
THE FALLACY OF LAISSEZ-FAIRE: LAND USE DEREGULATION, HOUSING AFFORDABILITY, AND THE POOR

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Although the idea of deregulation, or the gradual dismantling of governmental authority, did not originate in the 1980's, there is little question that the political climate of this decade, coupled with the Reagan administration's aggressive antigovernmental rhetoric, have made deregulation a central theme of contemporary public policy debates. Prompted by a combination of economic and ideological concerns, deregulation has been adopted or proposed in many areas of government. Land use is but one of these.

This article does not take philosophical issue with the underlying theme of deregulation, particularly in the areas of housing and land use, where the abuses of governmental regulation long have been apparent to observers and commentators.¹ The article does argue, however, that deregulation and the effort to recreate a simulacrum of a laissez-faire economic environment in the land use realm do not in themselves represent a legitimate substitute for a sound social policy. Further, should government apply a policy of deregulation to the current housing affordability crisis, the effect of such a policy will be far

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1. The critical literature on land use regulation, particularly regulation by local government, has reached vast proportions. The seminal work on the subject remains R. BABCOCK, *THE ZONING GAME* (1966).

less than that promised by its advocates, and inevitably will leave substantial housing needs, particularly those of the poor, still unaddressed.

Many advocates of deregulation may have little or no interest in the housing needs of the poor, as distinct from the needs of middle class households that have been priced out of housing by a variety of factors, of which only one may be excessive and unreasonable regulation. Indeed, many of the more passionate advocates may be motivated by ideological, rather than practical concerns. Concern for a rational social policy, however, dictates that the housing needs of the poor be addressed as well. In this respect, deregulation is an inadequate and, in many respects, irrelevant response. If the housing needs of the poor are to be addressed, affirmative steps, including the use of inclusionary housing programs and techniques, are necessary. Although such actions may not comport fully with the ideology underlying at least part of the deregulation movement, there is no reason that they cannot be integrated into a strategy that also embodies substantial land use deregulation. Indeed, this author would argue that they should be so integrated.

The article is in four sections. The first section offers a brief overview of the nature and impetus of the movement for land use and housing deregulation. The second section focuses on the limits of deregulation as a strategy for reducing housing costs. The third section considers the "affordable housing" goals of deregulation and the relationship of those goals to the housing needs of the poor. The final section deals with the nature of, and the rationale for, the affirmative measures that may make possible the creation of lower income housing opportunities, even under the economic and political climate of the 1980's.

I. THE MOVEMENT FOR LAND USE DEREGULATION

Few responsible observers would challenge the proposition that the land use regulatory scheme in effect throughout most of urban and suburban America drastically needs change.² Since the late 1960's, a substantial body of literature has emerged that documents both the effects of local land use regulation on housing costs,³ as well as the utter fail-

2. The existence of zoning regulations is far from universal in the United States. While Houston, Texas, may be an anomaly among major urban centers in its lack of zoning controls, see B. SIEGAN, *LAND USE WITHOUT ZONING* (1972), most outlying rural areas in large parts of the country still lack such regulations.

3. See generally G. PETERSON, *THE INFLUENCE OF ZONING REGULATIONS ON*

ure of this elaborate regulatory scheme to provide significant countervailing benefits in the form of meaningful enhancement of either social or environmental conditions.⁴ Indeed, local land use regulation has been frequently and justifiably cited as a significant cause of serious social problems.⁵ Zoning, in particular, has come under attack as a particularly inappropriate and ineffective method from a legal, economic and environmental standpoint, to control the manner in which land is used for development.⁶

The effects of regulation vary with the nature of the regulation imposed. Typical zoning restrictions increase housing costs by dictating that housing units larger than necessary be built on larger lots than necessary with excessive requirements for factors such as lot frontage and building setback. Many communities regulate the types of housing units that can be built and either severely restrict or entirely prohibit the construction of housing types other than detached single family houses. The cost effect of many such regulations, for example the difference in cost between a 2000 square foot house and one of 1000 square feet, can be measured easily.⁷

LAND AND HOUSING PRICES (1974); S. SEIDEL, *HOUSING COSTS AND GOVERNMENT REGULATION: CONFRONTING THE REGULATORY MAZE* (1978); UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, *FINAL REPORT OF THE TASK FORCE ON HOUSING COSTS* (1978); COUNCIL ON ENVIRONMENTAL QUALITY, *THE COSTS OF SPRAWL* (1974).

4. See generally B. FRIEDEN, *THE ENVIRONMENTAL PROTECTION HUSTLE* (1979). For a more optimistic view, see M. BROOKS, *HOUSING EQUITY AND ENVIRONMENTAL PROTECTION: THE NEEDLESS CONFLICT* (1976).

5. See generally M. DANIELSON, *THE POLITICS OF EXCLUSION* (1976); A. DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* (1973); NAT'L COMM'N ON URBAN PROBLEMS, *DOUGLAS COMM'N REPORT, BUILDING THE AMERICAN CITY* (1968).

6. See generally Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 M.L. REV. 261 (1984); Karlin, *Zoning and Other Land Use Controls*, reprinted in *RESOLVING THE HOUSING CRISIS* (M.B. Johnson ed. 1982); Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28 (1981); Krasnowiecki, *Abolish Zoning*, 32 SYRACUSE L. REV. 719 (1980). Interestingly, the author is aware of no serious commentary arguing in support of current local land use regulatory practices that has appeared in recent years.

7. In addition to S. SEIDEL, *supra* note 3, a substantial body of technical literature exists on the subject of land use regulations and housing costs. See, e.g., R. BURCHELL *MOUNT LAUREL II: CHALLENGE AND DELIVERY OF LOW-COST HOUSING* 318-49 (1983); W. SANDERS & D. MOSENA, *CHANGING DEVELOPMENT STANDARDS FOR AFFORDABLE HOUSING* (1982); CENTRAL NAUGATUCK VALLEY REGIONAL PLANNING AGENCY, *LEAST COST HOUSING: MINIMIZING THE FISCAL IMPACT OF ZONING AND SUBDIVISION REGULATIONS* (1976). See also A. MALLACH, *INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES* 57-66 (1984).

The effect of growth controls and environmental regulations that do not involve such precise technical standards as individual lot or dwelling unit area requirements may be more difficult to quantify, but nonetheless can be substantial.⁸ By increasing total development costs, reducing the number of units that can be built, either through reduction in density or through growth timing controls, and extending the length of time required to process an application for development, such controls can have a cumulative effect on the price of both land and housing units that may well substantially exceed the effect of more traditional zoning regulations.⁹

Land use regulation in the United States has been under broad attack since the late 1960's. Until the end of the 1970's, however, the most visible attack was on grounds substantially different from those which subsequently emerged. To a considerable extent, the salient issue of the 1970's was exclusionary zoning rather than deregulation. Exclusionary zoning was seen principally as the complex of ordinance provisions and administrative practices that effectively stood as a barrier to the movement of lower income households to American suburbia.¹⁰ The concern with exclusionary zoning led both academic commentators and advocates to direct their attention to the perceived abuses of local regulatory schemes rather than on the issue of regulation as such.

A major concern of exclusionary zoning opponents during this period was the widespread manipulation of local land use regulations to exclude subsidized housing while permitting housing of similar physi-

8. See generally B. FRIEDEN, *supra* note 4. See also Frieden, *The Exclusionary Effect of Growth Controls*; Mercer & Morgan, *An Estimate of Residential Growth Controls' Impact on House Prices*; Frech, *The California Coastal Commission: Economic Impacts*. The previous three articles are reprinted in *RESOLVING THE HOUSING CRISIS* (M.B. Johnson ed. 1982).

9. Although many zoning provisions increase costs beyond what may be necessary, in terms of strict health and safety standards, they do not, when reviewed in the context of housing market realities, inevitably increase the cost of housing beyond what would be dictated by market conditions in a particular area. Many communities can point to developments built to substantially higher standards in terms of larger units, lower density, and the like than those required by the zoning ordinance. Careful analysis, however, can establish a direct cost effect of zoning ordinance standards. See G. PETERSON, *supra* note 3.

10. The initial and most important critiques of exclusionary zoning practices were Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 *STAN. L. REV.* 767 (1969); Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 *SYRACUSE L. REV.* 509 (1971). See also M. DANIELSON, *supra* note 5.

cal but different social character to be built within the same community.¹¹ A substantial part of the exclusionary zoning litigation brought during the 1970's focused on this issue, and therefore, implicitly accepted the legitimacy of the regulatory scheme involved while challenging only the application of that scheme to a particular development proposal.¹²

Attitudes toward land use regulation began to change in the late 1970's prompted by both economic and ideological considerations. The key economic factor was the dramatic increase in the cost of housing relative to household incomes, which led to an increasing part of the American middle class being effectively priced out of the housing market.¹³ Although arguably in some areas these cost increases were more directly attributable to such factors as the rise in mortgage interest rates, increasing energy costs and the growing perception of the investment value of housing, the increases focused attention on the cost of housing generally, and on the role of land use regulations and growth controls in those costs.¹⁴

One could argue that as long as suburban exclusionary practices affected only the poor, they were not widely perceived as a significant issue. By the late 1970's, however, a more significant political constituency, perceived to be harmed by suburban land use regulations, came into existence. Equally important, this same middle-class constituency, unlike the poor, also represented a pool of potential effective housing market demand. The desire to reach this market jolted a large part of the homebuilding industry out of their traditional acquiescence to local policies and prejudices.

The second factor was ideological. The late 1970's and early 1980's saw the conjunction of a growing body of articulate advocates of more

11. This practice is described in detail in M. DANIELSON, *supra* note 5, at 79-106. See also M. BROOKS, *supra* note 4, at 36-45 (discussion of the use of environmental regulations as a tool to keep out federally subsidized housing projects).

12. The most notable cases of a long line on the subject have been *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), and *Parkview Heights Corp. v. City of Black Jack*, 335 F. Supp. 899 (1971).

13. See, e.g., CONGRESSIONAL BUDGET OFFICE, *HOMEOWNERSHIP: THE CHANGING RELATIONSHIP OF COSTS AND INCOMES, AND POSSIBLE FEDERAL ROLES* (1977).

14. B. FRIEDEN, *supra* note 4, at 167. Frieden writes:

In the late 1960's the victims of suburban exclusion were mainly poor people, a small and powerless minority. They are still victims of it in the 1970's. But now there are many more victims than before. Middle-income America, in addition to the poor, is now bearing the costs of suburban growth policies.

Id.

fundamental land use deregulation and a political climate in which their ideas were substantially more welcome than they had been in the more interventionist environment of the 1960's and early 1970's.¹⁵ A major figure of the second group stated succinctly the contrast in the views of the two schools of critics of local land use regulation: "The assumption of those who concentrate on exclusionary zoning is that if exclusionary motives could be curbed in some way, zoning would work. The thesis of this paper is that zoning cannot work . . ." ¹⁶ The common ground of the new school of critics is a free market orientation and opposition, in principle, to governmental regulation of individual economic behavior. They found opportunistic allies in the homebuilding industry. Although hardly opponents of government intervention in principle, the builders had their own reasons to become strong advocates of deregulation.

With the arrival of the Reagan administration, the movement for land use deregulation received official acknowledgement, although of a purely symbolic nature. President Reagan created the President's Commission on Housing in June 1981. Notably, one member of the Commission, eventually to become chairman of its regulations committee, was Bernard Siegen, a leader in the deregulation movement.¹⁷ The Commission report, which appeared in April 1982, called for far-reaching changes in the structure and practice of local land use regulation.¹⁸ This was followed by the establishment of the Joint Venture for Affordable Housing, an initiative of the federal Department of Housing and Urban Development that advocated a variety of land use deregulation measures. Significantly, however, the deregulatory measures advocated in the publications of the Joint Venture were not only of a far milder nature than those proposed by the President's Commission, but also largely devoid of the underlying ideological impetus of the Commission reports.¹⁹

15. This group includes such figures as Bernard Siegen, Donald Kmiec, Robert Ellickson, and Jan Krasnowiecki. Many of them were writing and speaking on these same themes many years before the period discussed here.

16. Krasnowiecki, *supra* note 6, at 720.

17. THE REPORT OF THE PRESIDENT'S COMM'N ON HOUSING at 262-63 (1982) [hereinafter cited as PRESIDENT'S COMM'N].

18. *Id.* at 199-210. Changes recommended by the Commission ranged from zoning standards to regulations governing the financing of infrastructure and the imposition of fees on development. *Id.*

19. See JOINT VENTURE FOR AFFORDABLE HOUSING, AFFORDABLE HOUSING: HOW LOCAL REGULATORY IMPROVEMENTS CAN HELP (1982) [hereinafter cited as

The Joint Venture perceived deregulation solely as a means by which to bring about marginal reductions in the cost of middle-income housing. Indeed, the Reagan administration's positions often seemed little more than a trivialized recapitulation of the arguments against exclusionary zoning, stripped of the social change concerns that once had been a central theme of those arguments. By this time, however, the realities of the housing marketplace compelled most of those individuals who had been active in the earlier effort against exclusionary zoning to conclude that the mere removal of exclusionary features from land use regulations would have little or no effect on the housing needs of the poor.

The Reagan administration's tepid approach to land use deregulation is a reflection of the political dynamics of the issue. Unlike many other areas in which deregulation has been pursued, the bedrock Republican constituency of affluent suburban America sees the maintenance of strict and generally exclusionary land use regulations as a matter of significant concern. Ironically, these regulations, which patently interfere with private property rights, have been perceived as the principal means of protecting other interests that are widely recognized to be tantamount to rights—particularly those associated with property values and social exclusivity. As a result, efforts to perpetuate land use regulations and make them even more restrictive are commonly viewed as reflecting the “conservative” position in the local political arena. It is almost inconceivable, therefore, that fundamental land use deregulation, as called for in the works of Siegen, Ellickson and their counterparts, notwithstanding their impeccable logic, will ever become a part of the serious political agenda of even the most conservative national administration. In fact, rather than being the advocates of an idea whose time has come, these writers appear to be communicating almost exclusively to one another.

In assessing the effects of land use deregulation on housing affordability generally, and on the lower income population in particular, a distinction must be made between the two approaches to deregulation. The first is the realistic agenda of the homebuilding industry and of the Joint Venture, namely the easing of standards or the removal of exclusionary features within a given regulatory framework. The sec-

AFFORDABLE HOUSING]. The interest of the Department of Housing & Urban Development in regulatory reform preceded the Reagan administration. *See* COUNCIL ON DEV. CHOICES FOR THE '80S, *THE AFFORDABLE COMMUNITY: GROWTH, CHANGE AND CHOICE IN THE '80S* 31-38, 71-73 and 84-89 (1981).

ond approach is the fundamental deregulation espoused by advocates of land use *laissez-faire*. Although the latter may be of largely academic interest because it is unlikely to become a part of any serious political agenda, nonetheless it will be instructive to examine it in terms of its likely effect on housing for the nation's poor. In the final analysis, however, from the perspective of housing affordability, the difference between the two may be minimal.

II. THE LIMITS OF LAND USE DEREGULATION

The focus of land use deregulation, in the context of this article, is to reduce the cost of housing and thereby make it affordable to more people. Although it is difficult to quarrel with that objective, it is a highly generalized one that leaves more questions asked than answered. Arguably the most important question is that of the extent to which deregulation realistically can reduce housing costs and thereby increase housing affordability. That question, in turn, can be answered only by looking at two interrelated issues: first, the extent to which market considerations will prompt developers to take advantage of potential savings that might be made available; and second, the extent to which those savings actually exist, rather than being little more than artifacts of creative accounting techniques. A close examination strongly suggests that, even if market conditions would permit, the potential savings available are likely to be far less than the advocates of deregulation have claimed.

Substantial evidence exists in support of the proposition that market factors operate independently of regulatory requirements in determining housing costs. The relationship is complex. As one commentator has written, "central to the debate over the effect of zoning on housing prices is the question of whether zoning simply sets into the public record what the private market would have done in its absence, or whether zoning is, in fact, prescriptive."²⁰ The literature would appear to suggest, at least with regard to single family houses, that the former conclusion is more likely to be accurate. Typical is one study's finding regarding minimum house size requirements that "new houses generally exceeded the local minimum [requirement] by at least 300 square feet . . . most officials said consumer demand was the main reason bigger houses were built."²¹ Similar conclusions have been reached re-

20. B. HACK & G. POLK, *HOUSING COST AND GOVERNMENTAL REGULATIONS: IS REGULATORY REFORM JUSTIFIED BY WHAT WE KNOW* 6 (1981).

21. GEN. ACCOUNTING OFFICE, *WHY ARE NEW HOUSE PRICES SO HIGH*, HOW

garding the cost effect of building code provisions, with one commentator concluding that "above-code standards and practices appear to be the choice of builders, rather than something forced upon them."²²

It is likely that the result of a significant reduction in the cost of subdivision requirements and other exactions would be similar, although for somewhat different reasons. If subdivision requirements are relaxed in order to reduce costs, builders will build to the more modest standards to the extent they can do so without impairing marketability. Similarly, any reduction in fees or exactions, which in many communities substantially increase developers' costs, will be welcomed by developers. The real issue, however, is not whether some savings in the developers' costs are possible, but whether these savings will be passed on to the buyers of housing units.

The City of Newport Beach, California, is an instructive example. Newport Beach levies exceptionally high exactions on developers, including a fee in lieu of park dedication that is currently levied at over \$5000 per unit.²³ The development community, however, has not visibly opposed these exactions, and there is no evidence to suggest that these exactions have affected the production of housing in the community. This is not surprising because the Newport Beach market makes it possible to sell the houses and condominiums for prices ranging from \$150 to \$300 per square foot.²⁴ Under these circumstances, it seems reasonable to assume that the exactions simply are passed along to the buyers. Furthermore, because the market clearly can bear these costs, it would be fanciful to argue that, should the exactions be removed, the savings would be passed along to the homebuyers. This assumption, of course, is implicit in much of the literature on deregulation.

One could construct a hypothetical body of circumstances under which particular zoning provisions, subdivision requirements or exactions would have a measureable effect on the production of housing. Such circumstances would apply in a community in which a market existed only for modest houses or apartments and in which the maxi-

ARE THEY INFLUENCED BY GOVERNMENT REGULATION, AND CAN PRICES BE REDUCED 12 (1978) [hereinafter cited as GAO STUDY].

22. B. HACK & G. POLK, *see supra* note 20, at 19.

23. Telephone interview with Planning Department, City of Newport Beach, California (Sep. 1985).

24. CITY OF NEWPORT BEACH, CAL. HOUSING ELEMENT 51-52 (1984). For example, \$240,000 for a 1600 square foot unit and \$400,000 for a 2012 square foot unit. *Id.*

imum market price of such houses did not exceed the hard costs of construction by a large enough amount to make it possible for a developer to pass on substantial fees or exactions. If such a community imposed unreasonable cost-generating zoning standards or excessive fees and exactions, the result would not be production of more expensive housing. Rather, the result would be production of no housing at all because builders would be unable to sell the expensive units dictated by the municipal regulations.

If these unreasonable regulations were removed, some housing production very well might occur. It would be "affordable housing," not because of deregulation as such, but because in this particular case deregulation was necessary in order to enable builders to build for the only housing market in that community—a market limited to affordable housing. This is a significant distinction. If the market were any broader, the effect of deregulation would be lessened substantially.

There is no evidence, however, that communities meeting this description are sufficiently widespread to make possible any significant impact from this sort of deregulation. Although the author is not aware of a formal study on this point, it is his experience that those communities where demand is limited to modest housing generally have modest zoning and other requirements. The blatant excesses of regulation largely are limited to "premium" communities where developers can pass on the cost of those excesses to homebuyers. The latter half of that equation appears to be supported by Frieden's study of the San Francisco Bay area.²⁵

Although these particular circumstances may be unusual, the example does point to the conditions under which deregulation may have a significant impact on the housing market; namely, when the process of deregulation makes it possible to increase significantly the overall volume of housing production within a region. If, for example, either zoning restrictions or, more likely, growth controls, were pervasive enough to reduce production of housing below the levels dictated by the marketplace, their removal, all other factors remaining equal, would trigger an increase in housing production. Furthermore, because the artificially imposed scarcity of housing would have resulted in higher housing prices, the incremental production resulting from the elimination of restrictions largely would be made up of less expensive units.

It is unknown, however, to what extent growth controls or zoning

25. B. FRIEDEN, *supra* note 4, at 140-41. The conclusion cited here is implicit rather than explicit.

regulations exist at a scale capable of having a region-wide impact of this sort. Frieden argues that growth controls, as well as environmental barriers to development, had a region-wide effect in the San Francisco Bay Area. He provides, however, no credible substantiation of that argument.²⁶

An example of zoning restrictions having a region-wide effect may be found in Suffolk and Nassau Counties, New York. In this area, a large suburban subregion of New York City with a population in excess of 2.5 million, nearly all jurisdictions with land use regulatory powers provide no zoning for multifamily housing.²⁷ Rather, they permit its development only after a highly discretionary and arduous rezoning procedure.²⁸ As a result of this practice, not only is the proportion of multifamily housing in the local housing stock substantially lower than in any comparable region,²⁹ but the nature of the multifamily housing built also is affected. In the Town of Brookhaven, the largest single municipality in the region encompassing over 300 square miles, covenants limiting the number of bedrooms in the units or ensuring condominium rather than rental occupancy were extracted from developers as conditions of approval of their rezoning requests.³⁰

A purely localized growth control program, however, while having a potential impact on housing costs within that community, may have little or no aggregate regional housing market impact if enough room exists within the balance of the region to accommodate demand. A well known study in California, which documented housing price increases attributable to the Petaluma growth management program, relied on the continued production of substantial amounts of housing in adjacent communities without such growth controls as the basis of comparison.³¹ Implicit in that comparison is the conclusion that

26. *See generally id.* Although Frieden cites a substantial figure for aggregate loss of housing units resulting from the regulatory schemes he criticizes, *id.* at 139, he provides no data to indicate whether that loss of production was displaced to other parts of the larger region under consideration.

27. This characterization is based on the experience of the author who has been actively involved in housing and planning activities in this area since 1978.

28. *Id.*

29. LONG ISLAND LIGHTING CO., LONG ISLAND ALMANAC 33 (1984).

30. *See* Post-Trial Memorandum for Plaintiff at 25-26, Suffolk Housing Services v. Town of Brookhaven, No. 75-20017 (Sep. 17, 1982).

31. S. SCHWARTZ, D. HANSEN, R. GREEN, W. MOSS & R. BELZER, THE EFFECT OF GROWTH MANAGEMENT ON NEW HOUSING PRICES: PETALUMA, CALIFORNIA (1979).

Petaluma's growth controls did not have a significant regional effect whatever their localized effect may have been. The effects of these practices may be unfair and may be undesirable in other respects, but they do not necessarily affect aggregate housing supply or overall housing costs at a regional level.

In short, even if one assumes that there are significant savings available through deregulation, market considerations usually will prevent the housing consumer from realizing those savings. In most cases, the imposition of growth controls or exclusionary zoning standards by one community has the effect of displacing the production of less expensive housing to other communities rather than preventing it entirely. Even in the San Francisco Bay area, considerable amounts of affordable housing are being built, although admittedly not in the prime locations that are typically used as case studies by Frieden.³² This is not to suggest that unreasonable regulations have not had other negative effects in terms of the distribution of costs and benefits, both economic and environmental, across the region. In terms of the narrow issue of consumer housing cost, however, the effects are much less than claimed.

The sort of rigorous analysis that would establish the true effect of regulation on housing markets, and the realistic potential consumer benefits from deregulation, have been sorely lacking. Instead, the legal literature is almost completely devoid of serious economic analysis and the materials disseminated by the Department of Housing and Urban Development (HUD) are blatantly self-serving. Massive savings have been claimed for deregulation that largely disappear upon closer examination. In this respect, it is instructive to look closely at one of the housing cost reduction demonstration projects undertaken by HUD.³³ Table 1 is a statement of the savings claimed by HUD for the Shreveport, Louisiana, demonstration project.

An analysis of the savings claimed for this project raises serious questions about both the legitimacy of the savings and their relationship to deregulation. The claimed density savings, based on "double the density of similar suburban projects," are particularly suspect. The same HUD report documents that the total land and site development

32. Areas where affordable housing is being built include Suisun City in Solano County. See *Hills Full of Golden Homes*, San Francisco Chron., Jan. 9, 1984; see also the Antioch-Oakley area in Eastern Contra Costa County (based on observations of the author, June 1985).

33. This discussion is based on DEP'T OF HOUS. & URBAN DEV. HOUSING COST REDUCTION DEMONSTRATION (1980), reprinted in ULI—THE URBAN LAND INST. HOUSING SUPPLY AND AFFORDABILITY (1983) [hereinafter cited as ULI].

costs for the demonstration project were approximately \$6100.³⁴ For a saving of \$8500 to be achieved, the total costs at half the density must be \$14,600. No documentation is provided and no suggestion is made that those costs actually would have been \$14,600 in the absence of regulatory change. Indeed, it is inconceivable that an increase of fifty percent in density could translate into a reduction of nearly sixty percent in land and site development costs.³⁵ In essence, the table seems to show that "if this project had been a large lot suburban development, its land and site development costs might have been as high as \$14,600."³⁶ Even if that were correct, to claim the difference as savings is preposterous. Yet this one category of "savings" accounts for well over half the total.

TABLE 1: COST SAVINGS CLAIMED FOR SHREVEPORT, LOUISIANA HOUSING COST REDUCTION DEMONSTRATION PROJECT³⁷

COST SAVINGS AREA	SAVINGS
1. DENSITY:	
The density is about double the density of similar suburban projects	\$ 8,500
2. TIME	
a) Land carrying costs and administration costs	500
b) Development costs assuming 15% inflation for 12 months	500
c) Construction costs assuming 15% inflation for 12 months	4,400
3. CONSTRUCTION COST REDUCTIONS:	
a) reductions broken down by category in original	500
b) unspecified "other site and unit innovations"	600
TOTAL	\$15,000

The second category assumes that expedited processing saved one year for the developer and that cost savings based on those time savings should be based on an inflation rate of fifteen percent per year. Even acknowledging that the demonstration took place in 1980, a year of high inflation,³⁸ this assumption is highly suspect. First, it is hard to

34. *Id.* at 213.

35. Although the report states that the savings are the result of doubling the density, *id.* at 214, it is impossible to imagine how doubling the density would result in a savings of roughly 150%. While there are savings associated with density, the savings invariably are less than proportional to the increase in density because per acre costs increase with density.

36. *Id.*

37. U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING COST REDUCTION DEMONSTRATION (1980) (slightly edited by the author).

38. The increase in the Consumer Price Index for 1980 was 13.5%, the highest one

imagine what processing changes could have resulted in a time difference of a full year for a forty-three unit project. Although substantial time savings may be available as a result of processing improvements for large scale projects, there is no evidence that delays of this magnitude are a serious problem for small developments.³⁹ Second, assuming continued runaway inflation as a basis for determining cost savings is a highly dubious procedure. Not only is it not founded in historical experience, it is intrinsically undocumentable. At a more technical level, if one is going to build in this sort of inflation adjustment, it is clearly inappropriate to inflate construction costs on the basis of an imputed Consumer Price Index adjustment. During the period under consideration, a more relevant measure, the annual price increase in construction materials and components, was between seven and eight percent.⁴⁰

Finally, if the issue is affordability and not price level unadjusted for inflation, the only true savings are those measured in inflation adjusted for increases in household income during the same period. Thus, if incomes increase by fifteen percent during the same period that prices increase at that rate, time savings have no effect on affordability and therefore do not represent true savings. The significance of reducing processing time through deregulation lies not in the direct savings obtained,⁴¹ but in the overall effect of delay on the level of housing production, and by extension the market builders choose.

In the final analysis, assuming the bona fides of the construction cost reductions claimed, and generously assuming some savings in site development costs, it is debatable that any more than \$1600 to \$2500 per unit in the Shreveport demonstration can be considered true savings. Even then, some of those savings appeared to have less to do with deregulation than with encouraging the developer to utilize various means of achieving construction savings that were never barred by mu-

year figure in recent American history. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, Table 790, at 475 (1985) [hereinafter cited as STATISTICAL ABSTRACT].

39. The average length of time from submission of preliminary plans by the builder to receipt of a building permit is 7.5 months. GAO STUDY, *supra* note 21; see B. HACK & G. POLK *supra* note 20, at 12.

40. STATISTICAL ABSTRACT, *supra* note 38, Table 781, at 469.

41. The direct costs of delay, holding land and borrowing money for up-front costs to a developer who is typically highly leveraged, can be substantial and may influence significantly his ability to carry a project through to a successful conclusion. Measured as a percentage of the final cost to the consumer, however, they are insignificant.

municipal regulation, but of which he apparently had not been aware of previously.⁴²

Savings of two to four percent, as suggested above, are much closer to the consensus of the serious literature on the subject than are the HUD claims of twenty-one to thirty-three percent from the Housing Cost Reduction Demonstration.⁴³ Studies of different categories of regulation have elicited varying results, but the measureable cost increases found to be associated with regulation are consistently modest.⁴⁴

This is particularly the case when dealing with what might be called "petty deregulation," a term that well characterizes the Joint Venture projects. An example would be the use of clustering as an alternative to conventional single family subdivisions, a regulatory "innovation" heavily stressed in a recent major document of the National Association of Homebuilders.⁴⁵ The document points out the savings that can be obtained from clustering, as compared to conventional subdivision; cost savings between \$4000 to \$5000 per unit are documented.⁴⁶ Clustering, however, has been in use as a planning technique in the United States at least since the late 1920's.⁴⁷ By this point, most jurisdictions, at least in major eastern or western metropolitan areas, either explicitly allow clustering by right in their zoning ordinances, or consider it a relatively uncontroversial, special permit or conditional use application. Therefore, to the extent that clustering still needs to be advocated, it is the homebuilding community more than the regulators who must be convinced.⁴⁸ As suggested above, much of what passes for

42. Examples include use of smaller windows and more efficient purchasing of air conditioners and compressors. See ULI, *supra* note 33, at 214.

43. *Id.* at 216. See also PRESIDENT'S COMM'N, *supra* note 17, at 181 (citing this study in support of the proposition that "regulations increase costs—as much as 25% of the selling price in some cases"). As this article has shown, this assertion is nonsense.

44. See B. HACK & G. POLK, *supra* note 20, at 26.

45. NATIONAL ASS'N OF HOMEBUILDERS, HOUSING AMERICA—THE CHALLENGE AHEAD 87-89 (1985) [hereinafter cited as HOUSING AMERICA].

46. *Id.* at 89.

47. See generally C. STEIN, TOWARD NEW TOWNS FOR AMERICA (1957). Cluster planning was used in Radburn, New Jersey, in the late 1920's at a level far more sophisticated than generally encountered today. *Id.* at 38-73.

48. One example is Princeton Township, New Jersey, where the zoning ordinance has provided density bonuses in certain areas for use of the cluster provision. Developers have chosen not to use these provisions, however, believing that conventional large lots sell for a higher price. The municipality is contemplating mandating clustering in certain areas.

deregulation in other areas, particularly those dealing with construction techniques and materials, is also more a matter of builder inertia than regulatory restraint.

In the final analysis, the costs of regulation, especially when accurately identified and quantified, are but one of the many factors going into the cost of housing. Furthermore, in looking at the cost of housing, it is insufficient to look solely at the production or supply side of the cost equation in terms of such factors as the cost of regulation, money or land. Prices rose in many parts of the United States during the 1970's well beyond the level that is attributable to increases in production costs.⁴⁹

In the superheated economic climate of California, from which a disproportionate share of both the deregulation studies and polemics derive, regulation was but one of many factors causing an increase in housing prices during the 1970's that was substantially greater than that experienced in other parts of the country.⁵⁰ In retrospect, however, it appears that a bidding process, characterized by the readiness of the homebuilding industry to price to the limit of consumer expectations and pushed by continuing appreciation in the existing home market, had more to do with rising prices than any other factor. Other elements, such as land prices, were the result of this price spiral rather than being independent factors.

The more recent California experience provides substantial support for this proposition. With no evidence of more than modest regulatory reform, substantial numbers of the new housing developments taking place in 1985 in Southern California are priced at levels that would be

49. As Hack and Polk write, citing in part a Canadian study:

New Housing, the study concludes, was able to be built and marketed at higher prices, absorbing added regulatory costs, because of changing patterns of demand. "In the early 1970's the demand factors came together at the same time and impacted cumulatively. Prices rose. These initial increases combined with accelerating inflation to change the expectations about future land and housing prices." Among the demand factors were increased disposable income (two income families, general rise in income), decreased real returns for alternative investments (stocks, bonds, etc.) in the face of general inflation, and a rapid escalation of the number of households in the market (via divorces, the baby boom, etc.). The result was a sellers market, and the revaluation in the public's mind of assets in housing when set against what people could and were willing to pay.

B. HACK & G. POLK, *supra* note 20, at 22.

50. See Ellickson, *The Irony of Inclusionary Zoning*, 54 S. CAL. L. REV. 1167, 1167-68 (1981).

considered "affordable housing" by many deregulation advocates.⁵¹

One is forced, therefore, to conclude that the relationship between deregulation and housing affordability is, at best, a highly speculative one. Although little doubt exists that excessive or unreasonable land use regulation often contributes to increasing housing costs, the extent of that contribution is difficult to measure. Therefore, the likelihood that deregulation can lead directly to the provision of lower income housing is small. The issue, however, is somewhat more complicated because at least some advocates of deregulation argue that the benefits will be indirect, in the form of filtering. The next section will explore the goals of deregulation, both in terms of the creation of "affordable housing" generally and with regard to the provision of housing for the poor.

III. AFFORDABLE HOUSING AND LOW INCOME HOUSING

The term "affordable housing" has come to mean many different things to many different people. Indeed, it often is used in the recent literature in a way that avoids definition and encourages readers to apply whatever definition they find most comfortable. Among many advocates of deregulation, however, it is clear that whomever the beneficiaries of affordable housing are, they are not likely to be the poor. If we define the poor as households earning eighty percent or less of the median income in the area in which they live,⁵² it becomes apparent that few households in this category are likely to be the direct beneficiaries of current deregulation efforts. This conclusion is not surprising in view of what appears to be the modest direct cost benefits likely to be achieved by a deregulation strategy.

51. In an October 1985 survey of developments in the Los Angeles metropolitan area conducted by the author, nearly one-third of new townhouse or condominium developments contained units priced below \$80,000, and one-fourth of all detached single family developments contained units priced below \$100,000.

52. This standard, adjusted for household size, is that is used for the federal "Section 8" low income housing program. 42 U.S.C.A. § 1437a(b)(2) (West Supp. 1985). It has been established as a standard in land use law and as being synonymous with the "poor." *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 92 N.J. 158, 221, 456 A.2d 390, 421-22 (1983). The terms "lower income" or "low and moderate income" as used in this article also embody this standard. Note that if the income ceiling for the lower income population is set at 80% of the area median income, any responsible program to house the poor must, by definition, provide for a cross-section of households earning between 0% and 80% of the area median income. It should be noted that this is a liberal standard, one which includes roughly 40% of the nation's households.

Both the homebuilding industry and Reagan administration housing officials appear to perceive the middle class to be the beneficiaries of deregulation. The outgoing president of the National Association of Homebuilders (NAHB) defined an affordable housing unit as one selling for three times the median income of the area in which it is to be built.⁵³ The recent NAHB publication mentioned earlier focused attention on enhancing affordability "among the growing number of young Americans just entering the housing market for the first time."⁵⁴ This, in turn, seems to be a working definition used by the Joint Venture for Affordable Housing.⁵⁵ As often as not, however, the documents produced by HUD and others under the auspices of the Joint Venture assiduously avoid defining the term and take refuge in generalities such as making housing "more affordable for our citizens across the country,"⁵⁶ or better fitting "the changing needs of the housing market."⁵⁷

The likely beneficiaries of such housing, however, are households earning substantially above the area median income rather than the middle class generally. Under nearly all plausible circumstances, few households realistically can afford a house selling for three times their household income. Therefore, a unit selling for three times the area median income will be affordable only to a household earning substantially more than the median. This can be illustrated by a hypothetical example. We have assumed an area in which the median income is \$25,000. Table 2 below illustrates the carrying cost and income needed for a \$75,000 home under a number of alternative circumstances.

Depending on the various assumptions, particularly those dealing with the size of the down payment that the household can provide, a family that can purchase the hypothetical unit while spending no more than 28% of gross income each year for mortgage payments, taxes, and insurance, must have a minimum income falling between roughly \$33,000 to \$40,000, or from 131% to 161% of the area median. Furthermore, to reach the lower end of that range, the prospective pur-

53. Opening remarks by Peter Herder, Conference, "Affordable Housing for the '80s: A Conflict of Rights," San Diego, California (March 29, 1985).

54. HOUSING AMERICA, *supra* note 45, at 26.

55. U.S. DEP'T OF HOUS. & URBAN DEV., JOINT VENTURE FOR AFFORDABLE HOUSING, AFFORDABLE HOUSING: WHAT STATES CAN DO (1982) (Introduction).

56. AFFORDABLE HOUSING, *supra* note 19 (Foreword).

57. W. SANDERS & D. MOSENA, *supra* note 7 (Foreword). This study was financed with a HUD grant, under Joint Venture auspices.

TABLE 2 CARRYING COST AND INCOME NEED TO PURCHASE A \$75,000 HOME

	FEE SIMPLE		CONDOMINIUM	
	5%	20%	5%	20%
DOWN PAYMENT				
MORTGAGE AMOUNT	\$71,250	\$60,000	\$71,250	\$60,000
ANNUAL MORTGAGE PAYMENT/1	8,792	7,404	8,792	7,404
PROPERTY TAXES/2	1,500	1,500	1,500	1,500
INSURANCE/3	300	300	150	150
CONDOMINIUM FEES/4	0	0	840	840
TOTAL ANNUAL COST	10,592	9,204	11,282	9,894
INCOME NEEDED BASED ON 28% OF INCOME FOR ABOVE HOUSING COSTS:				
	37,829	32,871	40,293	35,335
PERCENT OF MEDIAN	151%	131%	161%	141%
PERCENTAGE OF INCOME NEEDED TO CARRY HOUSE BY A FAMILY AT THE AREA MEDIAN:				
	42%	37%	45%	40%

1/Based on 30 year mortgage at 12% (annual constant .1234)

2/Assumes property taxes at 2% of market value

3/Assumes for fee simple. insurance at \$40 per \$10,000 house value; hazard insurance for condominium unit owners is included in condominium fee.

4/Assumes condominium fees of \$70 per month.

chasers must be able to make a down payment of some \$15,000 and meet closing costs. Few first time homebuyers are able to make such a down payment.

There are circumstances under which the hypothetical unit would be affordable to a wider cross-section of households. In a low-tax state such as California, the minimum income requirement for the unit would be reduced by almost \$2700 simply by virtue of the one percent property tax rate cap in effect in that state. Similarly, use of mortgage financing providing by tax-exempt bond issues, which may carry interest rates in the area of 10% to 10.5% and are widely available for first-time homebuyers through a variety of state and local agencies, further increases affordability.⁵⁸ Under optimal circumstances, the hypothetical unit may be available to a household earning approximately 110%

58. It should be clear that changes in mortgage interest rates dramatically affect housing affordability. By spring 1986, conventional interest rates for long-term fixed-rate mortgages had widely dropped to 9.5%, a rate at which some of the units under consideration here could approach affordability to a household at the median income level. It is unlikely, however, that interest rates will remain this low; in any event, it is

of the area median income.⁵⁹

Similar conclusions on affordability emerge from the Urban Land Institute (ULI), a highly respected developer-oriented organization.⁶⁰ A ULI report presents twenty case studies of "affordable" housing projects completed in 1981 and 1982 and selected on the basis of a reasonably systematic national search.⁶¹ Each case study includes data on total monthly costs for the first year of occupancy.⁶²

The average monthly first year carrying cost for the twenty housing developments was \$788.20. Monthly first year carrying costs for nineteen of the twenty were above \$600.⁶³ Assuming, because utilities are included in these figures, that utility costs typically will represent an additional five percent of household income, a household should spend no more than 33% of its income for carrying costs as defined by the Urban Land Institute study. On this basis, the minimum income required to carry this average monthly cost was \$28,375. This, in turn represents 141% of the national median household income figure of \$20,171 for 1982.⁶⁴ Although some of the units described were affordable to less affluent households, the target population was one with incomes substantially above the median income in the area where they lived.⁶⁵

clear that such low interest rates were not contemplated at the time by the "deregulators" cited above.

59. If one assumes a 1% property tax rate and a 10.5% mortgage interest rate and, apply these factors to a fee simple unit with a 20% down payment, the following annual costs are obtained:

Mortgage payment	\$ 6,588
Property taxes	750
Insurance	300
Total	\$ 7,638
Minimum income needed [$\$7,638 \div .28$]	\$27,279
Percentage of area median [$\$25,000$]	1.09

60. URBAN LAND INST., AFFORDABLE HOUSING: TWENTY EXAMPLES FROM THE PRIVATE SECTOR (1982) (Douglas R. Porter and Susan Cole) [hereinafter cited as TWENTY EXAMPLES].

61. *Id.* at 15.

62. *Id.* at 20. The fact that these are *first year* carrying costs is significant. Many of the developers used various mechanisms to defer first year costs and increase initial affordability. Thus, first year carrying costs tend to overstate the true affordability of the unit.

63. *Id.* at 20.

64. STATISTICAL ABSTRACT, *supra* note 38, Table 738, at 444.

65. One of the TWENTY EXAMPLES, *supra* note 60, at 20, was something of an

If under the most optimistic scenarios, the expectations of the deregulation advocates⁶⁶ do not appear to reach even as far as the household earning the regional median income, what then of the poor? Nowhere in the literature is there an assertion that deregulation will result directly in the production of new housing for the lower income population. Instead, three suggestions emerge from the literature, and only one of these is grounded in any sense of a relationship between deregulation and the housing needs of the poor. The suggestions are first, increased federal and state housing subsidy programs; second, an "incomes policy", or a housing voucher program; and third, reliance on filtering as the source of future low income housing. Only the last bears any conceptual relationship to the question of deregulation in that an argument can be made that deregulation of the housing market potentially can increase the efficiency of the filtering process and thereby increase the quality or affordability of the used housing available to the poor.

Although both the NAHB⁶⁷ and the President's Commission on Housing⁶⁸ devote considerable space to deregulation, neither makes any effort to establish a link between its deregulation goals and the housing needs of the poor. Both groups treat the housing needs of the poor as a governmental preserve, that is, an area to which private sector actions and initiatives are largely irrelevant.⁶⁹ Except in the unlikely event that low-income households are able to increase their

anomaly, with monthly carrying costs of \$344. *Id.* The next lowest example had carrying costs of \$628 per month requiring a minimum income of \$22,608, still roughly 10% above the national median household income. *Id.*

66. Only the official or quasi-official sources such as HUD or NAHB even attempt to suggest the potential beneficiaries of deregulation. The legal or ideological literature on the subject does not deal with this issue.

67. HOUSING AMERICA, *supra* note 45, at 27.

68. PRESIDENT'S COMM'N, *supra* note 17, at 177-237.

69. The NAHB report makes the following recommendation to deal with lower income housing:

Improving housing conditions for America's low income and disadvantaged households will require a renewed commitment on the part of federal, state and local governments over the next 10 years. This report estimates that, at a minimum, 250,000 dilapidated units will have to be replaced or substantially rehabilitated annually.

In addition to improving or replacing the nation's substandard stock of housing, new approaches will have to be considered to raise housing standards in growing areas where the number of low-income families is expected to increase at about the same rate as the area's overall population growth. The options include proposals that would stimulate economic growth and raise the incomes of low-income house-

incomes to middle-class levels and thereby become fit candidates for the private housing market, the only hope for them is governmental assistance. While making the above policy recommendation, however, the NAHB report is not optimistic about its implementation.⁷⁰

The President's Commission sees the issue in much the same way as the NAHB. Again, the discussion of deregulation is directed entirely toward the homebuilding industry and the private market.⁷¹ Although the report's recommendations do not appear unreasonable, the body of the report makes clear that its proposed Housing Payments Program will be extremely limited in scope and would be directed exclusively to the very low income population, defined as fifty percent or less of regional median income, and then only to those income-qualified households suffering the most severe deficiencies in terms of both housing costs and housing quality.⁷²

Under current federal budgetary conditions, however, even the most minimal program appears unlikely. Based on the information presented in the President's Commission Report, there were nearly four million American households in 1977 meeting the severest tests of housing deficiency. These are households that were: (a) renters; (b) very low income; and (c) living in physically inadequate housing and/or spending more than *fifty percent* of gross income for shelter.⁷³ Assuming that each household required an average housing payment

holds; provide direct cash assistance to low-income families; and/or stimulate construction of low-cost housing through construction subsidies.
HOUSING AMERICA, *supra* note 45, at 27.

70. The report states:

The worsening housing problems of the nation's poorest households deserve special attention, but there appears to be little or no expansion of housing subsidy payments on the horizon . . . Without some unforeseen increase in the scope of these programs, the housing problems of low- and moderate-income households will continue to mount in the years ahead.

Id. at 24-25.

71. The report proposes that "[t]he primary Federal program for helping low-income families to achieve decent housing should be a Housing Payments Program. This program, coupled with housing supply assistance through the Community Development Block Grant program, should replace future commitments to build or substantially rehabilitate additional units under Federal housing programs." PRESIDENT'S COMM'N, *supra* note 17, at 18. It is unclear from the text whether the Commission sought to increase total CDBG funding to facilitate these additional activities or simply divided the funds available at current funding levels. Given the administration record, the latter appears more probable.

72. *Id.* at 23.

73. *Id.* at 11. The figure was derived as follows:

of \$250 per month, the annual cost of such a program would approach \$12 billion. Such a program, which is clearly beyond current political and budgetary realities, would leave over five million lower income renter households still living in substandard conditions or spending over thirty percent of gross income for shelter.⁷⁴ Furthermore, the report completely disregards the substantial number of largely lower income households living in overcrowded conditions. This group represented nearly three million households in 1980.⁷⁵

Although the quasi-official literature makes no reference to filtering, the more intellectual advocates of deregulation stress this process as the means of meeting lower income housing needs.⁷⁶ This position is supported by others as well.⁷⁷ Therefore, it is important to examine filtering in order to evaluate whether it is indeed likely to provide the

Very low income renter households in adequate housing [from Table 1.5]	8,470,000
Percentage spending over 50% of gross income for shelter [Table 1.4]	× <u>.22</u>
	1,863,400
Very low income renter households in inadequate housing [Table 1.5]	+ <u>1,997,000</u>
Total meeting proposed program criteria	3,860,400

74. *Id.* at 8 and 11. The figure was derived as follows:

Very low income renter households in adequate housing spending 30-50% of gross income for shelter	3,460,000
Low income renter households in adequate housing spending over 30% of gross income for shelter	+ 1,236,000
Low income renter households in physically inadequate housing	<u>680,000</u>
Total	5,376,400

75. STATISTICAL ABSTRACT, *supra* note 38, Table 1314, at 734. There is some overlap, of course, between this category and the other categories cited above.

76. One commentator writes:

Low and moderate income families benefit from the construction of housing at all levels of quality, including the highest quality units that they could not conceivably afford to buy. The infusion of new housing units into a regional market sets off a chain of moves that eventually tends to increase vacancy rates (or reduce prices) in the housing stock within the means of low and moderate income families. Consequently, an excellent way—perhaps even the best way—to improve the housing conditions of low and moderate income families is to increase the production of housing priced beyond their reach.

Ellickson, *supra* note 50, at 1185.

77. See W. CONNERLY & ASSOCIATES, THE IMPLICATIONS OF INCLUSIONARY HOUSING PROGRAMS (1979); Hagman, *Taking Care of One's Own Through Inclusion-*

answer to the nation's lower income housing needs.⁷⁸ If filtering will work thoroughly and efficiently, it clearly represents a more economically rational means of meeting lower income housing needs than the production of new housing units for all or most poor households in need.

It is not difficult to define what a truly effective filtering process should be able to achieve. Recognizing that there are some households whose incomes are so low that decent and affordable housing cannot be provided for them without some measure of subsidy,⁷⁹ the filtering process should nonetheless be able to provide all households in need of housing, and with incomes above that minimum threshold, with housing meeting reasonable, although modest, standards of quality at prices that are not burdensome. Furthermore, the geographic distribution of the available housing should bear a reasonable relationship to the availability of goods and services and to regional patterns of economic growth and employment opportunity.

In practice, the efficiency of the process falls far short of these goals. Although filtering does provide some used housing at prices below those of new housing production, it does so in a manner which demonstrates that it cannot be relied upon as the sole or even the principal means of providing lower income housing. It is generally acknowledged that units deteriorate physically as they reach the lower levels of the filtering chain, so that the housing alternatives available to the poor contain a disproportionate amount of substandard housing. Despite unquestioned improvements in recent years, nearly twenty percent of very low income and over ten percent of moderately low income renters still live in physically inadequate housing.⁸⁰ Furthermore, to the extent that the physical condition of the housing available to the poor has improved in recent years,⁸¹ it has been paralleled by a severe exacerbation of the affordability problem. Between 1970 and 1976, the me-

ary Zoning: Bootstrapping Low and Moderate Income Housing by Local Government, 5 URB. L. & POL'Y 169 (1982).

78. The following discussion on filtering follows closely the discussion of the same issue in the author's book, A. MALLACH, *supra* note 7, at 39-45.

79. By definition, there is an income level below which filtering cannot work: The income at which a family cannot afford to pay the rent needed to cover exclusively the utilities, operation and maintenance of a fully amortized building. Such families need subsidization by any standard. In theory, however, filtering should be capable of assisting all households above this minimal threshold.

80. PRESIDENT'S COMM'N, *supra* note 17, at 8.

81. *Id.* at 4-6.

dian rent paid as a percentage of household income in the New York metropolitan area increased from twenty percent to twenty-six percent.⁸² By 1976 fifty percent of renter households in central cities were spending more than a quarter of their income for rent, substantially more than in either suburban or rural areas.⁸³

The problem of excessive cost burden, which is best addressed by a program of transfer payments of some kind, is not the most serious imperfection in the filtering process. A more serious problem is that of the increasing geographic and economic segmentation of the housing market and the resulting segregation and isolation of the lower income population. Not all older housing filters down. In areas of strong housing demand, existing housing appreciates, often at levels comparable to or greater than new housing. As a result, the price of existing housing does not decline consistently relative to new housing as would be the case in a "pure" filtering process, and in many cases is more expensive than new housing. An example of this can be seen in the price trends of existing and new single family homes in the western United States, the area where arguably the greatest housing demand pressures have existed during the past decade. As Table 3 illustrates, the cost of existing housing has increased substantially more than the price of new houses built during the same period. The price of new houses increased at a faster rate in the West than in any other region of the United States during this period, reinforcing the point made earlier with regard to the close relationship between the existing house market and the price of new housing.⁸⁴

82. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, AND U.S. DEP'T OF HOUS. & URBAN DEV., ANNUAL HOUSING SURVEY: 1976, NEW YORK, N.Y. SMSA A-06 (1978) [hereinafter cited as ANNUAL HOUSING SURVEY].

83. G. STERNLIEB & J. HUGHES, AMERICA'S HOUSING: PROSPECTS AND PROBLEMS 85 (1980). The situation is continuing to worsen. Between 1975 and 1983 the number of renters spending over 30% of gross income for rent rose from 6.2 million to 9.8 million households. ANNUAL HOUSING SURVEY, *supra* note 82 (1975 and 1983).

84. During the period from 1972 to 1982, comparable increases in new house prices were 136% in the Midwest, 149% in the Northeast, and 156% in the South. STATISTICAL ABSTRACT, *supra* note 38, Table 1305, at 729.

 TABLE 3: COMPARATIVE PRICE TRENDS FOR EXISTING AND NEW HOUSES IN WESTERN UNITED STATES⁸⁵

YEAR	EXISTING HOUSES [MEDIAN PRICE]	NEW HOUSES [MEDIAN PRICE]	PRICE RATIO [EXISTING/NEW]
1972	\$28,400	\$27,500	1.03 to 1
1977	57,300	53,500	1.07 to 1
1982	98,900	75,000	1.32 to 1
INCREASE 1972-1982	+ 248%	+ 173%	

In areas of strong demand, where in-migration has been triggered typically by an increase in employment opportunities, proportionately less housing is likely to filter down to the lower income population. Reliance on filtering, therefore, effectively may exclude the poor from the regions where the greatest opportunities for upward mobility exist, or at best, enable them to live in those regions only at the price of accepting even more burdensome costs and more severe housing deficiencies.

The gross disparities between regions of the nation, such as between the Northeast and the Southwest, are exacerbated by the disparities within metropolitan areas. As employment opportunities and economic growth suburbanize, the central cities, notwithstanding their pockets of gentrification, have become a progressively greater repository of lower income households as the poor have found themselves priced out of housing opportunities outside the central cities. Table 4 illustrates the income distribution trend in three metropolitan areas during the 1970's. It graphically demonstrates the extent to which economic segregation is increasing in the nation's metropolitan areas. This is directly related to the reliance on filtering as the means of providing affordable housing to the less affluent. Although filtering may provide lower income families with housing in central cities, it does not provide them with housing in the suburbs, where the overwhelming majority of new jobs are being created.⁸⁶ Finally, segregation is more a social than an economic concern. One can acknowledge that racial and

85. STATISTICAL ABSTRACT, *supra* note 38, Tables 1305-06, at 729.

86. As this author has written:

Excessive reliance on filtering as the means by which housing will be provided to less affluent households reinforces existing disparities between urban and suburban areas and between areas of economic growth and stagnation, both on a national scale and within the different regions of the United States. If the exacerbation of these disparities is considered contrary to sound social policy, then sound policy

economic segregation is endemic in American society and that even among advocates of integration, there is considerable debate about the scale, or "grain," of desirable integration.⁸⁷ To do so, however, does not mean that the objective of at least some reasonable level of integration should be abandoned as a matter of social policy. Reliance on filtering, for the reasons outlined above, does just that.

TABLE 4: MEDIAN HOUSEHOLD INCOME TRENDS FOR OWNERS AND RENTERS BY CENTRAL CITY/SUBURBAN RESIDENCE⁸⁸

	HOMEOWNERS			RENTERS		
	CITY	SUBURBAN	RATIO/1	CITY	SUBURBAN	RATIO/1
NEW YORK, NEW YORK						
1970	\$11,700	\$14,000	.84	\$7,200	\$ 8,800	.82
1976	16,500	21,700	.77	8,900	11,600	.77
Change in constant dollars:						
	- 4.8%	+ 4.6%		- 16.6%	- 11.1%	
BALTIMORE, MARYLAND						
1970	\$ 9,500	\$12,300	.77	\$5,900	\$ 8,700	.68
1976	13,400	20,200	.66	7,600	12,200	.62
Change in constant dollars:						
	- 5.1%	+ 10.5%		- 13.3%	- 5.6%	
NEWARK, NEW JERSEY						
1970	\$ 9,800	\$13,700	.72	\$5,900	\$ 8,500	.69
1976	13,000	22,200	.59	6,300	11,400	.55
Change in constant dollars:						
	- 14.9%	+ 3.9%		- 31.5%	- 14.0%	

1/Central city median income expressed as a percentage of suburban median income within the same metropolitan area.

cannot rely beyond a certain limited point on filtering as the means of providing low and moderate income housing.

A. MALLACH, *supra* note 7, at 42.

This trend may have been exacerbated by the pattern of concentrating subsidized housing in urban areas, at least partly as a result of exclusionary zoning. It is doubtful, however, that the volume of such housing is adequate to affect significantly the overall trend shown here.

87. See, e.g., A. MALLACH, *supra* note 7, at 43-45; Ellickson, *supra* note 50, at 1198-1202.

88. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS AND U.S. DEP'T OF HOUS. & URBAN DEV., ANNUAL HOUSING SURVEY: 1976, NEW YORK, N.Y. SMSA (Current Housing Reports H-170-76,53); ANNUAL HOUSING SURVEY: 1977, NEWARK, N.J. SMSA (Current Housing Reports H-170-77-10); Constant dollar adjustment based

To the extent that deregulation is capable of achieving the most ambitious objectives of its advocates and generate a significant increase in both the overall volume of housing production and the affordability of the units that are produced, it is likely to result in some increase in efficiency of the filtering process. Given the limitations of deregulation as a strategy for significant change in housing production, any plausible improvements in filtering are likely to be marginal. Under these circumstances, arguments that the interaction of deregulation and filtering is capable of adequately addressing the housing needs of America's poor are irresponsible. The preoccupation of some free market advocates with the injustice done by regulation to landowners and developers appears largely to preclude concern on their part for the more severe injustices done the poor through the absence of a sound housing policy.

IV. HOUSING THE POOR IN THE 1980'S: THE ROLE OF INCLUSIONARY HOUSING PROGRAMS IN A SOUND HOUSING POLICY

The 1980's have not been good years for low income housing. The Reagan administration effectively has eliminated low income housing production programs while offering no more than a symbolic and penurious housing voucher program in their place. Deregulation, the panacea promoted by HUD through the Joint Venture for Affordable Housing, has not been intended to benefit the poor. The affordability crisis, which grew steadily during the 1970's, shows no sign of abatement, and homelessness, until recently an isolated phenomenon, has become widespread.⁸⁹

These conditions undoubtedly reflect the reality of the political climate of the 1980's and the widespread lack of interest on the part of the well-housed majority to the housing needs of the poor. The continued existence and exacerbation of the problem, however, dictate that it be addressed. Given an administration preoccupied with reducing re-

on Consumer Price Index by region, *STATISTICAL ABSTRACT*, *supra* note 38, Table 794 at 478.

89. A further indication of the exacerbation of the housing affordability problem is the dramatic increase between 1970 and 1980 in adult children living with their parents. The number of children aged 18 to 24 living at home increased from 10.6 million to 15.5 million (+46%), and those aged 25 to 34 living at home increased from 2 million to 4.2 million (+110%). Census Bureau study reported in *New York Times*, November 4, 1985.

sources for all domestic programs, massive deficits, and an apparent political consensus against raising federal taxes, no meaningful federal housing initiatives can be expected at least until the end of the Reagan presidency. This conclusion applies to housing voucher or income transfer programs as well as to housing production efforts. Although the former may be more politically acceptable at the moment, the fiscal priorities of the administration make the implementation of either program equally unlikely.

It is in this setting that inclusionary housing programs become such an important potential resource for housing the poor. While inclusionary programs were in use before the disappearance of federal subsidy funds and in some cases were enacted as a vehicle to facilitate use of such funds,⁹⁰ the loss of those subsidies has made the resource represented by inclusionary programs that much more significant.

An inclusionary housing program is one in which low and moderate income housing is provided as a direct outgrowth of the production of housing for the marketplace. Developers are offered incentives to provide, or more often are required to provide as a condition of approval, some number or percentage of lower income units in their developments. The percentage of lower income units typically ranges between ten percent and twenty-five percent.⁹¹ Variations on the basic inclusionary program model include programs in which developers are offered the opportunity to build the lower income units on another site from

90. Among early inclusionary programs, both those of Fairfax County, Virginia, and Los Angeles, California, were designed to provide a means for targeting federal housing subsidy funds. See Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 U.C.L.A. L. REV. 1432, 1439-40, 1446-47 (1974).

91. A survey of California inclusionary housing programs showed the following percentage distribution of lower income housing goals, as a percentage of total units in the development:

<u>Lower Income Housing</u>	<u>Total Units</u>
10%	26%
15%	16%
20%	10%
25%	10%
variable between 10% and 20%	19%
variable/negotiated	19%

A. MALLACH, *supra* note 7, at 215 (adapted from author's original work). For a discussion of aberrant ordinances requiring much lower or much higher percentages of lower income units, see *id.* at 107-08.

the market units or permitted to make a contribution to a housing fund in lieu of constructing the lower income units directly.⁹² Although inclusionary housing programs are not a panacea and are not a substitute for the failure of the public sector to allocate resources to lower income housing needs, they represent the most effective way currently available to provide lower income housing. Furthermore, they are capable of providing such housing in a way consistent with other sound social and economic policies.

The provision of lower income housing through inclusionary programs is linked directly to the satisfaction of market demand for housing. That, in turn, will take place largely in areas where such demand exists by virtue of economic growth or similar factors on the one hand, and adequate public community services on the other. Thus, the lower income units created in this way are likely to provide opportunities for economic advancement and upward mobility for their occupants as well as a quality of life far beyond that is provided by physically comparable units in inner city neighborhoods. In the process, a beneficial level of economic and racial integration also can be achieved.⁹³

Granting that benefits flow from inclusionary programs, at least to those lower income households who thereby receive housing,⁹⁴ it also must be recognized that there are costs. Much of the opposition to inclusionary programs has come from those who consider the costs either unreasonable or unfairly distributed. In most inclusionary programs, particularly those implemented in New Jersey in the wake of the *Mount Laurel* decision, there is little question that at least some of the required lower income units are not economically self-sustaining; they cannot be sold for a price that covers the developer's costs.

92. For more detailed information, see *id.* at 11-21 (general description of programs), 107-22 (program and ordinance features), and 166-90 (housing trust funds and contributions).

93. The level of integration in inclusionary programs, particularly when the housing developments subject to the inclusionary ordinance are large-scale ones, is more characteristic of the "community" or "neighborhood" level of integration advocated by Gans and Downs, than the more problematic "block" level. See H. GANS, *THE LEVITTOWNERS* 173 (1967); A. DOWNS, *supra* note 5, at 109-11; see also Ellickson, *supra* note 50, at 1201 (commentary on Gans and Downs). In an inclusionary development such as The Hills, in Bedminster, New Jersey, the lower income units are a separate, but integrated, cluster of 260 units, in a development containing 1287 total housing units.

94. The net benefit of inclusionary programs to the lower income population is questioned by Ellickson, *supra* note 50, at 1203-04. But see A. MALLACH, *supra* note 7, at 39-40. How effective one considers the filtering process to be has a substantial bearing on one's evaluation of this question.

To determine, however, who bears those costs is a complex and highly variable matter. To assert that the developer must therefore reduce his profit or, in the alternative, pass the cost on to the buyers of market units is simplistic. Indeed, Ellickson argues that in many cases, the landowner will end up bearing much of the cost in the form of a reduction in land value on his property.⁹⁵ Where Ellickson errs, however, is in suggesting that such an outcome is necessarily unfair or unreasonable. Indeed, it generally is recognized that government can and does affect land values in the interest of public policy. The broad discretion permitted in this area, short of a taking, has been affirmed by a long line of cases throughout the modern history of land use law.⁹⁶

Beyond that, there is the underlying issue that value both is created and removed by public action and rarely by the landowner.⁹⁷ The degree to which many commentators are upset by the unfairness of the distribution of the costs of inclusionary housing programs appears to be vastly out of proportion to the dimensions of the issue. Indeed, from an economic standpoint, the imposition of an inclusionary requirement readily can be compared either to the downzoning of land, as Hagman does, or to the imposition of an exaction. It has become

95. Ellickson, *supra* note 50, at 1191.

96. This article will not discuss the taking question. Note, however, the following cases in which governmental regulations were upheld: *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (downzoning); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (landmark preservation); *Golden v. Planning Bd. of Ramapo*, 37 N.Y.S.2d 236, 27 A.D.2d 236 (1971), *appeal dismissed*, 409 U.S. 103 (1971) (timing of growth). Obviously, however, there may be a point at which regulation does become a taking. One commentator has noted that “[b]y far the most intractable constitutional property issue is whether certain governmental actions take property without satisfying the constitutional requirements of due process and just compensation.” Rose & Mahon, *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 561 (1984).

97. One commentator writes:

It is not unfair to make the landowner pay because the value in her land is the result of the community action, not her own action. While the zoning and other land use controls can either prevent or allow demand to find a supply on a particular site, they do not create the demand (except indirectly by suppressing supply elsewhere). Therefore, if the community wants to take back some of the increase in value from the landowner on whom it conferred the value, it is fair to do so.

If landowners are treated unfairly, there is a lot of it going around. The community may downzone property for a number of purposes—to preserve a wetland, for example. That is just as unfair to a particular landowner as imposing an inclusionary zoning requirement. And if downzoning to provide a place where frogs can croak and birds can chirp is in the public interest, it should be equally possible to downzone a place so that low- and moderate-income persons can there sing.

Hagman, *supra* note 77, at 174-75.

customary throughout the United States for developers to bear the brunt of the costs associated with providing their sites with infrastructure as well as providing improvements to mitigate the impacts of the development on adjacent lands. The provision of additional public facilities by developers, such as parks, school sites, firehouses and the like, is also widespread. Such costs routinely are seen as the normal costs of doing business. If they can be absorbed within what the developer considers reasonable selling prices for his units, the project is likely to take place. If they cannot, the project will not begin. Three interrelated factors will be evaluated by the developer: (1) land price; (2) development costs and profit expectations; and (3) the likely market value of the product. Imposing an inclusionary housing requirement involves no more than an arithmetical adjustment and changes neither the fundamental underlying relationship nor the decision-making process of a rational developer.

Inclusionary programs represent a rational use of resources from another standpoint. The subsidy costs of lower income housing built through inclusionary programs are likely to be far closer to the value of the benefits obtained by their lower income occupants than recently has been the case with regard to federal subsidy programs. There is no question that many federal housing subsidy programs, particularly the Section 8 New Construction program, were extremely expensive ways to provide lower income housing.⁹⁸ Despite occasional HUD efforts at cost containment, the interplay of unjustifiably high project costs with a tax and financial structure that encouraged developers to maximize rather than minimize costs consistently resulted in taxpayers' money subsidizing developers to the same or greater extent than it was subsidizing the poor.⁹⁹

By contrast, in an inclusionary program it is the developer rather than the public sector who has the responsibility to ensure that the unit meets the affordability target of the program. Even if the developer is receiving some outside assistance in the form of tax-exempt financing or waivers of cost-generating regulatory provisions, the developer re-

98. For a discussion of the costs associated with the Section 8 New Construction programs, see PRESIDENT'S COMM'N, *supra* note 17, at 12-14; A. MALLACH, *supra* note 7, at 48-50.

99. Among the incentives to developers to maximize project costs were the tax shelter opportunities available through the construction of lower income housing. Because the value of the tax shelter was directly proportionate to total project cost and the lion's share of the developer's profits were derived from those shelters, any rational § 8 developer had a direct and compelling incentive to maximize project costs.

tains the ultimate subsidy obligation that can only be increased by failure to build as efficiently as possible.¹⁰⁰ This means that any rational developer will be strongly motivated to provide the required lower income units in the most efficient manner and take full advantage of cost-saving alternatives in site development and construction.

A corollary to this point is that if and when the federal government takes a fresh look at the area of subsidized housing production programs, linking such a program with inclusionary programs would make possible a far more efficient use of federal housing subsidy funds. Such a linkage might well reduce the cost to the federal government of subsidizing new housing units below that associated with housing vouchers and similar income transfer programs. A program such as the Section 17 or Housing Development Action Grant program, which provided capital grants up to fifty percent of project development cost for mixed-income rentals housing,¹⁰¹ could readily be integrated with an inclusionary program model.

Considerable experience has shown already that currently available federal, state and local resources can be linked effectively to inclusionary housing programs to increase the level of benefit to the lower income population and if necessary, reduce the scale of developer subsidy required. The most successful inclusionary programs, such as those of Montgomery County, Maryland, and Orange County, California, have provided various form of assistance to participating developers.¹⁰² Among the forms of assistance provided by different local jurisdictions have been tax-exempt bond financing, use of federal Community Development Block Grant funds, modification of zoning standards, waiver of cost-generating regulatory provisions, sale or lease of publicly-owned land, expedited development processing, tax abatement and use of municipally-raised funds.¹⁰³

For the foregoing reasons, there is increasing evidence that inclusionary housing programs are an effective way of delivering substantial numbers of lower income housing units. Furthermore, when such pro-

100. The losses associated with subsidizing lower income units in an inclusionary development are not deductible as a charitable contribution by the developer because they are a condition of development.

101. 42 U.S.C.A. § 1436o. The program standards required that a minimum of 20% of the units in any development funded under the program be affordable to § 8 eligible households. *Id.* at § 1437o(d)(4)(E).

102. A. MALLACH, *supra* note 7, at 124-25.

103. *See generally id.* at 118-22.

grams are combined with reasonable regulatory behavior by local government, they can be implemented without significant detriment either to the developer or to the consumer of the market units in the inclusionary development. Well before the *Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*¹⁰⁴ decision made inclusionary programs a central element of New Jersey's land use scheme, the effectiveness of inclusionary programs had been demonstrated in such jurisdictions as Orange County, California and Montgomery County, Maryland. By 1983, each of these programs had resulted in over 2000 occupied lower income units as well as some 4000 to 5000 additional committed units in the development pipeline.¹⁰⁵ Although these two counties might be considered the leading jurisdictions in this regard, similar programs, many of them quite effective, were in place in a large number of other communities around the country.¹⁰⁶

During the past two years, however, the State of New Jersey has been the center of attention with regard to inclusionary programs, as a result of the New Jersey Supreme Court's 1983 *Mount Laurel II* decision.¹⁰⁷ Although the court did not require municipalities to enact inclusionary programs to meet their constitutional obligations, it came close by holding that "[a] more effective inclusionary device that municipalities must use if they cannot otherwise meet their fair share obligations is the mandatory set-aside".¹⁰⁸ Since *Mount Laurel II*, in addition to the inclusionary programs established in New Jersey by the Pinelands Commission¹⁰⁹ and under the Coastal Area Facilities Review Act,¹¹⁰ at least forty municipalities known to the author have established inclusionary programs, either as a voluntary response to the mandate of the Supreme Court or as settlement of pending exclusion-

104. 92 N.J. 158, 456 A.2d 390 (1983).

105. *Id.* A. MALLACH, *supra* note 67, at 210, 219-20.

106. *See generally id.* at 201-24.

107. 92 N.J. 158, 456 A.2d 390 (1983).

108. 92 N.J. at 267, 456 A.2d at 446.

109. NEW JERSEY PINELANDS COMM'N, COMPREHENSIVE MANAGEMENT PLAN, §§ 6-1201, 6-1202 (1980).

110. DIVISION OF COASTAL RESOURCES, N.J. DEP'T OF ENVTL. PROTECTION, COASTAL RESOURCE AND DEVELOPMENT POLICIES §§ 7E-1.1 to 3.3 (1982). The imposition of inclusionary requirements by the Division was upheld by the courts. *In Re Egg Harbor Associates*, 185 N.J. Super. 507, 449 A.2d 1324 (App. Div. 1982), *aff'd*, 94 N.J. 358, 464 A.2d 1115 (1983). *See* Mallach, *Atlantic City, The Casinos, and the Mount Laurel II Decision*, 15 RUTGERS L.J. 695, 705-12 (1984).

ary zoning litigation.¹¹¹

Although development of low and moderate income housing after the decision has not taken place as expeditiously as many housing advocates had hoped,¹¹² by mid-1985 it had become clear that inclusionary housing programs could be expected to yield a substantial number of units in communities representing a cross-section of American suburbia, from elite enclaves to communities of modest and middle income character. The first project built under the *Mount Laurel II* standards, 260 lower income limited-equity condominium units within a 1287 unit planned development in Bedminster Township, was completed and the units sold to low and moderate income buyers for prices between \$27,000 and \$33,000 for the low income units and \$47,000 to \$55,000 for the moderate income units.¹¹³

Bedminster is an elite community. The most expensive market units in the same development sold for prices up to \$250,000. At the same time, the largest volume builder of "affordable" multifamily housing in New Jersey, who produces market housing at prices between \$62,000 and \$77,000,¹¹⁴ became actively involved in the construction of inclusionary developments. By late 1985 this one developer had projects under construction that contained lower income units in six different municipalities around the state.¹¹⁵ In contrast to the Bedminster project, the majority of these projects were in communities where homebuyers could not be expected to pay a premium for the market units in the development.

Given the gradual and cumulative nature of the *Mount Laurel* process, these initial developments are likely to be no more than the tip of the inclusionary iceberg. Based on an informal tally, between twenty

111. This is based on communities of which the author has direct knowledge. It is by no means a complete tally of all such ordinances that may have been adopted.

112. The process of resolving exclusionary zoning litigation, which the *Mount Laurel II* court sought to expedite, has nonetheless been a far slower one than anticipated. The special judges assigned to try such cases were not appointed until the fall of 1983 and, in any event, the nature of the judicial process is such that it cannot be expedited. Furthermore, most municipalities subject to *Mount Laurel II* refused to voluntarily conform their ordinances to the standards set forth in the decision, preferring to wait until compelled to do so as a result of litigation.

113. For a detailed description of this project, see A. MALLACH, *supra* note 7, at 237-51

114. Communication from Donald Daines, Esq., Legal Counsel, K. Hovnanian Companies of New Jersey, Inc., to author (Dec., 1984).

115. *Id.*

and thirty inclusionary developments are in the development "pipeline," with applications being prepared or pending before local planning boards.¹¹⁶

It must be emphasized that, under the New Jersey Supreme Court's guidelines, all of the lower income units included in these developments will be affordable to the poor. Furthermore, in nearly all cases mentioned above, fifty percent of the setaside units will be affordable to households characterized by HUD as "very low income", earning fifty percent of the area median income or less. These units are to be affordable to households with incomes between \$10,000 and \$15,000. This is in marked contrast to many of the California programs, which have been criticized for directing their attention principally to the middle class.¹¹⁷ It should be noted, however, that the New Jersey program with the lowest reach of which the author is aware establishes the minimum income for eligible households at thirty percent of the area median.¹¹⁸ In the absence of outside subsidies, it appears likely that none of these programs will provide the deep subsidy needed to reach the very poor, such as that provided under the Section 8 program.

116. Because no formal survey has been made, a few examples may be instructive. One of the smaller projects was described as follows:

[The developer] plans to build 275 condominiums there, mostly expensive town house units. The town houses will have greenhouses, glass-enclosed breakfast rooms, nine foot ceilings, marble foyers and grand open stairways. There will be both duplex and ranch models, some as large as 2,500 square feet, and they will cost from \$175,000 to \$400,000 . . . 63 apartments—more than 20 percent of the overall total of units—will be priced from about \$28,000 to \$50,000 so that families with smaller incomes can afford them.

N.Y. Times, Oct. 27, 1985, (Real Estate Section), at 10.

In the same community, Morris Township, a second application that will contain 70 lower income units, already has been filed with the Planning Board. Telephone interview with Guliet Hirsch, Esq. (Sept. 1985). The developers of the Bedminster project described above will file plans for the next phase of that development (which will include 180 lower income units) within the next six months. Telephone interview with John Kerwin, President, The Hills Development Co. (Aug., 1985). At the same time, in another less affluent community, a development application is being prepared for a 10,260 unit complex, 10% of which will be low and moderate income units. Telephone interview with Eric Neisser, Esq. (Oct. 1985).

117. See Ellickson, *supra* note 50, at 1192-93. In fairness, it should be pointed out that a number of the California communities that can be so characterized had simultaneous programs to utilize § 8 funds to construct new housing for the low income population. Although some of these programs, notably that of Irvine, California, integrated the § 8 units with market rate housing, the programs were not characterized explicitly as inclusionary programs.

118. PRINCETON, N.J., HOUSING BOARD RULES AND REGULATIONS, § 1.2 (1985).

Although in scattered cases New Jersey municipalities have provided explicit incentives for developers, such cases tend to be the exceptions to the rule. In general, developers have found that when an adequate density of development is permitted and when specific development standards are reasonable and free of unreasonably cost-generating provisions, a substantial number of truly lower income units can be incorporated within the development without unreasonable burden to the developer or to the consumer of the market units. In this respect, the *Mount Laurel II* court emphasized the following: "Thus, to the extent necessary to meet their prospective fair share and provide for their indigenous poor (and, in some cases, a portion of the region's poor), municipalities must remove zoning and subdivision restrictions and exactions that are not necessary to protect health and safety."¹¹⁹

The effect of the *Mount Laurel II* decision, therefore, along with the imposition of inclusionary requirements, has been to bring about substantial deregulation, at least with respect to those developments that are to include a setaside of lower income housing units.¹²⁰ Unlike the "petty deregulation" described earlier, the scale of the deregulation involved in many of these cases has been substantial, making possible fundamental changes in the magnitude and the character of the proposed developments. The effect of that deregulation, in turn, has been to create the economic means for the internal subsidization of the lower income units by the developer, a level of subsidization that is often substantial.¹²¹ Furthermore, although one cannot say with any certainty that none of those costs are passed on to the consumers of the market rate units, the fact remains that in many communities, the market rate units, even with any costs passed on, still will be substantially less expensive than any other new housing previously built in those communities.

In essence, a substantial feature of the successful inclusionary hous-

119. 92 N.J. 158, 259, 456 A.2d 390, 441 (1983).

120. The *Mount Laurel II* decision makes clear, however, that deregulation is required only to the extent that it is necessary to create the framework for addressing the municipality's low and moderate income housing obligation. The court states that "[m]unicipalities may continue to reserve areas for upper income housing, may continue to require certain community amenities in certain areas, may continue to zone with some regard to their fiscal obligations: they may do all of this, provided that they have otherwise complied with their *Mount Laurel* obligations". 92 N.J. at 260, 456 A.2d at 442.

121. One developer was quoted as estimating that the per unit loss on the lower income units would be \$25,000. N.Y. Times, Oct. 27, 1985, (Real Estate Section), at 10.

ing programs in New Jersey under *Mount Laurel* is that lower income housing is created through the recapture of a share of the benefits of deregulation. It seems clear that the increase in the number of units and the cost savings resulting from changes in regulatory standards has consistently created massive incremental profits for the developers. Even after the recapture represented by the subsidy costs associated with the lower income housing, the profitability of these developments still remains more than adequate to justify their construction.

A further conclusion from the New Jersey experience is that substantial land use deregulation is fully compatible with the imposition of a mandatory lower income housing setaside as a condition of approval. This conclusion is consistent with a rational perspective on the subject of land use deregulation. In the final analysis, there can be no such thing as "pure" deregulation. Except to those whose ideological blinders make it impossible to accept any regulation and who seek to return to some mythical past of unbridled laissez-faire, the test of a regulation is rationality: Does it further a legitimate social objective and does it do so in a manner that is efficient in its use of resources to achieve that objective and is without disproportionate negative second-order consequences? This author would argue that those tests are readily met by what can be characterized as the New Jersey model of the inclusionary housing program. The lower income units being built today, and likely to be built during the coming years as a result of this model, will contribute significantly to meeting the housing needs of New Jersey's poor.

Finally, the success of the New Jersey model raises serious questions about the credibility of the entire deregulation movement, at least with regard to its advocates in the Reagan administration and the NAHB. It also confirms many of the doubts expressed earlier in this article with regard to the ultimate consumer benefit that can be expected from the movement. Under the approaches being advocated by those bodies, the most significant benefits will accrue to the homebuilding industry rather than to the consuming public. Although it is clearly desirable for the United States to have a profitable homebuilding industry, measures that will increase industry profitability will not necessarily benefit the public as a whole. For the government of the United States to promote the one by claiming that it will accomplish the other is patently irresponsible. For that same government to do so while studiously ignoring the housing needs of the poor is pernicious.

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