given option of purchasing ⅓ of all set-aside units.	Up to 22% increase in density. Off-site construction allowed. Contribution of land or money to trust fund allowed.

TABLE 2. CONTINUED

Jurisdiction	Plan Type	Applicability	Set-Aside Requirement	Affordability Control	Bonus/Flexibility Provisions
Orange County, Calif.	Voluntary (originally mandatory)	Residential developments of 5+ units	25% for persons up to 120% Area Median Income (AMI) as follows: 10% low (≤ 80% AMI); 10% moderate I (81–100% AMI); 5% moderate II (101–120%). Families of 5+ persons must be given priority in acquisition of units with 3+ bedrooms.	Commitments must be made as early as possible in the development approval process. Set-aside units must be constructed prior to approval of final development phase. Deed restrictions must be recorded with resale restrictions monitored by County.	Standard density bonus of 25%. Developers may transfer excess affordable housing credits to other projects so long as a balance between affordable and market-rate units is achieved over a broad planning area.
Orlando, Fla.	Voluntary	Applies in specified zoning districts; no size threshold.	Construction of on-site housing equal to density bonus or payment of fee into housing trust fund.	Deed restriction	Density bonus ranging from 14–33% in 11 districts (64% in one district). A separate policy allocates 3% of available traffic capacity from concurrency management program to low- and moderate-income housing.
Pitkin County, Colo.	Mandatory	Applications for rezoning, special use permits, building permit approval, subdivision approval, or planned unit development.	50% of residential units; 20% of tourist condominimum units; One employee unit per three tourist bedrooms or double occupancy hotel rooms; One employee or moderate-income unit per 300 sq.ft. of commercial floor area.	Ordinance not specific.	Set-aside obligation may be reduced by one-half by reducing density by one-half and conveying preexisting subdivision lots or completed dwelling units to local housing authority.

Notes:

* Repealed and replaced by development excise tax targeted to housing trust fund. See S. Mark White, "Using Fees and Taxes to Promote Affordable Housing," *Land Use Law & Zoning Digest* 43, No. 9 (Sept. 1991): 3–9.

**Draft ordinace prepared in response to consent decree in *Walker v. United States Department of Housing and Urban Development*, No. CA–3–85–1210–R (N.D. Texas), a fair housing case.

See also George Sternlieb and David Listokin, "Inclusionary Zoning," *Development Review and Outlook 1984–1985* (Washington, D.C.: Urban Land Institute, 1984), 444–49.

nonprofit entities to directly or indirectly control the resale price of residential dwelling units.[41] In Maine, the covenants may be used to:

- Control resale prices;
- Control the amount of equity appreciation;
- Control improvements to real estate;
- Control the class of persons to whom a dwelling may be sold [note: by its terms, this provision does not authorize discrimination on the basis of race, color, sex, physical or mental handicap, religion, ancestry, or national origin];
- Grant a right of first refusal or option to purchase to qualified holders;
- Maintain the property as residential real estate;
- Limit the type of construction or materials that may be used in the improvements; or
- Prohibit, limit, or require acts enhancing property value or affordability.

The legislation expressly addresses common law constraints on the use of easements or covenants *in gross* by specifying that the covenants are enforceable even where most common law criteria are not satisfied. Exceptions to common law restrictions recognized by the legislation include the lack of an appurtenant interest in real property; the assignability of the interest to another holder; the unfamiliarity of the interest under common law principles; the imposition of negative burdens; the creation of affirmative obligations on the burdened estate; the failure of the benefits or burdens to touch or concern real property; the lack of privity of estate or contract; limiting the covenant to successors or assigns of the original parties; or the rule against perpetuities.

Local governments have also developed creative mechanisms for integrating inclusionary land-use programs with innovative management and ownership arrangements. Davis, California, now requires developers to satisfy a portion of their inclusionary obligations through the conveyance of land to nonprofit housing corporations, mutual housing associations, housing cooperatives, or other nonprofit housing entities.[42]

The transfer of land or completed units to a community land trust could also be adapted to inclusionary land-use programs. A community land trust (CLT) is a nonprofit entity that minimizes the cost of land to homeowners by splitting the ownership interest between the land and the home. Generally, the CLT retains ownership in the land and leases or sells the home to low-income households. Land ownership allows the CLT to capture any profit on resale of the home for reinvestment in the community. According to a recent report, more than 100 community land trusts are currently in operation in more than 23 states.[43] These mechanisms ensure not only that housing will remain affordable over time, but also that dwelling units produced through an inclusionary program will be competently managed.

Other examples of enforcement mechanisms include:

- Development agreements or fines and penalties can also be used to enforce income restrictions but are less common. (A discussion of the use of development agreements to provide affordable housing is included in Chapter 3.)
- The execution of a promissory note secured by a deed of trust. Upon the conveyance of the unit(s) to a low- or moderate-income purchaser, the note and deed are released with or without a new promissory note and deed of trust against the purchaser. If the units are sold to someone other than a low- or moderate-income household, the promissory note and deed of trust would be due and payable to the jurisdiction, enabling the jurisdiction to seek alternate housing for the target beneficiaries. This is the approach employed by San Francisco in its linkage program.
- If the developer is receiving governmental assistance or tax credits applicable to the low- or very-low-income housing units, the developer will probably be under contract with a state or federal agency to maintain the dwelling units in an affordable status for a specified period of time. Local governments may choose to "sign off" on those restrictions subject to verification of the contractual arrangements. This provision is more lenient than property use restrictions and would result in the elimination of inclusionary units where developers choose to prepay or otherwise terminate their obligations under federal contracts. (See also the discussion of "expiring use" issues in Chapter 4.)
- The negotiation of a contract, such as a development agreement, can establish that the conveyance of the units to persons other than low- or moderate-income persons is a breach of contract. Persons purchasing low- or moderate-income dwelling units would be required to become parties to the contract, and the failure of the developer to notify the jurisdiction of the sale of those units would constitute a breach of contract. The jurisdiction could require the developer to execute a lien on the property in order to enforce these obligations. In addition, reasonable liquidated damages could be established in the event of a breach.

LINKAGE

Linkage ordinances require developers of office buildings or other forms of nonresidential uses, such as commercial, retail, or institutional development, to build housing, to pay a fee in lieu of construction into a housing trust fund, or to make equity contributions to a low-income housing project. The underlying rationale is that new nonresidential development creates a need for housing by attracting employees to an area. The businesses occupying nonresidential buildings benefit from the availability of a well-housed and accessible labor force. The NIMBY Report and other federal policies clearly recognize industry's stake in a well-housed labor force.[44] Linkage ordinances are also increasingly applied to residential development on the theory that new residential development creates a need for service-sector and other low-income employees within the vicinity of the development.

Linkage ordinances have become an increasingly

Businesses benefit from the availability of a well-housed and accessible labor force. Linkage ordinances require developers of office buildings and other forms of non-residential uses to build housing, pay a fee in lieu of construction, or make equity contributions to low-income housing projects. Courts are increasingly willing to support the concept of linkage as long as the local government has established a connection between the fee amount and the need for affordable housing.

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popular method of financing local housing needs in the wake of declining federal subsidies. In addition, linkage funds can be combined with other revenue sources in order to meet federal matching fund requirements under NAHA. The linkage concept is similar to the concept behind impact fees, dedications, and fees in lieu of land for parks and recreation—the rational nexus standard justifies requiring the provider of the jobs to pay for the facilities, the need for which is generated by the employment.

Local governments must be careful, however, to comply with the constitutional standards of nexus and proportionality established by *Nollan v. California Coastal Commission*, and other state court decisions.[45] Courts are split as to whether linkage programs are unauthorized taxes and whether they constitute an unconstitutional taking. However, courts are increasingly willing to support the concept of linkage so long as the local government has established a connection between the fee amount and the need for affordable housing created by new development.[46] Courts have also approved the site-specific exaction of contributions to affordable housing needs so long as adequate standards are contained in the state or local enabling ordinances.[47] Regional general welfare cases requiring cities and counties to provide their fair share of regional housing needs can be used as authority for linkage fee programs.[48]

The use of inclusionary zoning or linkage programs ties development approval to the adequacy of available affordable housing to accommodate new growth. As such, most commentators assume that the rational nexus standards applicable to impact fees and developer exactions for public facilities apply to linkage, and express doubt as to whether there is a sufficient causal relationship between new development and the need for new housing to justify the fee. Indeed, if housing resources for low- and moderate-income persons were viewed as a constraint on the optimal amount of development within a community, a carrying-capacity standard for low- and moderate-income housing could be identified.[49]

Where local governments tie the rate of growth to carrying-capacity standards, several important constitutional principles apply. First, the government must be prepared to demonstrate that the development will contribute or add to the need for housing or will consume resources otherwise available for housing opportunities. Second, where local governments condition development approval on the adequacy of public facilities, good faith attempts to remedy existing housing deficiencies through other funding sources must be shown.[50] The standard cannot be used solely to discourage growth or to foist past problems on the shoulders of the development industry. This test has often been applied to situations where concerns over facilities congestion have masked improper exclusionary motives. The denial of development approval on an ad-hoc basis premised on the inadequacy of public facilities can be invalidated when it is used for an improper public purpose, such as an artifice to exclude low- or moderate-income persons from a jurisdiction.[51] The standards of causality and the propriety of public purpose are referred to as "legitimacy review."[52]

Such standards establish the community's authority to deny development approval in the face of inadequate housing resources under its police powers. Under a linkage system, developers are asked to mitigate their impact on housing resources in order for

development permission to be granted. Any standards for the mitigation of housing impacts (such as a linkage fee or construction requirement) must be limited to an amount that is no greater than what is needed to correct the developer's pro-rata responsibility for the problem. This is referred to as the "proportionality" requirement. If a community tries to justify an exaction under its police powers but does not meet the standards for legitimacy or proportionality review, a court will characterize its actions as a taking of private property or as an unauthorized tax.

In several cases, fees requiring developers to contribute to off-site housing needs have been stricken where no demonstration was made that costs were properly apportioned or that good faith efforts to remedy existing housing needs (which cannot be funded through development fees) were undertaken by the local government. Accordingly, these cases involved extremely large fee amounts that tilted the takings inquiry in favor of the developer on hardship grounds. In so doing, however, some courts have cast doubt on the basis for linking development to housing needs in a community. In *Seawall Associates v. City of New York*,[53] the city placed a moratorium on the demolition of single-room-occupancy buildings (SROs) and combined the restriction with affirmative obligations to maintain and/or upgrade SRO units. Property owners could purchase an exemption from the moratorium by making a payment into a housing trust fund, and variances were authorized where a rate of return of at least 8.5 percent on the *assessed* valuation of the property could not be realized. Primarily because of affirmative obligations imposed upon landowners to maintain and upgrade their properties and to lease all units to low-income renters, the court characterized the scheme as a "permanent physical occupation," which is categorically compensable under the takings clause of the United States Constitution.[54] The court also took a dim view of the documentation used by the city to justify the restrictions on demolition. While the city had identified a severe homelessness problem, the court found no relationship between homelessness and the demolition of SRO units.

A housing preservation ordinance (HPO) adopted by Seattle was also stricken on enabling authority and, more recently, substantive due process grounds. In 1980, the city attempted to slow the conversion of low-income housing developments to nonresidential uses by imposing a fee on changes in use. The fee was successfully challenged as a tax, and the ordinance was replaced with the HPO. The HPO required developers seeking to demolish low-income housing to obtain a housing demolition license, which could be granted only if relocation assistance was provided to the tenants and if a specified percentage of the housing was replaced. As an alternative to providing replacement housing, developers were allowed to contribute to a housing replacement fund.

In *San Telmo Associates v. City of Seattle*,[55] the city invalidated the ordinance as an unlawful tax on development rather than a regulatory fee. While the decision was grounded primarily on a unique Washington statute prohibiting the imposition of taxes or fees on development, the decision also characterized the measure as "an attempt to shift the social costs of development on to the developer under the guise of a regulation." The court characterized the provision of housing as a "public" responsibility, which it felt was being shifted to a "limited segment of the population." The court also expressed "grave reservations" as to whether the fee—which amounted to approximately $1.5 million—could survive a takings challenge. Similarly, in *R/L Associates, Inc. v. City of Seattle*,[56] the court invalidated tenant assistance provisions of the HPO primarily on the strength of its ruling in *San Telmo*, but declined to rule on whether the ordinance constituted a taking of private property.

The city continued to enforce the HPO despite these mandates. In several recent cases, the city's recalcitrance, coupled with the burden of the expensive fee requirements, were ruled a violation of substantive due process. In *Sintra, Inc. v. City of Seattle*,[57] the court ruled that the assessment of a $218,000 fee for the development of a $670,000 property was unduly oppressive and a violation of substantive due process. In *Robinson v. City of Seattle*,[58] the court applied a three-part analysis in determining whether the ordinance satisfied substantive due process standards:

> The three-prong due process test . . . inquires: 1) whether the regulation aims to achieve a legitimate public purpose; 2) whether the means adopted are reasonably necessary to achieve that purpose; and 3) whether the regulation is unduly oppressive on the property owner. . . . The first and second part of this test are often easily met by challenged government action. The third part is a more difficult determination. [59]

Finding that the ordinance easily passed the first two elements of the substantive due process inquiry, the court rested its decision on an economic hardship analysis. This analysis takes into consideration a number of economic and public policy factors:

> The "unduly oppressive" inquiry lodges wide discretion in the court and implies a balancing of the public's interest against those of the regulated landowner. We have suggested several factors for the court to consider to assist it in determining whether a regulation is overly oppressive, namely: the nature of the harm sought to be avoided; the availability and effectiveness of less drastic protective measures; and the economic loss suffered by the property owner. This court also has noted a set of nonexclusive factors for guidance in performing the "unduly oppressive" balancing test.

On the public's side, the seriousness of the public problem; the extent to which the owner's land contributes to it; the degree to which the proposed regulation solves it; and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss; the extent of remaining uses; past, present, and future uses; temporary or permanent nature of the regulation; the extent to which the owner should have anticipated such regulation; and how feasible it is for the owner to alter present or currently planned uses.[60]

Applying these standards, the court found that the fee provisions, coupled with the city's reluctance to comply with previous court orders, amounted to a violation of substantive due process. Accordingly, the court invalidated the ordinance and remanded the case for a determination of damages.

Whether the *Robinson* and *Sintra* cases will discourage the implementation of linkage systems within or outside Washington remains to be seen. Both cases rejected facial takings challenges, ruling that the ordinance substantially advanced the legitimate public purpose of preserving low-income housing, and did not deny the developers all reasonable use of their property. The language of the opinion also reinforces the need for compliance with the "good faith" standards articulated above, suggesting that the ordinance was simply underinclusive and overly burdensome:

> [T]he City may not constitutionally pass on the social costs of the development of the downtown Seattle area to *current owners of low-income housing. The problem must be shared by the entire city,* and those who plan to develop their property from low-income housing to other uses cannot be penalized by being required to provide more housing. *San Telmo Assocs. v. Seattle,* 108 Wash.2d 20, 25, 735 P.2d 673 (1987). . . .
>
> The public problem of homelessness is certainly serious. The extent to which an owner's land or property particularly contributes to a public problem may in certain instances be determinative, such as in some environmental protection cases. However, this factor is not particularly crucial in this action because these urban properties already have multiple potential uses. The problems of homelessness and a lack of low-income housing in Seattle are in part a *function of how all Seattle landowners are using their property.* We further conclude that both the feasibility of less harsh means of achieving the City's purpose and the permanence of the nonzoning regulation in controlling the type of use of the landowner's property militate against the City. This court has already said of the HPO that solving the problem of the decrease in affordable rental housing in the City of Seattle is a *burden to be shouldered commonly and not imposed on individual property owners.* (Emphasis added.)[61]

This deficiency can be met by complying with the "good faith" standards articulated above. By spreading the burden of providing low-income housing, the burden on the development industry is reduced pro rata, and the program becomes more effective through the inclusion of non-development-related revenue sources. This approach reduces incidences of hardship and expands the public policy nexus. In fact, a nearly identical case in San Francisco, which also has a longstanding practice of charging commercial developers for their impacts on housing needs, was upheld against unlawful taxation, equal protection, due process, and takings challenges.[62]

Whether the court would characterize a broadly applied linkage ordinance adopted as part of an overall housing strategy, particularly one that requires existing residents to finance existing housing deficiencies, as an attempt to foist a general public burden on a limited segment of the population seems doubtful. A broad-based approach undermines the public policy arguments underlying the substantive due process inquiry. In the Seattle cases, the fees were limited to a small segment of the development community—owners of low-income housing. In addition, the policy basis for the opinion is factually suspect. The court in *San Telmo* did not reconcile its peremptory characterization of housing as a general public obligation with the fact that 98.6 percent of the housing stock in the United States is produced by the private sector.[63] Whether the substantive due process rationale will be followed elsewhere could become a function of how linkage ordinances are structured and their role in overall housing programs.

Quantifying the marginal impact of new development on housing needs is an important part of this strategy. Notably absent from the *Seawall* and Seattle court decisions was a discussion of any attempt to allocate housing costs between the development community and other potential funding sources. Several studies have examined the need for new housing created by employment and growth.[64] As new employment and residential growth locates in a community, the additional housing demand puts stress on the existing housing market, and land that could have been devoted to housing needs is consumed for other purposes. This creates a potential increase in housing costs and diminishes housing opportunities where the demand is not met with a commensurate increase in supply. The failure to accommodate marginal housing demands within the local jurisdiction may force employees and residents to locate in other jurisdictions, thereby increasing trip lengths and traffic congestion.

Interestingly, the New Jersey Supreme Court, in *Holmdel Builders Ass'n v. Township of Holmdel,* eschewed the rational nexus test applied to impact fees and other development exactions in approving the linkage concept, ruling that an indirect connection

between housing needs and commercial development would suffice in the linkage context.[65] The court relied heavily on its finding that new commercial or market-rate residential development consumes land that would otherwise be available for low- and moderate-income housing. Because the restriction on land supply would justify permit denial,[66] the opinion suggests that linkage fees are designed to mitigate the adverse effect of new development rather than to subsidize broad societal burdens.

In *Commercial Builders v. City of Sacramento*,[67] the court upheld linkage fees calculated on the basis of a yearly subsidy of $12,000 per inclusionary household. The linkage fees were designed to raise about $3.6 million annually or nine percent of the projected annual cost to provide affordable housing. The city had identified additional money from nondevelopment sources, including debt funding and general revenues. The court rejected an argument that the ordinance transgressed the constitutional principles set forth in *Nollan*, citing favorably a study establishing that additional low-income housing would be necessitated by an influx of workers associated with new nonresidential development. The court distinguished purely financial exactions, such as fees, from those involving physical encroachments to land. While exactions involving permanent physical occupations must substantially advance a legitimate public purpose, the court ruled that purely financial exactions used to defray a social cost are permissible if reasonably related to the needs created by development activity.

Exceptions to the rational nexus requirements are: the use of taxation rather than police powers; and the provision of low- and moderate-income units through a voluntary arrangement with developers. With excise taxes, monetary compensation is not tied to the need for housing created by a development, and the tax is not collected as a condition of development approval. Because the level of judicial scrutiny for exactions has been refined by *Nollan*, some local governments have turned to development excise taxes for added flexibility.[68] Excise taxes must be authorized by general enabling legislation or home rule powers. Development excise taxes are not subject to constitutional standards of nexus and proportionality, and may be used for the express purpose of raising revenue for affordable housing.

Developers can also voluntarily agree to provide more low- and moderate-income housing than a local government can constitutionally require through the use of development agreements or other obligations incurred as a quid pro quo for regulatory or other incentives.[69] However, local governments must insure that the underlying regulations that are relaxed as a result of such agreements are constitutional. If the underlying regulations are confiscatory, the city may be held liable for compensation regardless of whether developers can escape such regulations through the provision of low- and moderate-income housing. Development agreements are a useful mechanism for establishing the developers' obligations while ensuring that permits will be forthcoming without undue delay. Development agreements are discussed in further detail in Chapter 3.

FINANCING AFFORDABLE HOUSING

Public housing authorities (PHAs), which are agents of the state, are the traditional conduits of low-income housing production. Typically, a PHA finances and operates low-income housing projects through the sale of tax-exempt bonds. A precursor to the public-private partnership movement was the use of "turnkey" procedures whereby low-income housing projects would be constructed by private developers and turned over to the PHA for ownership and operation.[70] Changes in the federal tax laws in 1986 reduced the role of PHAs in new construction, and the emphasis reverted to tax credits for investors in privately owned developments. The rise of housing trust funds and other innovative local programs signals a trend towards the use of federal-state-local and public-private partnerships in the provision of affordable housing.[71]

Housing Trust Funds

Housing trust funds (HTFs) and public-private partnerships are increasingly used by local governments as a response to reductions in federal funding for housing and a lack of financial resources by local governments. A housing trust fund is generally defined as a "dedicated source of revenue available to help low- and moderate-income people achieve affordable housing."[72] Sources of funds include linkage payments; tax increment financing; endowments and grants; surplus reserve funds from refinancing municipal bond issues; and taxes and fees. Disbursements under the program might include payments for housing-related improvements, such as parks and transit.

Texas established a state HTF in 1991 to provide financial assistance to local governments, PHAs, nonprofit corporations, and income-eligible persons to finance, acquire, rehabilitate, or develop housing.[73] Assistance is limited to low- and very-low-income families. The HTF is funded through general appropriations or transfers and unencumbered fund balances of the Housing Finance Division in the Texas Department of Housing and Community Affairs. The Housing Finance Division administers the HTF program.

The Illinois Affordable Housing Act of 1989 creates an Affordable Housing Program targeted to low- and very-low-income families, and an HTF funded by program investments, general appropriations, and a real estate transfer tax.[74] HTF monies may be used for

new construction, rehabilitation, retention, and operation of low- or very-low-income housing. The trust fund is intended to be a supplementary rather than a primary funding source. The Illinois Housing Development Authority administers the Affordable Housing Program and disburses HTF monies. The Housing Development Authority has also been directed to develop a program for exporting tax increment financing from commercial and industrial developments to very-low-, low-, and moderate-income projects outside a tax increment financing district.

The Maine Affordable Housing Partnership Act of 1989,[75] calls for the preparation of a state plan for low- and moderate-income housing designed to establish integrated, mixed-income neighborhoods. A state agency, the Maine Affordable Housing Alliance, is charged with rule making and implementation authority requiring local governments to use private- and public-sector resources in the development of affordable housing, and to coordinate housing proposals with comprehensive land-use plans. A nonlapsing revolving loan fund is established for assistance to local governments and nonprofit agencies, and an Affordable Housing Land Trust Fund is established in order to require deed restrictions, covenants, or other property interests designed to preserve the supply of land available for affordable housing. The State Housing Authority is authorized to designate four "housing opportunity zones" in deteriorating urban areas. Local governments must have a local housing alliance and a plan of action to revitalize deteriorating residential dwellings and neighborhoods.

The Vermont Housing and Conservation Trust Fund serves the dual purpose of providing low-income housing and protecting agricultural and historic resources.[76] The fund is maintained by general appropriations and other public or private resources that may be approved by the general assembly. Municipal, state, nonprofit, or cooperative housing agencies are eligible for support.

The Rhode Island Housing and Conservation Trust Fund Act was recently enacted to provide low- and moderate-income housing. Monies are derived from an existing $5 million housing endowment fund for the State Housing and Mortgage Finance Corporation and placed into a housing and conservation trust fund.[77]

The Washington Affordable Housing Act,[78] creates a housing assistance program and HTF that includes revenue from gifts, appropriations, and pooled interest from real estate brokers' escrow accounts. The program is targeted to very-low- and low-income families, first-time homebuyers, and persons with special housing needs, such as the mentally ill, recovering alcoholics, frail elderly persons, disabled persons, and single-parent families. Eligible activities include:

- New construction, rent subsidies, social service matching funds, technical assistance for nonprofit community or neighborhood-based organizations;
- Homeless shelters and temporary assistance to families in order to prevent homelessness;
- Downpayment and closing cost assistance for first-time homebuyers; and
- The preservation of housing subject to expiring use restrictions.

HTF priority is given to projects with access to employment centers or public transportation. Local governments are authorized to leverage HTF contributions by donating land, making infrastructure improvements, waiving impact fees, granting zoning variances, and using "creative local planning." The Department of Community Development, which administers the program, is authorized to protect state interests by: 1) requiring a share in project appreciation proportionate to state contributions; 2) requiring a lump-sum repayment of HTF assistance upon the sale or change of use of the project; or 3) requiring a deferred principal or interest payment after a specified time period.

Tax Increment Financing

Redevelopment activities in inner-city areas have contributed to the loss of housing units available to low- and moderate-income persons. Between 1970 and 1982, for example, nearly one-half of all single-room-occupancy (SRO) units (116,000 units), which provide a source of low-cost housing for low-income, homeless, and transient persons, were demolished.[79] In addition, housing programs in inner-city areas must compete with economic ventures such as downtown landscaping, small business investment corporations, and slum clearance projects, for limited financial resources. As a consequence, some states have begun to target downtown economic assistance resources like tax increment financing for the production of housing for the poor.

Tax increment financing (TIF) is a mechanism frequently employed by local governments to encourage the redevelopment of blighted urban areas. Under TIF, tax revenues from the "base" valuation existing at the commencement of a redevelopment project are allocated to taxing entities as usual, while ad valorem taxes on increases in value (the tax increment) are earmarked for redevelopment activities. TIF revenues are generally used to finance bonds (referred to as "tax allocation bonds") issued by a redevelopment authority, and the value increment is added back to the tax base when the bonds are retired. Because property value increases are needed to retire tax allocation bonds and because the interest rate on tax allocation

BRIDGE

The East Bay Asian Local Development Corporation worked jointly with BRIDGE to develop this mixed-use housing, commercial, and parking facility in Oakland's Chinatown. They secured $4 million in city tax increment funds and $5.5 million in HUD funds for the project. The project includes a nine-story senior tower and low-rise family apartments. The buildings cluster around a podium-level interior courtyard with play area over ground-floor commercial space. It won a United Nations World Habitat Award.

bonds is higher than that for general revenue bonds, TIF was originally thought unsuitable for the financing of low-income housing other than in cases in which low-income housing was included in mixed-use projects. (TIF is traditionally used as a mechanism for funding economic development activities and infrastructure improvements.)

But TIF is becoming an increasingly important tool for financing low- and moderate-income housing, especially in the absence of federal subsidies. In California, state law now requires that 20 percent of all TIF revenues be allocated to very-low-, low-, and moderate-income housing.[80] The provision now applies retroactively to projects established before 1977, the date that the set-aside requirement took effect, and requires that low-income housing projects destroyed by redevelopment agencies must be replaced.

Minnesota also authorizes the use of TIF to provide affordable housing. A TIF plan may be established for a "housing district" containing projects for low- and moderate-income housing projects and nonaffordable housing or nonresidential uses up to 20 percent of fair-market value.[81] Ninety-five percent of owner-occupied units must be affordable to families earning 115 percent of the area median income, as defined in the federal Mortgage Revenue Bond legislation, while at least 50 percent of rental units must be set aside for households earning no more than 50 percent of the area median income as defined by the federal Low-Income Housing Tax Credit legislation. TIF revenues may be used to finance the housing project, public improvements directly related to the project, and administrative expenses. The TIF can remain in effect for up to 25 years from receipt of the first tax increment. However, failure to comply with the set-aside requirements results in the application of time limits for economic development TIF districts—eight years from receipt of the first tax increment and 10 years from approval of the TIF plan.

PROMOTING INFILL DEVELOPMENT AND PRESERVING AFFORDABLE HOUSING

Our nation's existing housing stock is its most affordable source of housing. Preserving the stock of existing housing units in decent neighborhoods, especially infill areas, avoids expensive costs associated with new construction and the extension of public facilities and services to outlying areas. By contrast, the

uncontrolled development and redevelopment of land at rapid levels can drive up the cost of housing, especially for low- and moderate-income persons, in two separate ways. First, speculation often drives up land values, thereby adding to land costs and inhibiting the construction of housing at affordable levels. Second, the use of land for purposes other than the construction of low- and moderate-income housing diminishes the supply of land available for use as housing. As a consequence, many jurisdictions have responded by adopting regulatory and land acquisition measures to ensure that existing housing stock and the supply of land available for affordable housing is preserved. The alternative would be the irretrievable loss of opportunities for low- and moderate-income housing development.

The NIMBY Report, on pages 3-1 to 3-12, identifies rent controls, outdated building codes, property tax disincentives, and restrictions on the siting of manufactured housing and accessory apartments as major barriers to redevelopment and revitalization of central cities. The report goes on to say that anti-redlining legislation, such as the Community Reinvestment Act, provides a significant level of needed reinvestment to central city areas. Regulations that encourage infill include ordinances conditioning the demolition or replacement of certain housing types on the replacement of such housing elsewhere, the payment of a fee in lieu of such replacement, or the payment of relocation assistance to existing tenants. Nonregulatory measures include land assembly, infrastructure maintenance, and investment policies. The use of partnership arrangements with private entities, such as those involving the donation of municipally owned land acquired through the foreclosure of delinquent taxes (referred to as *in rem* properties), and facilitation of financial incentives, such as the low-income housing tax credit and mortgage revenue bonds, also do not rely on regulation and can be effective affordable housing tools.

Promoting Infill Development

Infill development promotes housing affordability by using existing infrastructure and services rather than requiring expensive extensions of roads, water/sewer lines, and other facilities into newly developed areas. Infill development also avoids the consumption of open space in outlying areas and puts housing closer to job centers. Infill development is often frustrated by small lot sizes, high land costs, and neighborhood resistance.[82]

Regulatory techniques that promote infill include administrative streamlining, density bonuses, and the elimination of overzoning for industrial uses in urbanized areas.[83] Infill parcels are often burdened by delinquent taxes or antiquated infrastructure. Cities can address these problems through the forgiveness of delinquent taxes and the funding of off-site improvements. Tax increment financing and special improvement districts are often used as well. Governments may take a more active role through land assembly, land banking, and through leasing and joint venture arrangements using publicly owned land.[84]

Any successful strategy to promote viable inner-city neighborhoods must take into consideration the regional setting of the urban core. The most successful strategies for promoting inner-city development have involved related and integrated controls on outlying development. For example, San Diego and Minneapolis have used "tiered" growth management systems founded on the staged growth concept judicially approved in *Golden v. Planning Board of Town of Ramapo*.[85] The cities employ a comprehensive system of zoning, impact fees, and public incentives to encourage growth in urbanized areas while staging or discouraging growth in outlying areas. By discouraging urban sprawl and employing incentives for growth in central city areas, the cities have attempted to change the pattern of urban development while preserving viable, livable central city environments.

Preserving Existing Supply: Housing Preservation, Housing Replacement, and Single-Room-Occupancy (SRO) Ordinances

In order to preserve existing affordable housing supplies, many localities have adopted ordinances that condition the demolition or replacement of certain housing types on the replacement of such housing elsewhere, the payment of a fee in lieu of such replacement, or the payment of relocation assistance to existing tenants. The conditions are generally tied to demolition licenses (the technique used in Seattle, San Francisco, and Hartford) or demolition/conversion moratoria (used in New York City). Some local governments have attempted to slow the diminution in rental housing supplies by regulating condominium conversions through the special use permit or subdivision approval process.[86] Rent control is also widely used where rapid growth in market-rate or upscale residential units has driven the price of rental housing beyond the reach of low- and moderate-income tenants. A recent federal decision upheld a Cambridge, Massachusetts, ordinance that coupled rent control with a requirement that permits be obtained from the city's rent control office prior to removing rental units from the market—including those removed through condominium conversion—against a takings challenge.[87]

Single-room-occupancy (SRO) programs combine SRO demolition moratoria with relaxed construction standards and below-market interest loans to SRO developers.[88] Reasonable fees on the conversion of SROs to market-rate dwellings or nonresidential uses have been upheld by the courts,[89] although the New York Supreme Court recently invalidated a moratorium on demolition that was coupled with provisions

requiring rehabilitation and rental to bona fide tenants.[90] (See also the discussion above of linkage.)

Rent controls involve the establishment of a maximum rental price that may be charged by a landlord to a tenant. While many view rent controls as necessary to preserve affordable rental alternatives for low-income persons in areas where rapid demand has contributed to escalating rents, opponents claim that rent controls inhibit the construction of new rental housing.[91] The Advisory Commission on Regulatory Barriers was clearly aligned with opponents of rent control, and the Department of Housing and Urban Development has recently issued a critical report.[92]

Regardless of the efficacy of rent control in the overall housing picture, the commission's concerns seem unbalanced given the infrequency with which the technique is used. Rent control is generally limited to those areas where rapid growth in market-rate or upscale residential units has driven the price of rental housing beyond the reach of low- and moderate-income tenants. Permanent rent controls are used by state and local governments in only five states (California, D.C., Massachusetts, New Jersey, and New York), and, in many states, rent controls are banned outright, subjected to very stringent statutory criteria, or are permissible only in the event of an emergency due to a disaster.

The argument that rent control discourages investment in new housing and maintenance, contributes to homelessness, and induces a rise in the cost of uncontrolled units has been questioned. A recent article published in the *Journal of the American Planning Association* points out that much of the evidence against rent control stems from a single study published in 1987.[93] The Appelbaum article argues that the 1987 study is flawed by selective sampling and the failure to isolate other factors contributing to high rates of homelessness, such as climate, unemployment, and the high rents that motivate rent control in the first instance. The authors point out that three of the four jurisdictions identified as having the most severe rate of homelessness lack rent control and cite a number of studies finding little relationship between rent control and overall housing affordability, investment in new construction and maintenance, abandonment and displacement, and tax ratables.

Moreover, the homelessness problem is most often identified with mental illness rather than rent controls.[94] In a random sampling of 41 cities, based upon a national study by the Department of Housing and Urban Development, Applebaum et al. found that only unemployment rates, high mean temperatures, high percentages of renters, and low vacancy rates bore a statistically significant correlation with homelessness.[95] The incidence of homelessness was attributed to the declines in federal housing subsidies rather than to rent controls.

Indeed, the evidence against rent control suggests that, to the extent that a problem exists, it is more a function of system design rather than inherent flaws in the approach itself. The exemption of new housing construction, the use of vacancy decontrols, and monitoring systems designed to target rent controls to the poorest segments of the population can be used to soften the impact on landlords and to avoid discouraging new construction.[96]

When properly structured, rent control ordinances have consistently been upheld by the United States Supreme Court against due process and Fifth Amendment challenges.[97] In *Yee v. City of Escondido*,[98] the Court ruled that a rent control ordinance, coupled with a state statute that limited the grounds upon which leases in manufactured home rental communities could be terminated (including failure to pay rent), did not amount to a permanent physical occupation of the landlord's property. The mobile home park owners claimed that the combination of the California Mobilehome Residence Law and the City of Escondido's rent control ordinance amounted to a taking without just compensation. Rent control, according to the Court, was an accepted constitutional principle. The Court ruled that, since neither the city ordinance nor the state laws' limitations on eviction required park owners to continue to rent their land, the governmental action involved regulation of the use of property rather than physical occupation. The Court's decision, however, simply removes the permanent physical occupation test, which results in *per se* liability under the takings clause of the United States Constitution, as a potential argument for landowners in that situation. It did not resolve the issue of when the burden on landowners become so onerous as to deny all reasonable use of their property, or whether rent controls bear a requisite nexus to the public purpose of protecting the supply of low-income housing.

The typical elements of a rent control ordinance include:

Applicability. Rent control laws typically exempt owner-occupied dwelling units, buildings designed only for transient occupancy, rooming houses, and units constructed after the effective date of the ordinance. The exemption for new construction is generally designed to soften any disincentive for the construction of new buildings designed for occupancy by low- and moderate-income families. Exemptions or other preferential incentives for new construction generally take the following forms: 1) the exemption of all construction commenced after a date established in the ordinance; 2) the exemption of initial rents charged in new buildings only; or 3) an exemption for an established period of time or until an initial turnover in tenants.

Price Adjustments/Fair Return. Fair-return standards, which determine allowable increases in rent, are the most controversial and frequently litigated features of rent control ordinances. In order to survive judicial

scrutiny under the takings clause of the United States Constitution, the ordinance must ensure that there is an adequate rate of return for landowners.[99] While most fair-return standards focus exclusively on the landlord's rate of return or recovery of capital investments, some ordinances now consider hardship to the tenant where rent increases are sought above a certain threshold level.[100] In *Pennell v. City of San Jose*, the United States Supreme Court upheld a novel ordinance requiring the rent control board to consider whether rent increases above eight percent would impose an "unreasonably severe financial or economic hardship on a particular tenant."[101] The San Jose ordinance granted an automatic increase of up to eight percent, with consideration of seven additional factors justifying increases exceeding eight percent. These included cost of debt service, rental history of the unit, physical condition of the unit, changes in housing services, market-value rents for comparable units, and other financial information provided by the landlord. The city prescribed certain household income and monthly expenses under which financial or economic hardship would be presumed. Tenants bear the burden of establishing other economic hardships.

In the United States, fair-return standards are generally designed to stabilize rents rather than to ensure comparable returns for comparable units.[102] Most ordinances authorize rental increases above a baseline level established prior to the effective date of the ordinance based upon an established formula, criteria set forth in the ordinance, or an individualized increase established through an administrative process.

The types of standards generally include:

Cash-flow standards, which allow increases to cover debt service and maintenance costs;

Return-on-equity standards, which authorize increases to cover debt service costs, maintenance costs, and an allowance for initial cash investments;

Return-on-value standards, which authorize increases to cover operating expenses and a fair return based on the value of the property;

Percentage net operating income standards, which authorize adjustments where net operating income falls below a specified percentage of gross rents; and

Net operating income maintenance standards, which provide that rents may increase to include increases in operating expenses above a baseline rental established in the ordinance. In addition, most ordinances authorize increases to cover the cost of capital improvements.

Vacancy Decontrol. Many rent control ordinances contain a provision allowing the landlord to reassume control over the rent, with or without further controls on rent increases, when a lease is terminated. The converse situation, in which the landlord is required to grant the tenant a lease of unlimited duration, has invited litigation on takings grounds. The United States Supreme Court decision in *Yee v. City of Escondido* (discussed above) suggests that the failure to provide vacancy decontrol is not a *per se* taking. However, the combination of restrictions on rent increases and the absence of vacancy decontrols could expose local governments to liability as the hardship to landlords increases.

Chapter 2. Notes

1. Allan Mallach, *Inclusionary Housing Programs: Policies and Practices* (New Brunswick, N.J.: Center for Urban Policy Research, Rutgers University, 1984).

2. See, for example, Cal. Gov't Code, Sec. 65589.8 (West Supp. 1992), which mandates that inclusionary set-aside ordinances allow developers to satisfy inclusionary requirements by constructing rental housing; 1991 Connecticut Laws, P.A. 91-204, S.H.B. No. 7118; Florida Stat. Ann. Sec. 163.3202(3); Maryland Ann. Code Sec. 12.01 (Supp. 1991); N.H. Rev. Stat. Ann. Sec. 674:21 (West Supp. 1988).

3. A 1989 study in New Jersey found that, while 16,849 dwelling units were scheduled for production in only 54 communities through the use of inclusionary set-asides, only 1,700 units had been produced with Department of Housing and Urban Development subsidies. Martha Lamar, Allan Mallach, John M. Payne, "Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988," *Rutgers Law Review* 41 (1989): 1199, 1209.

4. Robert Ellickson, "The Irony of Inclusionary Zoning," *Southern California Law Review* 54 (1981): 1167.

5. Ibid.

6. This theory is generally used to explain why impact fees do not automatically translate into higher home prices. Charles J. Delaney and Marc T. Smith, "Development Exactions: Winners and Losers," *Real Estate Law Journal* 17 (1989): 195; Forrest E. Huffman, Arthur C. Nelson, Marc T. Smith, and Michael A. Stegman, "Who Bears the Burden of Impact Fees?," *Journal of the American Planning Association* 54 (1988): 49.

7. Donald Hagman, "Taking Care of One's Own Through Inclusionary Zoning: Bootstrapping Low- and Moderate-Income Housing by Local Government," *Urban Law and Policy* 5 (1982): 169; S. Mark White, "Development Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives," *Journal of Land Use and Environmental Law* 6 (1990): 25, 28-29.

8. Hagman, "Taking Care of One's Own," 175-76.

9. See Madelyn Glickfeld and Ned Levine, *Regional Growth . . . Local Reaction: The Enactment and Effects of Local Growth Control and Management Measures in California* (Cambridge, Mass.: Lincoln Institute of Land Policy, 1992); California Association of Realtors, *Matrix of Land Use Planning Measures*, 1971-1988.

10. Orange County adopted a mandatory set-aside requirement in 1979 and, in 1983, changed the program to an incentive-based, voluntary provision. Michael Banzhaf, "Are Mandatory Inclusionary Housing Programs Passe? The Orange County Experience," *Western State University Law Review* 13 (1986): 473. Between 1980 and 1986, the county issued 24,913 building permits for housing, which was the third highest level of permit issuance of any county in the state. U.S. Dept. of Commerce, *County and City Data Book* (May 1988),59. This figure represented 7.9 percent of all housing permits issued in the state during that period and a 14 percent growth rate for the county.

Montgomery County, Maryland, adopted its "moderately priced dwelling unit" (MPDU) program in 1973, which required developers building more than 50 units in a subdivision to set aside 15 percent of those units for moderate-income residents. See *Marshall v. Fitzgerald*, 47 Md. App. 319, 423 A.2d 9th 67 (1980). Montgomery County issued 7,509 building permits for housing between 1980 and 1986—the highest level in the State of Maryland—for a 23.9 percent growth rate. Clearly, inclusionary zoning has not discouraged the production of new housing in Orange or Montgomery counties.

11. Mark Miller, "Inside an 'Enterprise Zone'," *News Week*, March 6, 1989, 43; Ron Stodghill II, Patrick E. Cole, Teresa McGuire, "Enterprise Zones—Or Twilight Zones?," *Business Week*, February 27, 1989, 113; Joseph P. Shapiro, "A Conservative War on Poverty," *U.S. News & World Report*, February 27, 1989, 20; Ann McDaniels, "Kemp's Brave New World," *News Week*, January 2, 1989, 26; Patrick G. Marshall, "Do Enterprise Zones Work?," *Editorial Research Report (Congressional Quarterly)*, April 28, 1989, 230, 239.

12. Harold A. McDougall, "Affordable Housing for the 1990s," *Journal of Law Reform* 20 (1987): 727, 741.

13. Mallach, *Inclusionary Zoning*, 39-41.

14. Dale A. Whitman, "Federal Housing Assistance for the Poor," *Urban Lawyer* 9 (1977): 32-33.

15. Ibid.

16. It is estimated that nearly two-thirds of eligible low-income renters do not receive governmental assistance. Joint Center For Housing Studies, *The State of the Nation's Housing* (1991): 16.

17. 214 Va. 235, 198 S.E.2d 600 (1973).

18. See *Board of Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959).

19. A number of cases have upheld the use of zoning districts with a direct socioeconomic purpose (e.g., retirement community districts authorizing elderly housing) as a valid exercise of the police powers and as an authorized purpose under the zoning enabling legislation. See, for example, *Shephard v. Woodland Tp. Committee & Planning Board*, 71 N.J. 230, 364 A.2d 1005 (1976); *Taxpayers Association of Weymouth Township v. Weymouth Township*, 71 N.J. 249, 364 A.2d 1016 (1976); and *Maldini v. Ambro*, 36 N.Y.2d 481, 369 N.Y.S.2d 385, 330 N.E.2d 403 (1975). Compare *Hinman v. Planning and Zoning Commission*, 26 Conn.Supp. 125, 214 A.2d 131 (1965); Richards, "Zoning for Direct Social Control," *Duke Law Journal* (1982): 761.

20. 67 N.J. 151, 336 A2d 713 (1975), *cert denied*, 423 U.S. 808 (1975) (Mt. Laurel I); 92 N.J. 158, 456 A2d 390 (1983) (Mt. Laurel II).

21. __ U.S. __, 60 U.S.L.W. 4842 (1992).

22. *Yee v. City of Escondido*, __ U.S. __, 112 S.Ct. 1522 (1992).

23. 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

24. Mallach, *Inclusionary Zoning*, 36-37.

25. Ibid., 166-173.

26. 94 N.J. 358, 464 A.2d 115 (1983).

27. 397 Mass. 329, 491 N.E.2d 618 (1986). Compare *Middlesex v. Aldermen of Newton*, 371 Mass. 849, 359 N.E.2d 1279 (1977), in which a 10 percent set-aside requirement was invalidated because there was no express authority in state zoning legislation.

28. *South Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 447 (1983).

29. Henry A. Hill, "Government Munipulation of Land Values to Build Affordable Housing: The Issue of Compensating Benefits," *Real Estate Law Journal* 13 (1984): 3.

30. Virginia Code Ann. Secs. 15.1-491.8, -491.9 (1991).

31. Gov't Code Sec. 65915. The legislation also requires regulatory incentives for developments providing other social amenities, such as housing within one-half mile of a mass transit guideway station (Sec. 65913.5) and the provision of child care facilities (Sec. 65917.5).

32. Mallach, *Inclusionary Zoning*, 106-122.

33. S. Mark White, "Using Fees and Taxes to Promote Affordable Housing," *Land Use Law and Zoning Digest* 43 (September 1991): 3.

34. Linda Bozung, "A Positive Response to Growth Control Plans: The Orange County Inclusionary Housing Program," *Pepperdine Law Review* 9 (1982): 841-42.

35. IV American Law Institute, *Restatement (Second) of Property*, Sec. 410, comment at 2429 (1944).

36. Mallach, *Inclusionary Zoning*, 142. Mallach notes that these periods generally range from 10 years to perpetuity. The Palo Alto, California, program includes deed restrictions "lasting 59 years, which period started anew with each transaction." Mallach offers the opinion that "[t]he likelihood of any one homeowner remaining in the unit for more than 59 years is remote enough for this provision to be considered a de facto perpetual control." The San Francisco linkage ordinance uses a renewal feature coupled with a 20-year promissory note.

37. Gerald Korngold, "Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements," *Texas Law Review* 63 (1984): 433.

38. Robert W. Burchell, W. Patrick Beaton, and David Listokin, *Mount Laurel II: Challenge and Delivery of Low-Cost Housing* (New Brunswick, N.J.: Center for Urban Policy Research, Rutgers University, 1983) 356; 24 C.F.R. Sec. 203.32 (Apr. 1, 1991), which mandates that FHA-insured mortgages be clear of all prior liens; one exception to this rule, however, allows a lien that favors a local government and has the prior approval of the commissioner.

39. 56 *Federal Register* 58762 (Nov. 21, 1991).

40. Mallach, *Inclusionary Zoning*, 144, note 2; Cal. Gov't. Code Sec. 65915(c).

41. 1991 Maine Laws, ch. 373 (to be codified at 33 Maine Rev. Stat. Ann., ch. 6, Secs. 121-126); 1991 Rhode Island Laws, Ch. 91-237.

42. Davis, California, Ord. No. 1567 (June 20, 1990).

43. "Community Land Trusts Grow, Make Housing More Affordable," *Housing and Development Reporter*, October 14, 1991, 431; Institute for Community Economics, *The Community Land Trust Handbook* (1982). See also Connecticut Housing Land Bank and Land Trust Program, Conn. Gen. Stat. Ann. Secs. 214b-214e (1989), as amended by 1991 Connecticut Laws, P.A. 91-182, S.H.B. 7067; and Maine Rev. Stat. Ann. Secs. 5021-5025, which established an Office of Nonprofit Assistance to monitor and assist homestead land trusts.

44. *NIMBY Report*, 8-9. In 1990, the Labor Management Relations Act was amended to authorize unions to negotiate for employer-assisted housing [Public Law No.101-723 [S.1949] (Apr. 18, 1990)]. As a consequence, a Boston community-based housing corporation was able to establish a $1million, three-year trust fund designed to provide housing assistance to service workers.

45. 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). See Robert H. Freilich and Terry D. Morgan, "Municipal Strategies for Imposing Valid Development Exactions: Responding to *Nollan*," *Zoning and Planning Law Report* 10 (December 1987): 169, 172; Robert H. Freilich and Stephen P. Chinn, "Finetuning the Taking Equation, Applying It to Development Exactions (Part II)," *Land Use Law and Zoning Digest* 40 (March 1988).

46. *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 1991 W.L. 146977 (9th Cir. 1991); *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990); compare *Bonan v. General Hospital Corporation*, 398 Mass. 315, 496 N.E.2d 640 (1986), vacating No. 76438 (Mass. Super. Ct. March 31, 1986), which invalidated a linkage fee at trial court level on procedural grounds. A recent District of Columbia appellate court decision dismissed a linkage ordinance adopted by initiative under a unique provision of the city's charter and federal enabling authority conferring exclusive discretion pertaining to the allocation of resources on the City Council. *Hessey et al. v. Board of Elections*, 601 A.2d 3 (D.C. App. 1991).

47. See *Blagden Alley Ass'n v. District of Columbia Zoning Comm'n*, 590 A.2d 139 (D.C. App. 1991), which approved the practice of off-site housing exactions but remanded the case for findings; *Nunziato v. Planning Board*, 225 N.J. Super. 124, 541 A.2d 1105 (1988), which invalidated $500-per-dwelling-unit contribution to affordable housing program exacted as a condition of variance approval; and *Alexander's Dept. Stores of New Jersey v. Borough of Paramus*, 243 N.J. Super. 157, 578 A.2d 1241 (1990), which rejected a neighboring landowner's challenge to affordable housing contribution on standing grounds.

48. *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990); see also *In re Egg Harbor Associates*, 94 N.J. 358, 464 A.2d 1115 (1983).

49. One commentator reports that housing has been considered as one of the mandatory elements of Florida "concurrency" requirement, which prohibits the issuance of development permits that would cause a reduction in locally adopted level-of-service standards for public facilities. Robert Odland, "Growth Management: What California Can Learn from the Sunshine State," *Loyola of Los Angeles Law Review* 24 (1991): 1109, 1119.

50. *Stoney-Brook Development Corp. v. Town of Fremont*, 474 A.2d 561 (N.H. 1984); *Conway v. Town of Stratham*, 414 A.2d 539 (N.H. 1980); *Westwood Forest Estates, Inc. v. Village of South Nyack*, 244 N.E.2d 700 (N.Y. 1969), *Q.C. Construction v. Gallo*, 649 F.Supp. 1331 (D. R.I. 1986); *Associated Homebuilders, Inc. v. City of Livermore*, 557 A.2d 473 (Cal. 1976) (J. Mosk, dissenting). As a corollary, where jurisdictions are making real and substantial attempts to remedy public facility or housing deficiencies and to accommodate new growth through the planning process, courts will assume their good faith. See, for example, *Golden v. Planning Board of the Town of Ramapo*, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291, app. diss'd, 409 U.S. 1003 (1972); *Smoke Rise, Inc. v. Washington Suburban Sanitary Commission*, 400 F.Supp. 1369 (D.Md. 1975); *Beck v. Town of Raymond*, 394 A.2d 847 (N.H. 1978); *Rancourt v. Town of Barnstead*, 523 A.2d 55 (N.H. 1986); *Westwood Forest Estates, Inc. v. Village of South Nyack*, 244 N.E.2d 700 (N.Y. 1969); *Belle Harbor Realty v. Kerr*, 323 N.E.2d 697 (N.Y. 1974).

51. *Dailey v. City of Lawton, Okla.*, 296 F. Supp. 266 (W.D. Okla. 1969), aff'd, 425 F.2d 1037 (10th Cir. 1970), which declared that the denial of multifamily zoning for a low-income housing sponsor based on the inadequacy of public facilities was invalid and discriminatory; *Urban League of Essex County v. Mahwah Tp.*, 207 N.J. Super. 169, 504 A.2d 66, 79-81 (1984); *Kennedy Park Homes Ass'n v.*

City of Lackawanna, 436 F.2d 108, 114 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971), which invalidated a moratorium on rezoning and subdivision approvals due to asserted lack of sewer capacity because there was evidence of racial discrimination and lack of effort to resolve existing facility deficiencies.

52. Freilich and Morgan, "Municipal Strategies for Imposing Valid Development Exactions."

53. 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989).

54. Ibid., 542 N.E.2d at1062-65; see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

55. 108 Wash.2d 20, 735 P.2d 20 (1987).

56. 113 Wash.2d 402, 780 P.2d 838 (1989).

57. 119 Wash.2d 1, 829 P.2d 765 (1992).

58. 119 Wash.2d 34, 830 P.2d 318 (1992).

59. Ibid., 830 P.2d 329.

60. Ibid.

61. Ibid., 830 P.2d 330, 331.

62. *Terminal Plaza v. City and County of San Francisco*, 177 Cal.App.3d 982, 223 Cal.Rptr. 379 (1986).

63. George Sternlieb and James W. Hughes, "Private Market Provision of Low-Income Housing: Historical Perspective and Future Prospects," *Housing Policy Debate* 2 (1990): 123.

64. Jerold Kayden and Robert Pollard, "Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing," *Law and Contemporary Problems* 50 (1987): 127; George Sternlieb, Robert Burchell, and Lynne Sagalyn, *The Affluent Suburb* (New Brunswick, N.J.: Center for Urban Policy Research, Rutgers University, 1971), 59-92.

65. *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990).

66. *Tocco v. New Jersey Council on Affordable Housing*, 242 N.J. Super. 218, 576 A.2d 328, *cert. denied*, 585 N.J. 401 (1990), *cert. denied*, 111 S.Ct. 1389 (1991).

67. *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 1991 W.L. 146977 (9th Cir. 1991). The fee amount is not set forth in the opinion.

68. S. Mark White, "Using Fees and Taxes to Promote Affordable Housing." Cf. 1990 Washington Laws, Ch. 17, S.H.B. 2929, Sec. 36 (to be codified at Wash. Rev. Code Sec. 82.46.010), which authorizes an excise tax on real estate transfers of 0.25 percent or a supplemental tax of 1.5 percent of the selling price in order to finance capital improvements designated in a comprehensive plan and housing relocation assistance for tenants displaced from the change in use or conversion of residential developments.

69. *Leroy Land Dev. v. Tahoe Regional Planning Agency*, 939 F.2d 696 (9th Cir. 1991).

70. See *Marino v. Town of Ramapo*, 68 Misc.2d 44, 326 N.Y.S.2d 162 (1971).

71. See Robert H. Freilich and Brenda Nichols, "Public-Private Partnership in Joint Development: The Legal and Financial Anatomy of Large Scale Urban Projects," *Municipal Finance Journal* 7 (1986): 5; Robert H. Freilich and Stephen P. Chinn, "Transportation Corridors: Shaping and Financing Urbanization Through Integration of Eminent Domain, Zoning and Growth Management Techniques," *University of Missouri at Kansas City Law Review* 55 (1987): 153, 183.

72. David Rosen, *Housing Trust Funds*, PAS Report No. 406 (Chicago: APA, 1987), 9.

73. 1991 Texas Laws, Ch. 762, S.B. No. 546, Sec. 2 (to be codified at Tex. Rev. Civ. Stat. Art. 4413(501), Sec. 3.16).

74. Illinois Rev. Stat., Ch. 67 , Paragraphs 1251, 1254-1255.

75. 30 Maine Rev. Stat. Ann. Sec. 5001 et seq.

76. 10 Vermont Stat. Ann. Sec. 312 (Supp. 1991).

77. R.I. Gen. Laws Sec. 42-55.1-1 to -55.1-3 (Supp. 1991).

78. Wash. Rev. Code Sec.43.185.010 et seq. (as amended by 1991 Washington Laws, ch. 356, S.H.B. 1624).

79. Field Hearing before Subcommittee on Policy Research and Housing of the House Committee on Banking, Finance, and Urban Affairs, 101st Cong., 1st Sess., No. 101-38 (June 19, 1989), at 31-32; *NIMBY Report*, 7-13.

80. Community Redevelopment Law, California Health and Safety Code Secs. 33000, 33334.2; Amanda Susskind and Robin Harris, "Providing Affordable Housing through Redevelopment," *Public Law News* (Annual Meeting Issue 1991), 6, 13.

81. Minn. Stat. Ann. Sec. 469.174 (West Supp. 1992).

82. Real Estate Research Corporation, "Is Infill the Answer to Affordable Units?," in Frank Schnidman and Jane Silverman, editors, *Housing Supply and Affordability* (Washington, D.C.: ULI, 1983): 203-204.

83. Real Estate Research Corporation, *Infill Development Strategies* (Washington, D.C.: ULI and APA, 1982): 43-62; Eric Smart, *Making Infill Projects Work* (Washington, D.C. and Cambridge, Mass.: ULI and Lincoln Institute of Land Policy, 1985): 27-35.

84. Real Estate Reserch Corporation, *Infill Development Strategies*, 69-92.

85. Robert H. Freilich and Ragsdale, "Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region," *Minnesota Law Review* 58 (1974): 1009; David Callies and Robert H. Freilich, *Cases and Materials on Land Use* (St. Paul, Minn.: West Publishing Co., 1986); San Diego Progress Guide and General Plan with Freilich and Leitner, legal consultants, *Guidelines for Future Development*, adopted February 26, 1979); see also *J.W. Jones v. City of San Diego*, 157 Cal.App.3d, 203 Cal.Rptr. 580 (1984).

86. See, for example, *Griffin Development Corp. v. City of Oxnard*, 39 Cal.3d 256, 217 Cal.Rptr. 1, 703 P.2d 339 (1985), in which it was found that the regulation of condominium conversions through special use permits was a legitimate use of police power and did not amount to a taking of private property; *McHenry State Bank v. City of McHenry*, 113 Ill.App.3d 82, 68 Ill.Dec.615, 446 N.E.2d 521 (1983), which considered condominium conversion regulations not authorized by zoning enabling legislation; *CHR General, Inc. v. City of Newton*, 387 Mass. 351, 439 N.E.2d 788 (1982), in which condominium conversion

regulations not authorized by zoning enabling legislation or independent municipal powers were challenged; *Graham Court Associates v. Chapel Hill*, 281 S.E.2d 418 (N.C.App. 1981), in which the town lacked authority under zoning enabling legislation to prohibit conversion of apartments to condominiums; and *Bridge Park Co. v. Borough of Highland Park*, 113 N.J.Super. 219, 273 A.2d 397 (1971), which ruled on an ordinance prohibiting horizontal property regimes or condominium units not authorized by zoning enabling legislation. For a discussion of the impacts of condominium conversion on neighborhoods and fiscal resources, see U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *The Conversion of Rental Housing to Condominiums and Cooperatives: A National Study of Scope, Causes and Impacts* (Washington, D.C.: U.S. GPO, June 1980).

87. *Gilbert v. City of Cambridge*, 932 F.2d 51 (1st Cir.), *cert. denied*, 112 S.Ct. 192 (1991); see also *Santa Monica Pines, Ltd. v. Rent Control Board*, 35 Cal.3d 858, 201 Cal.Rptr. 593, 679 P.2d 27 (1984).

88. See "SROs: A Poor Stepchild Comes of Age," *Zoning News*, August 1990, 1-3; Frances Werner and David Bryson, "A Guide for the Preservation and Maintenance of Single Room Occupancy (SRO) Housing," *Clearinghouse Review* (April 1982): 999.

89. Compare *Gilbert v. City of Cambridge*, which upheld a condominium conversion ordinance against takings challenge; *Terminal Plaza v. City & County of San Francisco*, 177 Cal.App.3d 892, 223 Cal.Rptr. 379 (App. 1986), which upheld in-lieu fee charged as a condition of converting single-room occupancy buildings to commercial or market-rate users; *Bullock v. City and County of San Francisco*, 271 Cal.Rptr. 44 (Cal.App. 1 Dist. 1990), which decided that a moratorium on conversion of SRO units to a hotel (conditioned on payment of a tenant relocation assistance fee) was constitutional but was preempted by state legislation; *Kalaydjian v. City of Los Angeles*, 149 Cal.App.3d 690, 197 Cal.Rptr. 149 (1983), which upheld a tenant relocation fee imposed as condition of condominium conversion; ***with*** *San Telmo Associates v. City of Seattle*, 108 Wash.2d 20, 735 P.2d 673 (1987), which ruled that a housing preservation ordinance and in-lieu fee were prohibited by state anti-impact fee legislation; *R/L Associates, Inc. v. City of Seattle*, 113 Wash.2d 402, 780 P.2d 838 (1989), in which tenant assistance provisions imposed as a condition to conversion of low-income housing units were ruled to be inconsistent with a state statute; and the recent companion cases of *Sintra v. City of Seattle*, 108 Wash.2d 20, 735 P.2d 20 (1987) and *Robinson v. City of Seattle*, 113 Wash.2d 402, 780 P.2d 838 (1989), in which tenant relocation assistance provisions were invalidated as a violation of substantive due process.

Legislation passed by Washington state in 1990 authorizes local governments to require tenant relocation assistance payments for landowners converting low-income housing developments to other uses. Wash.Rev.Code, Secs. 82.02.020, 59.18.440-59.18.450 (West Supp. 1991).

90. *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989).

91. See, for example, Anthony Downs, *Residential Rent Controls: An Evaluation* (Washington, D.C.: ULI, 1988).

92. U.S. Department of Housing and Urban Development, *Report to Congress on Rent Control* (1991).

93. Richard P. Appelbaum et al., "Scapegoating Rent Control: Masking the Causes of Homelessness," *Journal of the American Planning Association* 57 (Spring 1991): 153.

94. For studies of the incidence of mental illness and drug addiction among the homeless, see "The Physical and Mental Health Status of Homeless Adults," *Housing Policy Debate* 2 (1991): 815; "Alcohol and Other Drug Problems Among the Homeless: Research, Practice, and Future Directions," *Housing Policy Debate* 2 (1991): 837.

95. Applebaum, "Scapegoating Rent Control," 157-58.

96. For a thorough and comprehensive description of system design, see Kenneth Baar, "Guidelines for Drafting Rent Control Laws: Lessons of a Decade," *Rutgers Law Review* 35, no.4 (1983): 721-85.

97. *Pennell v. City of San Jose*, 485 U.S. 9, 108 S.Ct. 849 (1988); *Block v. Hirsh*, 256 U.S. 135 (1944); *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Eggar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Marcus Brown Holding Co. v. Feldman* 256 U.S. 170 (1921).

98. *Yee v. City of Escondido*, __ U.S. __, 112 S.Ct. 1522 (1992); *Fragopoulos v. Rent Control Board of Cambridge*, 557 N.E.2d 1153 (Mass. 1990), in which the court ruled that conditions placed upon a landlord who sought to change rent-controlled property from four-unit building to an owner-occupied, three-unit building are not a physical invasion and occupation of his property.

99. See *McHugh v. Santa Monica Rent Control Board*, 49 Cal.3d 348, 261 Cal.Rptr. 318, 777 P.2d 91 (1989); *Fisher v. City of Berkeley*, 37 Cal.3d 644, 209 Cal.Rptr. 682, 693 P.2d 261, *aff'd*, 475 U.S. 260 (1986); *Nash v. City of Santa Monica*, 37 Cal.3d 97, 207 Cal.Rptr. 285, 688 P.2d 894, *app. diss'd*, 470 U.S. 1046 (1985); *Birkenfield v. City of Berkeley*, 17 Cal.3d 129, 130 Cal.Rptr. 465, 550 P.2d 1001 (1976); *Helmsly v. Borough of Ft. Lee*, 78 N.J. 200, 394 A.2d 65 (1978), which invalidated a 2.5 percent general adjustment ceiling and onerous individual adjustment exclusion; *Kress, Dunlap & Lane, Ltd. v. Downing*, 193 F.Supp. 874 (D.V.I. 1961), which struck down a rent control ordinance allowing no increase in rentals for a 14-year period; *Searle v. Rent Stabilization Board*, 271 Cal.Rptr. 437 (Cal. App. 1990), which invalidated a rent control ordinance that limited annual rental adjustments to only 40 percent of the CPI and required a landlord to petition for an inflation adjustment. See also Katherine E. Stone and Phillip A. Seymour, "*Hall v. City of Santa Barbara*: A New Foot in the Takings Door?," *Public Law News* 15, no. 2 (1991): 5.

100. Dennis Keating, "Rent Control: Fair Return, Landlord Hardship, and Regulatory Takings," *Zoning and Planning Law Handbook* (1990): 401-03.

101. 485 U.S. 8 (1988).

102. Baar, "Guidelines for Drafting Rent Control Laws," 732-36.

Chapter 3. Reactive Measures: Targeted Modification of "Regulatory Barriers"

The modification of regulatory obstacles to the production of affordable housing is championed by the NIMBY Report and other publications as a mechanism to facilitate the production of housing through the free market. However, the modification of regulatory restrictions need not result in the weakening of environmental, public facilities, urban design, or other sound planning standards that contribute to orderly development. Selective modifications to zoning standards, subdivision requirements, growth controls, and environmental restrictions can allow the free market to operate without jeopardizing community goals and objectives. *Furthermore, the wholesale abandonment of regulatory restrictions would create no incentive for developers to produce low-income housing.* Therefore, regulatory incentives should be carefully targeted, selectively applied, and diligently enforced in order to ensure that their benefits accrue to low- and moderate-income persons as well as to developers. The purpose of this chapter is to present several ideas on how regulatory modifications can be structured while preserving the validity of the underlying system.

ZONING AND SUBDIVISION REFORM

The initial housing affordability problem identified by the NIMBY Report is the use of large-lot zoning in suburban jurisdictions to exclude poor persons. Minimum lot sizes of up to five acres in suburban Chicago are cited as a prevalent practice in American jurisdictions. The use of zoning to protect property values was one of the original purposes of the Standard Zoning Enabling Act. The planning profession has long resisted excessively large lot sizes, which have contributed to urban sprawl, inhibited the efficient provision of public facilities and services, and added to traffic congestion by minimizing the feasibility of public transit and maximizing automobile reliance.[1] The NIMBY Report ignores recent innovations in the use of zoning to protect prime agricultural land, environmentally sensitive lands, and neighborhood integrity.

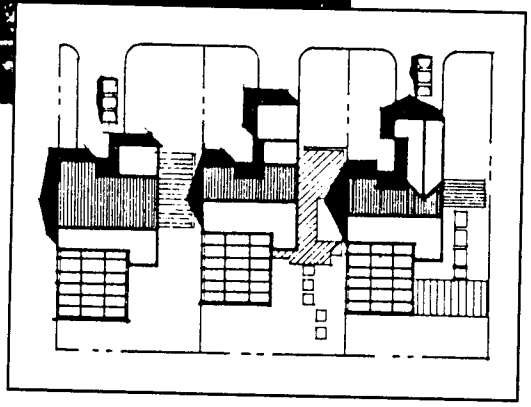
Zoning and subdivision controls influence housing costs in three major ways. First, density restrictions influence both the supply of housing that may be produced within a zoning district as well as the cost per unit of land. Density limits are often justified in order to protect neighborhood character, prevent the congestion of public facilities and services, and protect environmental and agricultural resources. As density increases, land costs are spread among a greater number of dwelling units, resulting in lower costs per unit of land. However, increases in densities can create inflation in land purchase costs, thereby absorbing some of the savings that would otherwise be realized from increased densities.

Second, the substantive standards imposed by zoning or subdivision ordinances often increase housing costs or permit fewer dwellings to be placed on particular land parcels, thereby limiting the supply of housing. The most rudimentary examples are ordinances limiting permissible construction to single-family, stick-built dwellings. Excluding manufactured homes and multifamily dwellings directly results in an increase in the cost of permissible construction. Additional regulations that affect costs include setback requirements, minimum lot sizes, minimum floor area, and numerous other restrictions.

Third, local governments increasingly require the installation of off-site facilities as a condition of rezoning or development approval. It is generally assumed that these costs are passed on directly to the consumer. This issue is discussed in greater detail in the sections on impact fees and development exactions in this chapter.

Contrary to the findings of the NIMBY Report and other criticism of density restrictions, it is often the development industry—not local government—that needs to be convinced of the merits of high-density zoning.[2] In many areas of the country, especially in rapidly growing jurisdictions with a strong demand for upscale housing, residential developments are constructed well below maximum permitted density. Accordingly, noncumulative zoning or mandatory affordable housing zones may be needed to ensure that new development conforms to community goals and objectives for affordable housing. (Cumulative zoning allows new development to conform to either the underlying zoning use and density classification or that of a "higher" zoning and density classification. With cumulative zoning, single-family dwellings—which are the most favorable classification of the typical zoning ordinance—can be placed in multifam-

Allan Karchmer



Cluster zoning allows increased densities on concentrated portions of a proposed development tract, reducing infrastructure costs both in the aggregate and on a per-unit basis (above and opposite page). Cluster and other nontraditional development regulations, like zero lot line (right), can also yield more aesthetically pleasing lot layouts, yield higher open space ratios, and preserve natural amenities.

ily districts, but the reverse is not true.) Traditionally, cumulative zoning was a nuisance control used to separate residences from noxious industrial uses.[3] While having a social rather than a nuisance control objective, noncumulative multifamily zoning districts can be used to exclude single-family dwelling units from areas appropriate for high-density development.[4]

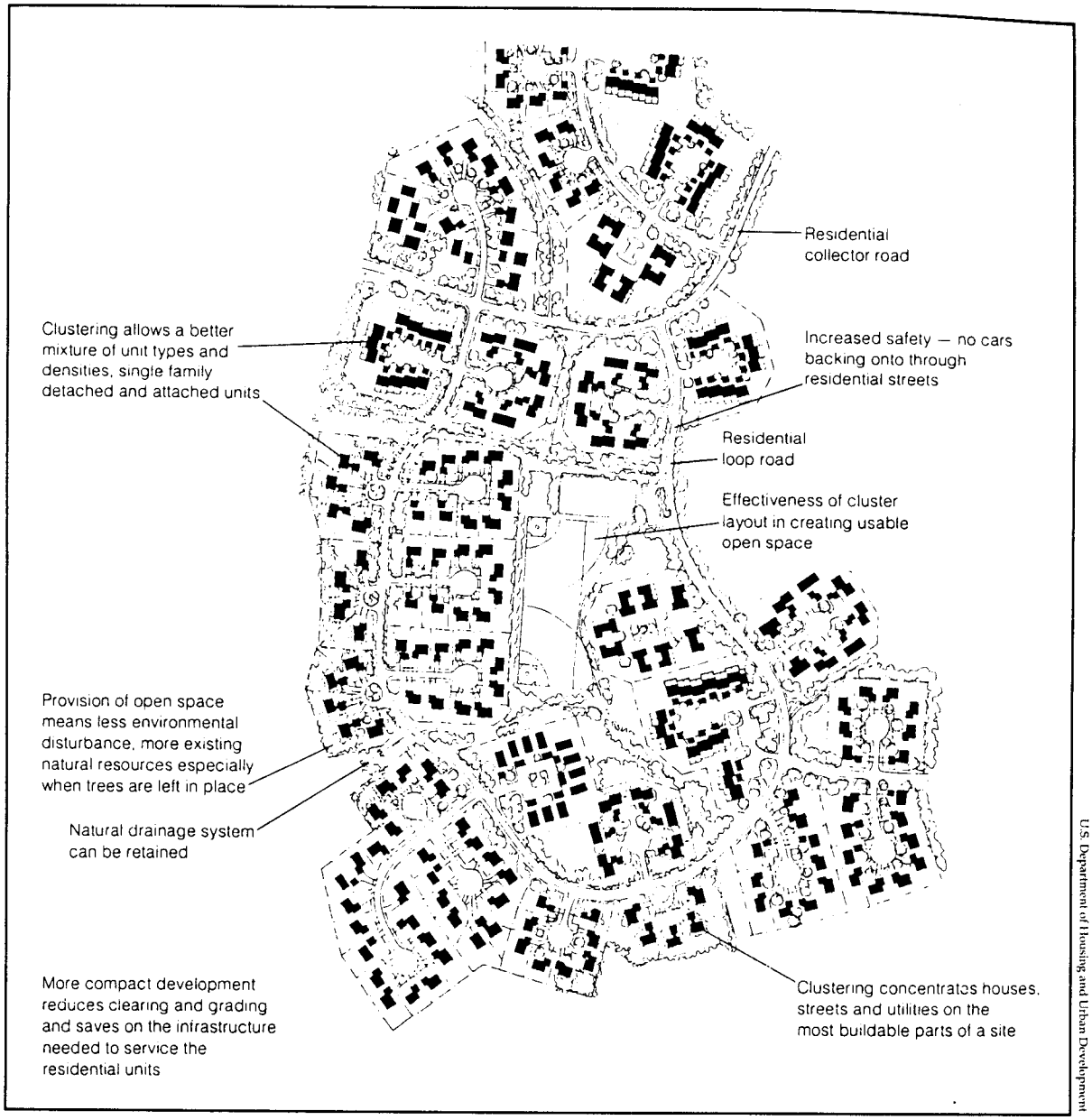
Several state agencies and previous Planning Advisory Service Reports have provided useful guidance on how development standards can be reformed to reduce construction costs.[5] Communities can consider selectively incorporating such standards into special districts for the production of affordable housing.

Many sources have addressed the various standards imposed by zoning and subdivision regulations that add to housing costs. They can be categorized as supply standards and capital standards. Supply standards affect the development potential of a site and, accordingly, the supply of housing that may enter the market. Supply standards range from basic density specifications to other standards, such as setback and frontage requirements, that affect lot sizes and therefore the number of dwelling units that may be placed on a given parcel of land. It is noteworthy that most of these standards are geared toward suburban, single-family developments. Capital standards address the quantity, quality, and location of the production factors. Examples include street-width requirements and minimum floor areas. Increases in the quantity and quality of capital factors generally add to the cost of production and, therefore, the final cost of the dwelling unit. Many standards primarily directed to land supply affect capital costs as well, and vice versa. While this report is not intended to duplicate the exhaustive research contained elsewhere, a summary of standards that have been applied or suggested is contained in Table 3.

Regulatory reform does not mean wholesale abdication of regulatory responsibilities. In order for reforms to reach their intended beneficiaries, they must be carefully targeted. The types and categories of development that may benefit from reform measures must be carefully spelled out in the ordinance, and targeted geographic areas must be clearly defined. It is very important that the reform measures and regulatory incentives be packaged together and, above all, honored in the approval process. Deviation from these principles will result in the benefits of reform accruing to the wrong types of development, without eliminating the regulatory risks that discourage the production of low- and moderate-income housing projects.

Innovative Zoning Techniques: Zero Lot Line, Cluster, and Mixed-Use Zoning

Innovative site planning techniques, such as the use of zero lot lines (ZLL) and cluster zoning, create cost savings by allowing more compact lot sizes and arrangements, more efficient use of infrastructure, and greater densities than is possible under traditional zoning ordinances.[6] The modification of development standards, including minimum lot size, setbacks, street



widths, off-street parking requirements, maximum lot coverage, sidewalks, and site improvement requirements (e.g., sewer, drainage, and curb and gutter) can reduce development costs.[7]

Cluster zoning allows increased densities on concentrated portions of a proposed development tract, thereby reducing infrastructure costs both in the aggregate and on a per-unit basis. A 1978 report issued by the HUD notes that the cost of street pavement, clearing, and storm sewers for cluster developments is only 62 percent of comparable figures for conventional subdivisions.[8] Cluster is generally authorized as part of a planned unit development (PUD) and is coupled with flexible development standards such as ZLL. ZLL standards allow buildings to abut one another on common lot boundaries, thereby eliminating the side-yard setback. While most jurisdictions limit these standards to PUDs, they have been successfully employed as a base district standard.[9] In order to maintain privacy, most ZLL regulations prohibit openings on walls abutting the lot lines.

Cluster and ZLL regulations can result in a more aesthetically pleasing lot layout and yield higher open space ratios than traditional "cookie-cutter" subdivisions. However, most local governments authorize the use of these standards only as a conditional use or as part of a PUD, which can require a lengthy and unpredictable approval process. If these standards are used as a mechanism to stimulate the production of affordable housing, authorizing flexible standards as of right should be considered. A New Hampshire statute prohibits discrimination against multifamily or cluster housing:

> All citizens of the State benefit from a balanced supply of housing which is affordable to persons

TABLE 3. DEVELOPMENT STANDARD REFORMS

Capital Standards

Standard	Rational/Benefits	Suggested Guidelines
Reduce street-width requirements	Reduces direct capital costs for pavement and cut and fill. [1] Reduces incidental costs associated with utility installation, and maintenance costs.[2]	Widths under 20 ft. may be sufficient[2]; typical range is 20–30 ft. depending upon design capacity, availability of off-street parking and intensity of development.[1,4,6] Special classifications may be developed for neighborhood streets carrying lower average daily traffic volumes, such as subcollectors, access streets, and special purpose streets (alleyways, marginal access streets, and divided streets).[1,6]
Modify cul-de-sac and turnaround street widths	Reduces pavement costs, but should ensure adequate mobility for emergency vehicles.	30-ft. radius is adequate for most vehicles; radii exceeding 40 ft. should be discouraged.[1] "Hammerhead" T- or Y-shaped turnarounds can ensure adequate mobility while avoiding wasteful lot layout of cul-de-sacs.[1]
Modify curb and gutter requirements	Can reduce capital costs, but inadequate construction standards can increase operation and maintenance costs over time.	Swales, mountable or roll-over curbs can be used as an alternative to vertical or concrete barrier curbs.[1]
Modify sidewalk standards	Reduces direct capital costs for pavement; can increase development potential of a site.	Require sidewalks on one side of street only; use of alternative pedestrian systems such as pathways; use of less expensive paving materials such as bituminous concrete.[1,2,4] Width should be limited to 3 ft. for residential streets and 4 ft. for collectors and subcollectors.[7] Infrequently used sidewalks can be replaced with pathways linking development clusters.[1]
Modify stormwater management requirements	Reduces direct construction costs, ongoing maintenance requirements.	Allow natural stormwater management systems.[1,2] Replace prescriptive system design requirements with performance standards.[1] Allow detention/retention basins, precast structures.[1] Reduce manholes/inlets by increasing spacing between structures or replacing with curved pipe sections, "Ts", and "Ys".[1]
Modify landscaping standards	Reduces direct capital costs and, since aesthetic standards are inherently subjective, can remove a source of delay and confusion.	Reduce tree caliper to 1–2 inches.[2] Require buffers only around intensely developed areas or parking areas rather than entire site perimeter.[2]
Modify parking standards	Reduces capital costs and avoids overconsumption of land otherwise available for housing.	1.25–2.5 spaces depending on number of bedrooms.[4] Width/length of stalls from 7.5' x 15' to 8' x 16.4' Parking lanes requiring an 8-foot width may not be needed where off-street parking is available.[1] Base standards on number of bedrooms rather than units; allow a portion of stalls to be devoted to compact cars.[2]
Reduce right-of-way widths	Increases development potential and enhances efficiency of infrastructure.	35–50 ft.[4] Use of easements or sidewalks/bicycle paths for utilities can be a useful alternative to right-of-way requirements.[2]
Modify sanitary sewer installation standards	Reduction in capital costs for piping and manholes.	Reduce pipe lengths through curvilinear design and replace manholes with clean-outs where possible.[1] 600- to 800-foot spacing between man-holes can be acceptable with adequate cleanout devices.[1] Consider use of 4–6 inch diameter distribution lines and 3-inch laterals.[1] Replace site inspection with television cameras.[1] Common laterals can be used to reduce pipe length.[1]
Modify water service requirements	Reduces capital costs for pipe lenths and diameters as well as operational costs.	Consider plastic pipes for distribution lines, corporation stop assembly connections, and multiple service connections.[1]

TABLE 3. CONTINUED

Supply Standards

Standard	Rational/Benefits	Suggested Guidelines
Zone sufficient land for all housing types, including medium and high densities	Allows market or government agencies to provide adequate supply of housing sufficient to accommodate demand. Directly authorizes construction of low-cost housing.	Highly variable depending upon local conditions.
Reduce minimum lot sizes.	**Large lot sizes impede construction of smaller, single-family homes.**	**2,000–6,000 sq.ft.[1] Some districts eliminate minimum lot size and regulate only units per gross acre, with standards ranging from 21–56 units/acre.[4] One-half acre considered excessive for affordable housing.[2]**
Reduce or modify minimum floor area or lot coverage requirements	Allows home size to be determined by market.	*Lot coverage:* 40–50% maximum.[4] Developers or local governments often downsize or increase height of units, or place smaller homes on larger lots than minimum to preserve open space.[5]
Reduce or eliminate minimum site sizes for PUD/cluster developments	**Ordinances requiring minimum site size discourage use of PUD/cluster since large tracts may be hard to find.**	**100 acres considered excessive.[2]**
Reduce minimum lot width	Permits smaller lot sizes and increased densities.	0–60 ft.[4]
Reduce lot frontage requirements	**Reduces pavement, stormwater control, and utility installation costs. Permits smaller lot size.**	**32–60 ft.[5]**
Reduce front, side, and/or rear setback requirements.	Reduces pavement, service line, site clearance, and landscaping costs. Permits smaller lot sizes.	*Front:* 0–5 ft.[4] Site buildings perpendicular or at angles to the street; complement narrow front setbacks with rear parking and alleys.[1] *Side:* 0 ft. (zero-lot line)–10 ft.; reduction to 0 ft. is generally accompanied by 10 ft. for other lot line.[4] *Rear:* 0–5 ft.; larger setbacks sometimes used to accommodate parking at rear of lot.[5]
Allow cluster, zero lot line, or "Z" lot/herringbone lot configurations.	**Allows developers to maintain gross density of lot[1] and to concentrate development on nonsensitive portions of a site. Enhances efficiency of site infrastructure.**	**The most common standard is 0 ft. on one side and 10 ft. on the other.[5]**

Notes:

[1]United States Department of Housing and Urban Development, Office of Policy Development and Research, *Affordable Housing Development Guidelines for State and Local Government* (Washington, D.C., Nov. 1991).

[2]Pennsylvania Department of Community Affairs, *Reducing Barriers to Affordable Housing,* Planning Series No. 10 (Harrisburg, Pa., Jan. 1991).

[3]Florida Department of Community Affairs, *Technical Memo* 5 (Oct. 1990).

[4]Welford Sanders and David Mosena, *Changing Development Standards for Affordable Housing,* PAS Report No. 371 (Chicago: APA, 1982).

[5]Welford Sanders, Judith Getzels, David Mosena, and JoAnn Butler, *Affordable Single-Family Housing: A Review of Development Standards,* PAS Report No. 385 (Chicago: APA, 1984).

[6]Citing Bucks County Planning Commission, *Performance Streets, A Concept and Model Standards for Residential Streets* (Doylestown, Pa., 1980); American Society of Civil Engineers, et al., *Residential Streets,* 2d ed., 1990.

[7]Citing David Listokin and Carol Walker, *The Subdivision and Site Plan Handbook* (New Brunswick, N.J.:Rutgers University, Center for Urban Policy Research, 1989).

and families of low and moderate income. Establishment of housing which is decent, safe, sanitary and affordable to low- and moderate-income persons and families is in the best interests of each community and the State . . . and serves a vital public need. Opportunity for development of such housing, including so-called cluster development and the development of multifamily structures, should not be prohibited or discouraged by use of municipal planning and zoning powers or by unreasonable interpretation of such powers.[10]

Integration of Inexpensive Housing Units

Recommendation 7-11 of the NIMBY Report promotes the liberalization of restrictions on manufactured housing and accessory dwelling units as a mechanism to produce affordable housing. The modification of manufactured housing and accessory dwelling unit regulations are an important part of many state strategies to encourage the production of affordable housing and should continue to be encouraged.

Factory-built or manufactured housing. Because of economies of scale associated with the production of manufactured housing,[11] it presents a viable source of affordable "single-family" housing. However, local land-use regulations frequently discriminate against manufactured housing by confining manufactured homes to parks, singling out manufactured homes for special permitting procedures, or by excluding manufactured homes from most residential districts. The following types of discriminatory local regulations have been stricken on constitutional grounds: confinement of manufactured homes to parks;[12] exclusion of manufactured homes from all zoning districts;[13] and confining manufactured homes to unreasonably small areas of land.[14]

At least 16 states now have legislation prohibiting discrimination against manufactured housing. An increasing number of jurisdictions now permit manufactured homes by right in residential districts and outside of parks.[15] State antidiscrimination laws generally take the following forms: broadly worded prohibitions of ordinances having the effect of excluding prefabricated housing, except on the same terms and conditions of conventional housing;[16] prohibiting discriminatory treatment but giving local governments the right to impose zoning standards and procedural requirements (e.g., setback, minimum square footage, yard, parking, roofing/siding, density) on the same terms as site-built housing;[17] mandating that manufactured homes must be allowed in all residential areas;[18] and prohibiting the complete exclusion of manufactured homes from a community.[19] Some states actively encourage local governments to use manufactured homes as a vehicle for providing affordable housing.[20]

Accessory apartments. Allowing accessory apartments, or "granny flats," to be located in residential zones is an increasingly popular mechanism for providing low-cost housing.[21] Accessory apartments are generally excluded from single-family residential districts.[22] However, several states have authorized the establishment of accessory uses in single-family districts as a mechanism to encourage the production of affordable housing.

The New Jersey Council on Affordable Housing regulations (see Chapter 4) authorize municipalities to zone for accessory apartment units.[23] Municipalities that participate in the substantive certification program may fulfill a limited portion of their regional fair-share obligations through accessory apartments.

California authorizes local governments to designate areas in multi- and single-family residential zones in which accessory dwelling units may be permitted.[24] While local governments may condition accessory units on the adequacy of water, sewer, and roadway facilities, the units are not subject to residential growth control programs. Local governments may develop standards pertaining to parking, height, setback, lot coverage, architectural review, and maximum unit size in the accessory unit ordinance. Accessory units must be approved in accordance with statutory standards if an ordinance has not been adopted. Special-use permits, conditional-use permits, or variances may also be granted for accessory units intended for occupancy by up to two adults who are 62 years of age or older.

GROWTH MANAGEMENT AND HOUSING AFFORDABILITY

The NIMBY Report is very critical of the use of local land-use regulations designed to control growth. The report targets a number of growth management techniques that are alleged to create severe housing affordability problems, including low-density zoning, building permit quotas, adequate public facilities ordinances, and urban growth boundaries. However, the report's conclusions are based primarily on public testimony by builders and developers rather than empirical evidence. While the report is ostensibly targeted to housing affordability issues, most of its comments are directed to the effect of growth management restrictions on economic growth and fiscal policy rather than on the production of low- and moderate-income housing. In a particularly misleading statement, the report attacks Florida's concurrency policy, which prohibits the issuance of development permits or development orders that would create a reduction in locally adopted level-of-service standards, as contributing to a lack of affordable housing.[25]

The report's conclusions are premature. The concurrency requirement was added to the Florida Local Government Comprehensive Planning and Land Development Regulation Act in 1986, and is not effective until adopted by a local government pursuant to a state-approved comprehensive plan. As of the summer of

At least 16 states now prohibit discrimination against manufactured housing. Local governments do have the right ot impose design standards on the same terms as site-built housing. Some states actively encourage local governments to use manufactured homes as a vehicle for providing affordable housing.

1989, only 116 local comprehensive plans had been reviewed by the State Department of Community Affairs, which administers the comprehensive planning legislation, and the process of reviewing all local comprehensive plans has only recently been completed.[26] A survey of 297 Florida jurisdictions completed in April 1991 found that only 68 jurisdictions, or 47 percent of those responding, had implemented their concurrency management policies through ordinances.[27] Because the legislation requires local governments to adopt local land-use regulations within one year *after* the approval of a comprehensive plan, only a handful of concurrency requirements were in effect at the time the NIMBY Report was released.

The report also claims that the requirement has not solved the state's infrastructure backlog problems. Again, this conclusion is premature. Concurrency has a lot to accomplish before it can be judged. Consider the fact that the state was experiencing an infrastructure backlog of nearly $53 million *at the time the concurrency requirement was written into law.*[28] The concurrency requirement is designed to deal with the adverse effects of years of unbridled growth and is an attempt to effectuate a long-term solution to this problem. Advocates of concurrency do not pretend that tying growth to the availability of infrastructure will cause the problem to disappear overnight. Any evaluation of the extent to which concurrency can resolve the difficult problems it is intended to address, or its effect on housing affordability, should be grounded on actual experience rather than speculation.

A similar misstatement is made about the Montgomery County, Maryland, adequate public facilities ordinance. The report cites a recent economic study of Montgomery County by Pollakowski and Wachter for the proposition that its regulatory system added "10 percent to the price of a home beyond what is necessary to ensure health, safety, and welfare."[29] To the contrary, the Pollakowski and Wachter study did not purport to evaluate the relationship between the county's growth controls and the "health, safety, and welfare" of county residents. Instead, the study was limited to a discussion of the effect of the county's land-use controls on housing costs. Unlike most empirical studies, which focus exclusively on individual growth management techniques, the Montgomery County study focused on the its entire regulatory scheme. Accordingly, the study's conclusions mask variations within the county's regulatory framework.

The study suggests that, individually, growth management policies, such as adequate public facilities ordinances and development quota systems, may *not* have as significant an impact on housing costs as the collective effects of other demand coefficients, such as consumer income, accessibility to employment, capital and construction costs, and other land-use regulations, such as large-lot zoning. Significantly, the study concluded that the county's adequate public facilities ordinance—a very restrictive and innovative land-use policy—had no significant relationship to the cost of housing.[30]

The bulk of the NIMBY Report's discussion of growth management focuses on California. The report blames local land-use controls there for contributing to urban sprawl, a widening imbalance between jobs and housing, and stagnant economic growth. Because no studies have measured the effect of growth management on urban decentralization, which was clearly the

trend across the United States prior to the advent of growth management, its conclusions are based entirely upon anecdotal testimony. Rather than forcing growth further and further from the urban core, growth controls can be tailored to accommodate urban infill and inclusionary objectives.

Recent evidence suggests that the motivation for growth control is not as sinister as the NIMBY Report suggests, nor are the opponents of growth control the hapless victims of upper-class landowners. In a recently published empirical study of growth control in California—the most comprehensive empirical study of growth control undertaken to date—the researchers found that jurisdictions with strict development controls tended to also have active programs designed to produce low- and moderate-income housing.[31] As a consequence, jurisdictions with tighter regulatory restrictions produced no fewer housing units than those with few or no growth controls. While the study does indicate that low-income housing production is low in both growth-controlled and non-growth-controlled jurisdictions, it does suggest that the effects of growth control can be remedied through the use of inclusionary zoning and other local housing programs.[32] Moreover, it demonstrates that larger factors are at work in the need for affordable housing in that state.[33]

The adoption of growth controls through the initiative process in California has captured considerable attention. Opponents of the initiative process seem to assume that the initiative is a formula for the adoption of growth limitations through the "tyranny of the majority." Nothing could be further from the truth. The Glickfeld report notes that voter-adopted growth management ordinances represent only 13.4 percent of those in the state, and that opponents of growth limitations are often able to mount successful, well-financed campaigns against their adoption.[34] To suggest that the sentiment in anti-initiative campaigns is inevitably *in favor of* growth control is similarly misleading. In a recent California case, an initiative measure designed to *limit* the control of private property through land-use and zoning passed, and was subsequently invalidated by the courts.[35] In any event, the supposed victimization of low-income housing consumers and the development industry seems fanciful, at best.

This discussion is not intended to suggest that growth controls have no impact, or even an insignificant impact, on the cost or availability of housing. Most studies have found a significant relationship between growth controls and the cost and availability of housing. However, this conclusion does not undermine the benefits of local controls. Growth management regulations can be adjusted to accommodate affordable housing objectives or to work in a proactive manner to affirmatively promote the construction of affordable housing. In addition, the costs of growth control are generally overstated or supported only by anecdotal evidence from the development industry. While the relationship between growth controls and housing affordability is of great concern to local planners, the NIMBY Report's conclusions suggest a call for administrative and substantive reforms rather than the elimination of growth management.

In the context of growth controls, many local governments have been able to demonstrate in court that the need to alleviate public facilities congestion and environmental problems outweighs the temporary impact of such measures on affordable housing.[36] In *Associated Home Builders v. City of Livermore*,[37] the California Supreme Court established three tests for balancing regional housing concerns with local public facilities and environmental issues. Under the *Livermore* analysis, the court examines:

- The extent and duration of the ordinance;
- The competing interests involved; and
- Whether the ordinance represents a reasonable accommodation of the competing interests.

The legislature responded to *Livermore* by requiring that local governments adopting numerical growth limits prepare findings of fact showing how public facilities and fiscal and environmental concerns justify the limitation of regional housing opportunities, and by placing the burden of proof on local governments to justify such ordinances. Several local governments have satisfied these criteria and have actually demonstrated that growth controls can be designed to have a minimal impact on regional housing needs.[38]

Adequate Public Facilities or Concurrency Management Ordinances

The fiscalization of zoning is cited by the NIMBY Report on page 1-8 as a major impetus for tight growth restrictions and high development exactions:

> [H]ouseholds coming in the area in pursuit of jobs are viewed as potential drains on a community's tax base because they consume in services more than they pay in taxes. By contrast, employment centers associated with the jobs that attract these households are viewed as tax assets to be encouraged.

The fragmented nature of local land-use controls undoubtedly creates perverse incentives for exclusionary land-use controls. However, this does not imply that fiscal considerations are improper or that growth restrictions are always unnecessary. Instead, exclusionary impacts are a consequence of the failure to link planning goals and objectives with appropriate implementation strategies.

Techniques to reduce fiscal incentives for exclusion-

ary growth controls include the application of regulatory restrictions on a uniform basis to nonresidential development; regional tax-base sharing; and the recognition by local governments of their good faith obligation to provide those public facilities that form the basis for development approval. A balanced approach to growth management that applies to both residential and nonresidential development is a more effective and desirable form of regulation, and will also more effectively combat the environmental and congestion problems that lead to local growth control efforts, than are programs that apply exclusively to residential development. In addition, where facility congestion forms the basis for growth restrictions, local governments are under a good faith obligation to provide the facilities and services needed to accommodate new growth and development. A common method for linking public facility objectives with plan implementation is the use of an adequate public facilities ordinance (APFO).

An APFO couples tight regulatory restrictions with a binding, financially feasible capital improvement program (CIP). The level of growth and development is tied to the capacity of existing facilities and those provided in the CIP. Both the regulatory restrictions and fiscal policies are driven by level-of-service (LOS) policies adopted in the capital improvements element of a local comprehensive plan. In Florida, the LOS standards of state agencies with responsibility for the provision of public facilities, such as state roads, are binding on the local government unless compelling reasons are advanced to adopt a different LOS standard.[39]

Tying growth control to *binding* LOS standards is the *antithesis* of exclusionary, fiscal zoning. The very process of adopting an LOS standard requires local residents to balance public service choices with housing objectives. Critics of APFOs fear that existing residents will "gold-plate" their LOS standards in order to discourage growth. However, if existing service levels are low, the adoption of a high LOS standard will, by definition, create an existing infrastructure deficiency, which cannot be recovered through impact fees or developer exactions. Existing residents have no incentive to gold-plate LOS standards under an APFO, since gold-plated standards will result in high tax bills to correct existing infrastructure deficiencies. Moreover, concurrency management requirements now in place in Florida and Washington apply to all development orders, whether issued for a low-income elderly housing project or a shopping mall generating substantial sales tax revenues. Most importantly, the impetus for such legislation comes from the state and not from the NIMBY organizations demonized by the Advisory Commission on Regulatory Barriers.

While APFOs will sometimes cap the permissible level of construction below that supportable by the market, this need not undermine a local government's affordable housing objectives. An economic analysis of the collective system of land-use controls in Montgomery County, Maryland, found that the system contributed to increases in housing prices and the cost of developed land.[40] However, development ceilings imposed as a result of the county's APFO had a slightly *negative* impact on estimated price elasticity. The APFO, adopted in 1974, ties the level of growth to the availability and capacity of transportation, sewer, and school facilities throughout the county. The system is unique in that it applies to both residential growth and to employment, attempting to balance residential and employment growth within each planning policy area. The researchers suggested that one reason the growth limits failed to significantly affect housing costs in many areas of the county was that the supply of vacant land was sometimes below the permissible development ceiling.

The state of New Jersey, which has the most comprehensive and far-reaching "barrier removal" system in the nation, explicitly authorizes the staging of development where facility capacity has been reached. The Fair Housing Act, which was adopted to implement *Mt.Laurel* and approved in *Hills Development Corp. v. Bernards Township*,[41] authorizes local governments to phase in their fair-share obligations where warranted by infrastructure capacity limitations.[42] However, under the implementing regulations adopted by the Council on Affordable Housing, infrastructure concerns do not excuse the failure to designate and zone appropriate sites for affordable housing.[43] Infrastructure adjustments are *temporal* in nature, and new capacity must be reserved for low- and moderate-income housing as it becomes available.

The following principles, when incorporated into an APFO, can render it a powerful device for inclusionary planning:

- Because APFOs are predicated upon technical LOS standards, the certification that a development is consistent with the LOS standards in the comprehensive plan deflates objections by neighboring landowners that a project will create undue traffic congestion. The alternative is the continuance of large-lot, suboptimal zoning, which can always be used to stall the construction of low-income housing and which is accorded substantial deference by reviewing courts. The traditional nemesis of increased densities in suburban locations is the fear that multifamily dwellings and other intensive uses will increase traffic congestion and create a strain on other municipal services. By tying upzoning to the timing and sequencing of development, needed densities can be accommodated without unnecessary congestion.

- The APFO should apply to nonresidential as well as residential development. Appropriate adjustments to residential and nonresidential development ceilings should be allowed only if needed to effectuate a balance between jobs and housing. To the extent that such a restriction contributes to the relocation of housing in other jurisdictions, as is asserted in the NIMBY Report, nonresidential development will be similarly excluded. Therefore, regional equilibrium between jobs and housing can be preserved.
- Because development timing ordinances often delay development approval, the administration of an ordinance is critical. Compliance with LOS standards is an objective determination that can be made in a fairly short period of time. If developers are required to await the construction of a public facility needed to meet the applicable LOS, they should be entitled to an expedient determination of this fact, and the permission to proceed should be honored when the facilities become available. Conferring a present vested right to proceed with development at a future point in time will reduce the risk associated with the development process, facilitate the developer's financing plans, and discourage flight to outlying jurisdictions.[44] Similar measures that can be taken to reduce the risk associated with compliance include making binding determinations early in the approval process, reserving facility capacity throughout the process, and establishing deadlines for compliance review by staff.[45]
- Facility capacity can be reserved for low- and moderate-income housing in order to preserve the supply of land available for affordable housing, to discourage speculation, and to mitigate the effect of limitations on supply.

Development Allocation Systems

While analysts often blame growth controls for decreases in the supply of affordable housing units and increases in overall housing costs, the effect of modifications and adjustments to regulatory restrictions designed to encourage low- and moderate-income housing is often ignored. The effect of growth controls on housing prices and access depends upon how the system is administered and the types of incentives given for the construction of lower-cost housing. One method for alleviating the price effects of growth management is the use of a development allocation system. A development allocation system limits the number of development permits granted, using the carrying capacity of environmental and public facilities as a basis for determining the number of permits to be allowed. In general, development proposals are evaluated and ranked based upon the degree to which they satisfy criteria designed to ensure consistency with the system's objectives and goals.[46] Many systems award points or set aside permits for low- and moderate-income housing.

The law firm of Freilich, Leitner, Carlisle, and Shortlidge completed a survey of 260 communities with growth management systems to devise a permanent building permit allocation strategy for Los Angeles. Thirty-eight percent of the jurisdictions surveyed promoted affordable housing through a variety of development controls, including type, performance, and location.[47] The most commonly used techniques included:

- The allocation of development permits according to a point system. Point systems can be used to encourage the production of low- and moderate-income housing by: 1) rewarding projects according to the degree to which low- and moderate-income housing is included as part of the development proposal; 2) defining the provision of a fixed number or proportion of units as low- and moderate-income housing as a condition of approval (this is often referred to as an "absolute" criteria); or 3) rewarding projects for favorable location of such units, such as proximity to schools or major public facilities.
- The setting aside of development permits for projects providing affordable housing; and
- The exemption of affordable housing from having to meet point totals for approval.

Moratoria and Interim Development Controls

Moratoria are temporary stop-gap measures designed to curtail development while the community engages in a planning process or corrects deficiencies in public services and facilities. Interim development ordinances (IDOs) are temporary controls that become effective when a local government decides to initiate the planning process and that terminate when a permanent ordinance becomes effective. Because moratoria and IDOs often reduce the supply of new housing below the market equilibrium, they are sometimes identified with increases in housing costs. Moratoria have been misused as ad hoc measures to obstruct proposed low-income housing projects but are generally invalidated where exclusionary concerns are proven to be the underlying motivations.[48] Because of the frequent misuse of moratoria, several jurisdictions by statute prohibit the use of moratoria without a

showing of a compelling need.[49]

While moratoria are often accused of driving up housing prices, temporary restrictions on certain types of development may be used effectively to correct imbalances in the provision of low- and moderate-income housing and to curb land speculation. In *Tocco v. New Jersey Council on Affordable Housing*,[50] an 18-month moratorium on the development of any parcel of land exceeding two or more acres was upheld against a challenge that it constituted a "temporary taking" of land without just compensation in violation of the Fifth Amendment. The moratorium was imposed by the state's Council on Affordable Housing, which administers the state's Fair Housing Act, in order to correct certain deficiencies (the deficiencies are not spelled out in the opinion) in a local regional housing element and fair-share plan.[51] The plaintiff conceded that the ordinance had a valid public purpose, relying only on the effect of the moratorium on the use of his property in claiming that it amounted to a taking. Noting that moratoria are not confiscatory if in effect for a "reasonable time period," the court held that the 18-month time period was not excessive.

IMPACT FEES AND DEVELOPMENT EXACTIONS

Recommendation 7-10 of the NIMBY Report proposes the adoption of state model codes for the imposition of impact fees and the establishment of the restrictive "direct benefit" test to gauge the legality of local fees. Impact fees and development exactions have become an increasingly important source of capital facilities financing in the wake of declining federal investment in infrastructure improvements and local revenue constraints. While impact fees are often blamed for rising home purchase costs, the motivation for their increasing use is the need to repair deteriorating infrastructure and to fund the repair and construction of new facilities, rather than exclusionary reasons.[52] The National Council of Public Works Improvements, which was commissioned by Congress in 1984, has supported the use of "beneficiary pays" principles and developer financing of infrastructure improvements as a response to financial constraints.[53]

Unfortunately, the NIMBY Report treats all off-site exactions as cost-inducing measures, assuming that they are always passed forward to the home buyer.[54] This analysis is simplistic and misleading, and ignores the life-cycle theory of housing affordability. Regardless of the nature of a development exaction, infrastructure costs will not simply go away if impact fees are abolished. Instead, the costs are shifted to the occupancy stage of housing consumption, necessitating increases in taxes, rates, and special assessments that fall most heavily on existing residents.

In many situations, the incidence of impact fees are borne by landowners and developers rather than the housing consumer.[55] Impact fees can be shifted backwards to landowners in the form of reduced bid prices for land where substitute housing is available in the same market area.[56] In many situations, the burden of impact fees is split between land costs, reduced developer profits, and increased housing costs. There is no consensus among economists on the proposition that impact fees are shifted forward to the consumer in the form of increased housing costs.

Detractors of impact fees have presented very few alternatives for the financing of growth-related public facilities in jurisdictions facing constitutional debt limits and political resistance to increased taxes. Public facility costs will not simply disappear if impact fees are eliminated or reduced; instead, their incidence will be shifted primarily to existing consumers of public facilities. For example, if a revenue bond issue is to recover the cost of water or sewer facilities occasioned by new development, the incidence of the debt service will fall most heavily on existing ratepayers, who comprise the majority of customers during the early years of the bond issue. Without the equalizing effect of impact fees, the result would be much higher rates or taxes for existing customers and consumers of public facilities. Ironically, the Bush administration has pushed heavily to constrain tax increases, and the Department of Transportation has endorsed user fees as the means to finance capital improvements.[57]

In order to soften the effect of impact fees on affordable housing, many jurisdictions exempt low- and moderate-income housing from the fees or apply reduced fee schedules.[58] Exemptions are expressly authorized by impact fee enabling legislation in Georgia, Florida, Indiana, New Jersey, Arizona, and Vermont. Local governments exempting low- and moderate-income housing from impact fees should observe the following principles:

- Any revenue shortfall arising from the exemption cannot be passed on to market-rate units;
- As with inclusionary zoning ordinances, the exemption must clearly apply only to the target beneficiaries, and developments taking advantage of the exemptions should be subject to ongoing restrictions to ensure that the units remain affordable.

In several states, the exemptions must be tied to goals, objectives, and policies for the production of low- and moderate-income housing that are clearly set forth in the comprehensive plan. This establishes a policy basis for differentiating low- and moderate-income housing development from projects subject to the fee.

ENVIRONMENTAL LEGISLATION

The NIMBY Report reserves some its most heated and strident rhetoric for federal and state environ-

mental regulations, particularly wetlands legislation and the Endangered Species Act. The commission advocates the narrowing of the wetlands definition, the use of public and private purchase of land affected by wetlands and habitat protection regulations, and procedural reforms.[59] Unfortunately, the report at times seems to exhibit a stronger concern for economic due process than the production of housing for low- and moderate-income persons.[60] While procedural streamlining and impact statements could provide much-needed balance to environmental protection strategies, regulatory reforms such as transfers of development rights (TDRs) would provide a much more effective framework for accommodating affordable housing than the use of purchase or condemnation.[61]

TDR systems are one mechanism that can be used to accommodate housing construction while protecting important environmental resources. Because TDRs would not result in a net reduction of permissible housing construction, they provide a more effective framework than the purchase or condemnation of environmentally sensitive lands. If the commission is truly concerned with the *production* of low- and moderate-income housing, it is puzzling why a strategy *that simply removes land permanently from development* is their preferred approach. While TDR systems also remove some land permanently from development, densities—and potential construction—are transferred to other sites. In other words, no net loss of affordable housing should occur under a properly drafted TDR system.

The development of environmental protection standards by federal, state, or local governments involves a careful balancing of environmental protection interests and housing objectives. Nowhere has this tension manifested itself more fully than in New Jersey, which has the toughest judicial regional general welfare standards of any state in the country. In *Albana v. Mayor & Township Committee of Washington*,[62] the plaintiff used the regional general welfare doctrine to challenge a three-acre minimum lot size requirement designed to protect a watershed within a state park area. The court upheld the ordinance, ruling that the lot size requirement was needed to protect the lake from contamination.

While the protection of wetlands has a minimal impact on housing opportunities, the cost of *not* protecting wetlands could be severe. The protection of wetlands is a valid public health, safety, and welfare concern. Wetlands protect the quality of water by filtering nutrients, sediments, and pollutants, and retain water needed for flood protection purposes. A 1981 study estimated that the loss of 8,422 acres of wetlands in the Boston area would cost $17 million annually in flood damage.[63]

It is more difficult to take issue with the commission's concerns over regulatory delay. Unusual regulatory delays result in deadweight economic losses which further the interests of neither environmental protection nor housing advocates. However, in order to eliminate regulatory delays, the federal government should be prepared to provide the funding and staffing needed to properly administer the wetlands preservation and other environmental protection programs. A description of administrative streamlining techniques is treated in more detail below.

ADMINISTRATIVE AND PROCEDURAL REFORMS

No aspect of land-use control has aroused such intense opposition, from both proponents and critics of rigorous planning, as the effect of arbitrary and excessive regulatory delay. Regulatory delay is largely a byproduct of the evolution of land-use regulations from the objective, rudimentary density and setback standards of Euclidean zoning to the complexity and sophistication of performance standards and negotiated approvals. The contrast between the old and the new is most aptly described in a landmark report by the American Bar Association:

> The high degree of discretion that has emerged as an integral part of the land-use administrative process was not foreseen in 1924 by the drafters of the Standard State Zoning Enabling Act (SZEA). [footnote omitted] As envisioned at the time, the local legislative body would adopt regulations that specified, in advance and in detail, development standards ranging from land-use classifications to maximum building heights and setbacks. Districts were crudely drawn and cumulative in nature. . . . A potential developer had only to look at the map and read the regulations to know exactly what could or could not be done with the property.[64]

The NIMBY Report correctly identifies unanticipated project delays as a major cost-inducing feature of local land-use control. Recommendations 7-3 to 7-5 of the report specifically call for the use of alternative dispute resolution to settle development disagreements, the consolidation of regulatory authority, and the establishment of "deemed approved" time limits for permit issuance. Unanticipated delay adds costs to development not only by increasing the amount of carrying costs—such as property taxes and construction loan interest—that a project incurs, but also by requiring investors to seek higher profit margins in order to account for added project risk. Abnormal delays are not a viable substitute for clearly articulated and enforceable development standards. Unanticipated and lengthy project delays, if avoidable, are unfair to developers and, ultimately, to the housing consumer.

A number of measures have been advanced by commentators, critics, and developers frustrated by

cumbersome approval processes in order to trim the fat from the regulatory web.[65] However, each reform measure cannot, alone, achieve a significant improvement in the approval process. Instead, each of these techniques is designed to accomplish a different objective. For example, the one-stop permitting procedure alleviates some problems associated with excessive delay but does not improve on uncertainties associated with discretionary approvals or inefficiencies in the processing of the single permit. Examples of regulatory reform objectives and techniques designed to achieve those objectives are contained in Table 4.

In several states (California, Oregon, Minnesota, and Washington), the state legislature has taken the initiative to streamline local procedural processes and to impose time limits on project review. This type of reform is most useful at the state level, since it imposes a binding constraint on local governments. In addition, some states now authorize the use of development agreements and other procedures whereby developers can acquire vested rights early in the approval process. Early vesting, if honored by the permitting agencies subject to the contract, can remove some of the risk factors that add to financing costs. In addition, the provision of housing targeted to the needy can be provided through the negotiation process.

Administrative Streamlining

Procedural reforms are designed to eliminate wasteful and time-consuming project review requirements from the local permitting process.[66] Project delays add to the carrying costs associated with real estate development, such as property taxes and interest costs. The process can be streamlined through the use of preapplication and coordinated staff review requirements, decision-making reforms, and coordinated project inspections. Some states have adopted more far-reaching requirements by providing that projects are automatically approved if not acted upon within a specified time period, and by vesting the right to complete construction where a landowner has proceeded to a specified stage of the approval process.

Preapplication procedures and services include one-stop information and permit-processing centers, and informative written materials offering procedural guidance. The development of procedural manuals, master forms, and special instructions, including flowcharts, can prove helpful to applicants. Improvements in staff review procedures include interdepartmental review and coordination with other permit-letting agencies, ombudsmen/permit expediters, and fast-track procedures for small or noncontroversial projects. Decision-making reforms include joint reviews and the delegation of responsibilities to planning commission or staff. Deadlines and "deemed approved" provisions can alleviate costly delays in project approval. Inspections can be consolidated by crosstraining inspectors or by arranging for inspections from different departments to occur simultaneously.

Several studies have attempted to quantify the cost of regulatory delay.[67] The components of delay costs are interest on construction loans, property taxes, insurance on land, investment opportunity costs, and overhead. In a 1984 University of California study by Johnston, Schwartz, and Hunt, researchers computed construction loan interest on a simple interest basis, with funds being disbursed on an incremental basis as development proceeds. They point out that accurate opportunity costs are difficult to derive under conventional research methods, which generally rely on developer surveys. The potential for overstatement of opportunity is obvious. Overhead costs include office rent, staff salaries, depreciation on equipment, insurance, and utilities. While these costs are often included in delay costs, their inclusion is difficult to justify since they are business costs that are incurred regardless of project delay. It is also difficult to attribute overhead to particular projects, and researchers have not adequately explained how this is done. For example, in the University of California study, the authors found that overhead costs were $10,000 per month and, without explanation, $120,000 for a 25-unit

TABLE 4. AFFORDABLE HOUSING OBJECTIVES AND PROCEDURAL REFORMS

Objective	Techniques
Alleviating uncertainty or eliminating confusion	Fixed versus discretionary standards
	Permit manuals
	Ombudsman
Abbreviating the approval process	Establish time limits for review
	Enforce time limits through the use of "deemed approved" provisions
	One-stop permitting and joint public hearings
	Increased or improved staffing
	Increased role of staff in decision making (e.g., administrative approval followed by consent agenda)
Protecting developer's investments—alleviating risk	Development agreements and early vesting
	Eliminating successive discretionary reviews; establish that final reviews (such as final plats) are ministerial

subdivision. Dividing this cost over 5.125 years—the time needed to complete a subdivision in the subject market—the researchers derived a $1,951 cost per month, or 38 percent of all delay costs through the site development stage. Eliminating overhead costs, total delay costs would have been only $3,115 or $124 per dwelling unit.

The development stages selected for measurement have an important effect on total costs attributed to delay. The development process includes not only permitting and site development, but also post-permitting construction delays that are often beyond the local government's control. Johnston, Schwartz, and Hunt found that 61 to 75 percent of all delay costs occur after permitting and during construction. In that study, costs incurred through site development were only $5,067, or $203 or 0.36 percent of all costs per dwelling unit.

The State of Washington was one of the first jurisdictions to address delays occasioned by multiple layers of administrative review. The Washington Environmental Procedures Act[68] allows applicants requiring permits from two or more state agencies, or state agencies and a local government, to submit a single master application to the Department of Ecology. The Department of Ecology acts as the coordinating agency for permit approval, transmitting the application to potentially interested departments. Each department has 15 days to register a response, and is thereafter barred from requiring a permit. The Department of Ecology publishes permit notifications and chairs a joint hearing involving all department heads. Each department interested in the permit application must register its final decision within 120 days of the hearing. Prior to processing an application, local governments must certify that the proposed project is consistent with the local comprehensive plan and zoning ordinance. Local governments are also allowed to voluntarily participate in the consolidated permitting procedures. The legislation requires the department to establish permitting information centers throughout the state and designates a general office for permit processing within each county.

The California Permit Streamlining Act[69] requires action by local decision-making bodies on specified development permits within time limits set forth in the statute. The failure to act on such permits within the specified time can result in automatic approval of the project. The permit streamlining act applies only to administrative approvals, such as site plans, subdivision plats, special-use permits, and variances. Where a zoning amendment is considered a legislative function, however, the permit streamlining act does not apply.

The act includes provisions to impede delays in both the *processing* and the *approval* of a development permit. Public agencies are required to compile a listing of the information that will be required for a permit application and the criteria that will be applied for a determination of completeness. New information cannot be required following the determination of completeness, although the agency may request clarification, amplification, correction, or supplementation of the information.

Unless an environmental impact report is required, the project must be approved or disapproved by the lead agency within six months of the determination of completeness. Projects requiring environmental review must be approved or disapproved within one year of the determination of completeness. A responsible agency must approve the project within 180 days of the lead agency action or the determination of completeness by the responsible agency. The failure to act within the prescribed time limits results in automatic approval of the permit application. The enactment of a development moratorium following the determination of completeness does not toll the deadlines provided by the statute. Written notice of whether an application for permit approval is complete must be given within 30 days of receipt, or the application will be deemed complete. If the decision is appealed, a written determination must be provided within 60 days.

The California courts had been in conflict as to whether the deemed approval feature is a violation of procedural due process.[70] But the act was amended to provide that the permitting agency's responsibility to provide public notice is not diminished by the act, and that public notice as provided by law is required prior to any "deemed approval." In order to avoid abuse of this provision, the applicant may provide public notice on its own initiative after providing seven day's notice to the permitting agency.

The Oregon statutes address the delays occasioned by multiple reviews of development proposals by state agencies by requiring a one-stop permit-processing procedure for development applications.[71] Permit applicants are required to submit only a single application to the Executive Department, which then notifies other state agencies of the pending application. Agencies that fail to respond within 30 days are precluded from requiring a permit of the applicant.

Promoting Certainty in the Approval Process: Vested Rights, Development Agreements, and Public-Private Partnerships

The imposition of new and unanticipated requirements late in the approval process impedes certainty, requires the expenditure of enormous sums of money on attorneys or other consultants, and can ultimately result in the demise of the development proposal. These "surprises" arise from the increasing complexity and sophistication of land-use regulation, which covers a wide variety of topics and standards; from multiple layers of review; and from increasingly lengthy permitting requirements, including increases in the number of

permits required for construction and the number of agencies involved in the process. State-mandated procedural reforms have been enacted in California, Colorado, Connecticut, and North Carolina.

Discretionary approval processes add the element of unpredictability to this scenario. A drawback of many inclusionary zoning ordinances and local land-use regulations is the employment of a discretionary approval process, such as a conditional use permit or special exception. Unpredictable approval processes involving broad, discretionary standards often hinder the use of inclusionary zoning incentives by developers. Discretionary approval processes, such as rezonings and variances, establish a *method* for approval of low-income housing but create substantial risks and uncertainties for prospective developers. Conversely, the advantage of such a system is that the underlying regulatory framework remains intact, and is modified only as needed to accommodate low- and moderate-income housing. The use of variances creates a special problem because of the narrow grounds of undue hardship under which a variance may be authorized. As contemplated by the Standard Zoning Enabling Act, variances are to be infrequently granted and reserved for those exceptional situations of severe economic hardship. The need for low-income housing generally does not constitute a hardship factor. However, at least one court has authorized the granting of a variance where justified by the public need for affordable housing.[72]

Several states have taken action to eliminate procedural delays and to improve the efficiency of the approval process in order to encourage the development of low- and moderate-income housing. As part of the California Permit Streamlining Act (see above), local governments are prohibited from imposing conditions on single-family or multifamily residential subdivisions that could have been imposed on approval of the preliminary plat. This restriction stays in place for a five-year period following recordation of the final plat. In 1986, amendments to the subdivision legislation were approved that allow residential developers to apply for a "vesting" tentative map early in the approval process. This map protects a developer from changes in the ordinances, policies, and standards in effect at the time of approval and prior to filing a final map application. In addition, these vested rights remain effective for a minimum of one year and maximum of two years following final map approval. Local governments cannot refuse to process a tentative map solely on the grounds that vested status is requested.

Colorado provides that vested rights accrue for a period of three years upon approval of a site-specific development plan.[73] Where the size or phasing of the development, economic cycles, or market conditions warrant a longer vesting period, local governments may vest rights beyond three years pursuant to a development agreement. Recent North Carolina legislation protects landowners for whom a site-specific or phased-development plan has been approved. The vested right continues for two years for a site-specific development plan and five years for a phased-development plan.[74]

An increasingly common device for the early vesting of development projects is the use of development agreements and concomitant agreement zoning. These tools are the result of "late vesting" rules in effect in many states, which allow local governments to change the regulations applicable to developments up to the point at which a building permit has been issued and construction has commenced. By entering into an agreement with the local government, a development agreement "freezes" the regulations applicable to a development for a period of time as set forth in the agreement.[75] In return, developers are often required to provide public benefits, such as the construction of public facilities, the dedication of environmentally sensitive lands, and preservation of historic structures.

Development agreements were originally conceived as a mechanism to soften the cost-inducing impacts of discretionary approval processes. In California, where the concept originated, the legislature made the following finding in its development agreement legislation:

> The lack of certainty in the approval of development projects can result in a waste of resources, *escalate the cost of housing* and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.[76] (Emphasis added.)

However, the use of development agreements as a *proactive* tool for the production of affordable housing has only recently begun to gain acceptance. The concept was first suggested by Donald Hagman[77] and seems to be on the rise. For example, development agreements can be used as a conduit for public-private partnerships, an increasingly viable source of funding for public infrastructure and private enterprise.[78]

Connecticut is the only state that expressly contemplates the use of development agreements for the provision of affordable housing.[79] The legislation authorizes zoning commissions to create special exemptions from density limits within multifamily districts in exchange for the construction of affordable housing by the developer. The developer's obligation to construct affordable housing must be enforced through a contract between the developer and the municipality providing for:

- The construction of one affordable housing unit for each dwelling unit constructed above the base district density limits;

- A provision that the units of affordable housing must be sold or rented to persons at income levels established by the municipality (not to exceed the area median income) for a period of 30 years from the completion of such units;
- Maximum sales or rental prices;
- The conveyance of units of affordable housing must include covenants running with the land and enforceable by the municipality incorporating the terms and conditions of the contract; and
- The contract provisions shall apply to the resale, leasing, or conversion of affordable housing to the condominium form of ownership.

Under the terms of the legislation, the developer's obligations to construct affordable housing may be discharged anywhere within the municipality and are not limited to the provision of dwelling units on site. Special exemptions are granted by the zoning board of appeals, which typically hears requests for variances. The exemptions contracts are enforced by the housing authority or other agency established or designated to administer the exemptions regulation.

Development agreements provide several advantages as tools for the provision of low-income housing. First, development agreements can form the basis for negotiated exactions in which the provision of low- and moderate-income housing is the quid pro quo for the early vesting of a proposed development. Second, development agreements reduce the degree of risk associated with project financing, which can translate into lower housing costs. These factors combine to make development agreements an increasingly viable source of funding for affordable housing within the parameters of the free market.

Chapter 3. Notes

1. Robert H. Freilich and S. Mark White, "Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America's Major Quality of Life Crisis," *Loyola of Los Angeles Law Review* 24 (1991): 915, 935-36.

2. Allan Mallach, "The Fallacy of Laissez-Faire: Land Use Deregulation, Housing Affordability, and the Poor," *Journal of Urban and Contemporary Problems* 30 (1986): 35.

3. Annotation, *Validity of Zoning Regulations Prohibiting Residential Use in Industrial Districts*, 38 A.L.R.2d 1136 (1954).

4. See, for example, *Tocco v. New Jersey Council on Affordable Housing*, 242 N.J. Super. 218, 576 A.2d 328, *cert. denied*, 585 N.J. 401 (1990), *cert. denied*, 111 S.Ct. 1389 (1991), which upheld a moratorium on large-lot homes in order to preserve the supply of land available to affordable development. While noncumulative zoning is generally sustained by the courts, the pre-mapping of multifamily zones could create increases in land values that absorb cost savings attributable to high-density development.

5. See, for example, Pennsylvania Department of Community Affairs, *Reducing Land Use Barriers to Affordable Housing* (Planning Series #10, Jan. 1991); "Affordable Housing Problem Deserves Careful Treatment in Local Comprehensive Plans," *Florida Department of Community Affairs Technical Memo* (October 1990); Welford Sanders, *Zero-Lot Line Development*, Planning Advisory Service Report No. 367, (Chicago: APA, 1982); Welford Sanders and David Mosena, *Changing Development Standards for Affordable Housing*, Planning Advisory Service Report 371 (Chicago: APA, 1982); Welford Sanders, Judith Getzels, David Mosena, and JoAnn Butler, *Affordable Single-Family Housing: A Review of Development Standards*, Planning Advisory Service Report 385 (Chicago, APA, 1984).

6. See the PAS Reports listed in note 5.

7. See David Listokin and Carole Walker, *Model New Jersey Subdivision Regulations* (New Brunswick, N.J.: Center for Urban Policy Studies, Rutgers University, 1987).

8. U. S. Department of Housing and Urban Development, *Final Report of the Task Force on Housing Costs* (May 1978), 25.

9. See *Planning* (April 1982), 15.

10. New Hampshire Rev.Stat.Ann. 672:1 (111e)(Supp. 1991).

11. "Manufactured housing" generally refers to housing that is built consistent with the Manufactured Home Construction and Safety Standards, generally referred to as to the "HUD Code." *National Manufactured Housing Construction and Safety Standards Act*, 42 U.S.C. Sec. 5401-5426 (1982 & Supp. 1987). "Modular" homes are those assembled at a factory and built to conform to local building code requirements, such as the Uniform Building Code, Standard Building Code, or BOCA Code. Because modular homes are built to local building code requirements, they encounter few difficulties with most local zoning codes but have higher production costs. See also Craig White and Edward Parish, *The Manufactured Housing Land Development Guide* (Denver, Colo.: Manufactured Housing Resources Group, Inc., 1984), 1-12, and Welford Sanders, *Regulating Manufactured Housing*, Planning Advisory Service Report No. 398 (Chicago: APA, December 1986).

12. See *Robinson Township v. Knoll*, 410 Mich. 293, 302 N.W.2d 146 (1981), which ruled such confinement to be a violation of equal protection; *Luczynski v. Temple*, 203 N.J. Super. 377, 497 a.2d 211 (N.J. Super. Ct. Ch. Div. 1985); compare *City of Brookside Village v. Comeau*, 633 S.W.2d 790 (Tex.), cert. denied, 459 U.S. 1087 (1974), which approved mobile home restrictions. See also *In re Shore*, 528 A.2d 1045 (Pa. Cmwlth. 1987), in which an ordinance permitting manufactured homes on individual lots, but excluding mobile home parks, was ruled unconstitutional.

13. See *Cannon v. Coweta County*, 389 S.E.2d 329 (1990), in which the exclusion of manufactured homes from the entire community was found to be a violation of substantive due process. See also *Board of Supervisors of Upper Frederick Township v. Moland Development Co.*, 19 Pa.Commw. 207, 339 A.2d 141 (1975).

14. See *Environmental Communities of Pennsylvania v. North Coventry Township*, 49 Pa. Commw. 167, 412 A.2d 650 (1980). The court found that limiting manufactured homes to 1.5 percent of township land was exclusionary. In *Nickola v. Township of Grand Blanc*, 394 Mich. 589, 232 N.W.2d 604 (1975), the court found that confining manufactured homes to 10 percent of township land was exclusionary and invalid.

15. Sanders, *Regulating Manufactured Housing*.

16. Vt. Stat. Ann. tit. 24, Sec.4406(4)(A) (1975 and Supp. 1989).

17. Cal. Gov't Code Sec. 65852.3 (West 1983 and Supp. 1991); Iowa Code Ann. Sec. 358A.30 (West 1983 and Supp. 1989); Minn. Stat. Ann. Secs. 394.25, 462.357(1) (West Supp. 1989); see Kansas S.B. No. 23, Sec. 19 (1991), which requires that "residential-design" manufactured homes be permitted in residential areas, subject to architectural and design controls.

18. Colo. Rev. Stat. Sec. 30-28-115 (1986); Iowa Code Ann. Sec. 358A.30 (West 1983 and Supp. 1989); Me. Rev. Stat. Ann. tit. 30, Sec. 4965 (West 1973 and Supp. 1986); N.J. Stat. Ann. Sec. 40:55D-100 (West 1983 and Supp. 1987); or in designated residential areas, Fla. Stat. Ann. Sec. 553.35; Minn. Stat. Ann. Sec. 394.25; Or. Rev. Stat. Sec. 197.295; N.H. Rev. Stat. Sec. 674.32; N.M. Rev. Stat. Sec. 3-21A-3(2)(A).

19. Neb. Stat. Ann. Sec. 15-902 (1987); N.H. Rev. Stat. Ann. Sec. 674.32 (1986); Tenn. Code Ann. Sec. 13-24-201 (1987); see also Kansas S.B. No. 23, Sec. 19 (1991).

20. See 1989 Washington Laws, H.B. No.2167, P. 1365, which encourage the revision of land-use regulations and permitting procedures, requiring needs assessment by certain counties and promulgation of model code.

21. Martin Gellen, *Accessory Apartments in Single-Family Housing* (New Brunswick, N.J.: Center for Urban Policy Research, Rutgers University, 1985); Dwight Merriam, "Accessory Apartments," *1984 Zoning & Planning Law Handbook* (New York: Clark Boardman,1984), 351; George W. Liebmann, "Suburban Zoning—Two Modest Proposals," *1991 Zoning & Planning Law Handbook* (New York: Clark Boardman, 1991): 81; and Patricia B. Pollak and A.N. Gorman, *Community-Based Housing for the Elderly: A Zoning Guide for Planners and Municipal Officials*, Planning Advisory Service Report No. 420 (Chicago: APA, 1989).

22. See, for example, *Town of Highland Park v. Marshall*, 235 S.W.2d 658 (Tex. Civ. App.-Dallas 1950, writ ref'd n.r.e.).

23. N.J. Admin. Code Sec. 5:92-16.1.

24. Cal. Gov't Code Sec. 65852.2 (West Supp. 1991); *Wilson v. City of Laguna Beach*, 92 Daily Journal DAR 6398 (Cal.App. 4 Dist. 1992), in which the court ordered the city to comply with the accessory units statute.

25. *NIMBY Report*, 2-5.

26. "Interview with Secretary Sadowski," *Florida Department of Community Affairs Technical Memo* (September 1991); "Avoid Common Problems Found in Other Local Plans," *Florida Department of Community Affairs Technical Memo* (Summer 1989).

27. University of Florida, Local Government Studies Program, and Center for Governmental Responsibility, Local Government Law Program, *Classification and Analysis of Local Government Concurrency Management Systems* (Tallahassee, Fla.: Florida Institute of Government, September 1991): 8.

28. Robert M. Rhodes, "Controversial 'Concurrency' in Florida," *Urban Land* (December 1988), 32.

29. *NIMBY Report*, 2-5, citing Henry Pollakowski and Susan Wachter, "The Effects of Land Use Constraints on Housing Prices," *Land Economics* 66 (1990): 315.

30. Pollakowski and Wachter, "The Effects of Land Use Constraints," 322-23.

31. Madelyn Glickfeld and Ned Levine, "The New Land Use Regulation 'Revolution': Why California's Local Jurisdictions Enact Growth Control and Managment Measures" in *Evaluating Local and State Growth Mangement Programs: What Can We Learn from Our Experience?* (Lincoln Institute of Land Policy and UCLA Extension Public Policy Program, July 27, 1990), 37-39. The evidence from this study is buried in footnote 4 of page 2-14 of the *NIMBY* Report. No discussion or rebuttal of the study's findings appears in the text of the NIMBY report.

32. Housing production was still low for jurisdictions with growth control. Moreover, the production of low-income units as a proportion of total housing need declined as the number of growth controls increased. The point of the Glickfeld report is that low-income housing production is just as abysmal in growth-controlled jurisdictions as those without growth control.

33. Indeed, regardless of whether a community has chosen to adopt restrictive growth controls, other institutional barriers render California a uniquely inhospitable environment for low-income housing. A requirement in the state's constitution that subsidized housing projects receive voter approval—a unique provision among American states—was upheld by the U.S. Supreme Court in *Hunter v. Erickson*, 393 U.S. 385 (1969). The impact of this provision may be softened by a recent state supreme court decision affirming that the voter approval requirement is not project specific. See *Davis v. City of Berkely*, 51 Cal.3d 227, 272 Cal.Rptr. 139, 794 P.2d 897 (1990).

34. Glickfeld and Levine, "The New Land Use Regulation Revolution," 5, 26-27. The report notes that ballot measures in San Diego, Riverside, and Orange Counties were all defeated by "large-scale" developer-financed campaigns.

35. *Patterson v. County of Tehema*, 190 Ca.App.3d 1298, 235 Cal.Rptr. 867 (Cal.App. 3 Dist. 1987). (Ordered not published 6-25-87).

36. *McCauley v. City of Jacksonville*, 739 F.Supp. 278 (E.D.N.C. 1989), *aff'd*, 904 F.2d 700 (4th Cir. 1990), in considering a building permit moratorium ruled that the suspension of building permit and denial of sewer service due to sewer overflow did not violate FHA or procedural/substantive due process; *Davis v. City of Brandon*, 805 P.2d 709 (Ore. App. 1991), which upheld a moratorium to prevent vegetation destruction and erosion.

37. 18 Cal.3d 582, 135 Cal.Rptr. 41, 557 P.2d 473 (1976)

38. See, for example, *Building Industry Ass'n of San Diego v. City of Oceanside*, No. N37638 (San Diego County Superior Ct., Aug. 21, 1991); *Building Industry Ass'n v. Superior Court*, 211 Cal.App.3d 277, 259 Cal.Rptr. 325 (1989); *Building Industry Association v. City of Camarillo*, 41 Cal.3d 810, 718 P.2d 68, 226 Cal.Rptr. 81 (1986), *overruled on other grounds, Lesher Communications v. City of Walnut Creek*, 52 Cal.3d 531, 277 CR 1, 802 P.2d 317 (1990).

39. Florida Admin. Code Sec.9J-5.0055(1)(d).

40. Pollakowski and Wachter, "The Effects of Land Use Constraints," 315.

41. 103 N.J. 9, 510 A.2d 621 (1986).

42. N.J. Stat. Ann. Sec.52:270-323.

43. N.J. Admin. Code Sec.5:92-8.6(b).

44. This technique was employed successfully by Ramapo, New York, under its acclaimed growth management system. Robert H. Freilich, "Development Timing, Moratoria, and Controlling Growth," *Institute on Planning, Zoning and Eminent Domain* 147 (1974): 163-64; *Golden v. Planning Board of the Town of Ramapo*, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291, *app. diss'd*, 409 U.S. 1003 (1972).

45. These types of provisions have been written by the law firm of Freilich, Leitner, Carlisle, and Shortlidge for the concurrency management ordinances of St. Johns and Escambia Counties, Florida.

46. Stephen P. Chinn and Elizabeth A. Garvin, "Designing Development Allocation Systems," *Land Use Law and Zoning Digest* (February 1992): 3.

47. Freilich, Leitner, Carlisle and Shortlidge, "Advice on Alternative Building Permit Allocation Strategies," a paper submitted to the City of Los Angeles (October 27, 1988), 113-14.

48. *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973); *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983).

49. New Jersey Statutes Sec. 40:55D-28(4); Oregon Revised Statutes Secs. 197.505-197.540; see also California Govt. Code Sec. 669.5, which places the burden of proof on local governments for justifying numeric growth controls.

50. 242 N.J.Super. 218, 576 A.2d 218 (Super. Ct., App. Div. 1990)

51. COAH administers the state's Fair Housing Act, which was enacted in response to the New Jersey Supreme Court's far-reaching decisions in *Mt. Laurel*. COAH was created by the New Jersey legislature through the state's Fair Housing Act, NJSA Secs. 52:27D-301 *et seq*. The moratorium was imposed pursuant to an administrative regulation authorizing local governments to "take appropriate measures that may be essential to the satisfaction of the municipality's obligation to provide for its fair share of its region's present and prospective need for low- and moderate-income housing." NJAC Sec. 5:91-11.1.

52. Terry D. Morgan, "Impact Fees in Georgia: Understanding the Phenomenon," *Georgia Planner* (August 1989), 1.

53. Nancy S. Rutledge, "Public Infrastructure as a National Concern," *Urban, State and Local Law Newsletter* (Fall 1987): 1, 18.

54. *NIMBY Report*, 1-8. In its critique of growth controls, the report cites (on page 2-11), without authority, the increased tendency of states to "require" localities to adopt impact fees. This statement is simply false. No states require local governments to adopt impact fees, and, in fact, most state impact fee enabling legislation has been designed to *curb* local discretion in the calculation, enforcement, and administration of impact fee ordinances. Terry D. Morgan, "Recent Developments in the Law of Impact Fees with Special Attention to Legislation," 1990 *Institute on Planning, Zoning and Eminent Domain* (1990).

55. David Shulman, "Exactions in the New Disinflationary Environment," *Policy Studies Journal* 12 (March 1984): 529. For example, in *Board of County Commissioners v. Sie-Gray Developers*, 334 S.E.2d 542 (Va. 1985), the developer negotiated a contingency clause in the land purchase contract, which provided that the price of the land would be reduced by an established amount if off-site road improvement requirements were required by the county.

56. Forrest Huffman, Arthur Nelson, Marc Smith, and Michael Stegman, "Who Bears the Burden of Development Impact Fees?," *Journal of the American Planning Association* 54 (1988): 50-51.

57. U. S. Department of Transportation, *Moving America: A Statement of National Transportation Policy and Strategies for Action* (February 1990).

58. S. Mark White, "Development Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Purposes," *Journal of Land Use and Environmental Law* 6 (1990): 25.; S. Mark White, "Impact Fee Exemptions for Affordable Housing," *Urban Land*, August 1991, 34.

59. See the *NIMBY Report*, at pages 4-4 to 4-8 for the commission's criticism of wetlands regulations; at pages 4-8 to 4-12 for its criticism of the Endangered Species Act; and Recommendations 6-10 to 6-11 for the commission's suggested response to those criticisms.

60. On page 4-5, the report cites a four-year delay in the approval of a *sales and storage* facility sited in a wetlands area as evidence of excessive wetlands regulation. On pages 4-6 and 4-7, the commission recommends compensation for property owners burdened by regulatory restrictions in wetland areas. The relationship of these sections of the report to *housing affordability* are not explained. While compensating owners of wetlands might further some peoples' notions of equity, justice, and constitutional theory, there is no evidence this approach would promote the availability of housing to low- and moderate-income persons. Furthermore, the commission ignores several cases that have recently required such compensation for permit denials in wetland areas. See, for example, *Florida Rock Industries, Inc. v. United States*, 31 ERC 1835 (Cl. Ct. 1990); *Loveladies Harbor, Inc. v. United States*, 15 Cl.Ct. 381 (1988), 21 Cl.Ct. 153, 31 ERC 1847 (Cl. Ct. 1990); compare *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327 (1984), in which the prohibition of development in wetland area was upheld against takings challenge; *McNulty v. Town of Indiatlantic*, 727 F.Supp. 604 (M.D. Fla. 1989), in which oceanfront setback requirement were upheld against just compensation claims; *Presbytery v. King County*, 114 Wash.2d 320, 787 P.2d 907 (1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 28, 112 L.Ed.2d 238 (1990), which upheld the prohibition of construction on wetland lots; *Dufau v. United States*, 21 Cl.Ct. 161, 32 ERC 1524 (July 23, 1990); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 [23 ERC 1561] (1985). The Supreme Court has recently ruled that the deprivation of all reasonable use of property through the complete prohibition on construction seaward of an oceanfront setback line is a *per se* taking of private property, subject to nuisance and property rights exceptions found in the common law. *Lucas v. South Carolina Coastal Council*, ___U.S. ___, 60 U.S.L.W. 4842 (1992).

61. Daniel R. Mandelker, "The Conflict Between Environmental Land Use Regulation and Housing Affordability," *Zoning and Planning Law Report* 15, no. 1 (January 1992): 1-6.

62. 194 N.J. Super. 265, 476 A.2d 852 (1984).

63. F.R. Thibodeau and B.D. Ostro, "Economic Analysis of Wetland Protection," *Journal of Environmental Management* 12 (1981): 19-30; David G. Burke et al., *Protecting Nontidal Wetlands*, Planning Advisory Service Report Nos. 412/413 (Chicago: APA, 1988), 1-14.

64. Richard P. Fishman, ed., *Housing For All Under Law: New Directions in Housing, Land Use, and Planning Law* (Cambridge, Mass.: Ballinger, 1978), 217-18.

65. For excellent summaries of reform proposals, see the heading "Regulatory Reform" in the bibliography in Annette Kolis, ed., *Thirteen Perspectives on Regulatory Simplification*, Urban Land Institute Research Report No. 29 (Washington, D.C.: ULI, 1979).

66. See "Fremont's Single Application Form," *PAS Memo*, no. M-5 (1971); Kolis, *Thirteen Perspectives on Regulatory Simplification*; and JohnVranicar, Welford Sanders, and David Mosena, *Streamlining Land Use Regulation: A Guidebook for Local Governments* (Washington, D.C.: U.S. GPO, 1980).

67. See R. Johnston, S. Schwartz, and W. Hunt, *The Effect of Local Development Regulations on the Cost of Producing Single-Family Housing* (University of California at Davis, April 1984); R. Burchell, W.P. Beaton, and D. Listokin, *Mount Laurel II: Challenge and Delivery of Low-Cost Housing* (New Brunswick, N.J.: Center for Urban Policy Research, Rutgers University, 1983); R. Burchell and D. Listokin, "The Impact of Local Government Regulations on Housing Costs and Potential Avenues for State Meliorative Measures," in George Sternleib and James Hughes, *America's Housing: Prospects and Problems* (New Brunswick, N.J.: Rutgers University, Center for Urban Policy Research, 1980), 313, 324-25; Stephen R. Seidel, *Housing Costs and Governmental Regulations: Confronting the Regulatory Maze* (New Brunswick, N.J.: Center for Urban Policy Research, Rutgers University, 1978).

68. Wash. Rev. Code Sec.90.62.010 (West Supp. 1991); see also Oregon Rev. Stat. Secs. 285.25 - 285.260; Minnesota Stat. Ann. Secs. 116C.22 - 116C.34 (1987 and Supp. 1992).

69. Cal. Gov't Code Secs. 65920-65961 (West 1983 & Supp. 1991); see also *Orsi v. City Council of City of Salinas*, 219 Cal.App.3d 1576, 268 Cal.Rptr. 912 (Cal.App. 6 Dist. 1990).

70. Compare *Palmer v. Ojai*, 178 Cal.App.3d 280, 223 Cal.Rptr. 542 (Cal.App. 2 Dist. 1986), which upheld the permit streamlining act and provided that cities could not raise the due process arguments of neighboring landowners to defeat permit applications that had been approved automatically without a notice and hearing, with *Selinger v. City Council of City of Redlands*, 216 Cal.App.3d 259, 264 Cal.Rptr. 499 (Cal.App. 4 Dist. 1989)(*rev. denied* Jan. 25, 1990), which ruled that the act was unconstitutional because it failed to provide for notice and hearing to adjacent landowners prior to permit approval.

71. Ore. Rev. Stat. Sec.477.800-.865.

72. *DiSimone v. Greater Englewood Housing Corp.*, 56 N.J. 428, 267 A.2d 31 (1970).

73. Colorado Rev. Stat. Secs. 24-68-101 to -106.

74. N.C. Gen. Stat. Sec. 153A-344.1 (Supp. 1990).

75. Cal. Govt. Code Secs. 65864-65869.5 (1990); Florida Stat. Secs. 163.3220-.3243; Nev. Rev. Stat. Secs. 278.0201-.0207 (Michie 1990). See, generally, Judith Wegner, "Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals," *North Carolina Law Review* 65 (1987): 957, 994-1027; Theodore Taub, "Development Agreements," *Land Use Law and Zoning Digest* (October 1990): 3.

76. Cal. Gov't Code Sec. 65864 (1983).

77. Donald Hagman, "Taking Care of One's Own Through Inclusionary Zoning: Bootstrapping Low- and Moderate-Income Housing by Local Government," *Urban Law and Policy* 5 (1982): 169, 173.

78. Judith Wegner, "Utopian Visions: Cooperation Without Conflicts in Public/Private Ventures," *Santa Clara Law Review* 31 (1991): 313.

79. Connecticut Pub. Act 88-338 (amending Conn. Gen. Stat. Secs. 8-3c, 8-3d, and 8-6).