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A Positive Response to Growth Control Plans: The Orange County Inclusionary Housing Program

LINDA J. BOZUNG*

Affordable housing programs have been enacted throughout the state in response to the current critical housing shortage. They serve an essential function as an element of community growth control plans. This article focuses on the success of the Orange County affordable housing program. By utilizing a variety of means, such as density bonus plans, flexible regulations, and deed restrictions, the County has developed a plan which is not only successful but may also serve as a model for other local governments.

I. INTRODUCTION

A study of an inclusionary housing program¹ would be incomplete without a brief explanation of its definitional precursor, exclusionary zoning. Exclusionary zoning is the term used by critics of municipal growth control plans to describe the regulations that local governments employ to implement such plans.² Those zoning regulations are said to be exclusionary because, although they direct the development and control the growth of a community, they inevitably create an economic barrier to potential residents. That barrier is created when the zoning regulations limit the amount of land that may be developed within the purview of the growth control plan and there is no concurrent de-

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1. An inclusionary housing program is designed to encourage the provision of low and moderate income housing in a community. Such a program may be either voluntary or mandatory and will often make available bonus density zoning to aid the developer in providing housing in a manner that will allow him/her to make a reasonable profit. A bonus density provision permits the developer to build a greater number of units on the property than ordinarily permitted by the zoning ordinance, thus compensating partially, if not totally, for the loss occasioned by the requirement to build a specific percentage of low and moderate income units. See *infra* notes 47-67 and accompanying text.

2. See, e.g., Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971). See generally Comment, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development*, 26 STAN. L. REV. 585 (1974).

crease in the demand for that land. Prices of these land parcels escalate in response to this supply/demand imbalance³ and are accompanied by a corresponding, if not greater, rise in housing prices.⁴ This increase in the price of housing serves to preclude an entire economic segment of the population from purchasing housing in the area of the plan: that segment is thus "excluded" from the community.⁵ This exclusionary effect of the zoning regulations is viewed, even by apologists for the plans,⁶ as one of their most serious flaws.⁷

Recognizing this flaw, a number of communities have implemented, as an element of their growth control plans, programs

3. It is believed that part of the supply and demand problem in Orange County is induced by a handful of major property owners who deliberately meter the development of their land. Housing Element, Orange County General Plan, at IV-10 (March, 1979) [hereinafter cited as Housing Element].

4. See Comment, *California Lower Income Housing Policy: At Legislative and Judicial Crossroads*, 29 HASTINGS L.J. 793, 793 (1978) [hereinafter cited as *Crossroads*]. The ABA Advisory Commission on Housing and Urban Growth, while recognizing that land use restrictions may have an escalating impact on the cost of housing, found that impact "difficult to isolate or measure." A.B.A. ADVISORY COMMISSION REPORT ON HOUSING AND URBAN GROWTH, HOUSING FOR ALL UNDER LAW 54 n.254 (R. Fishman ed. 1978) [hereinafter cited as A.B.A. REPORT]. But see S. SCHWARTZ & R. JOHNSTON, LOCAL GOVERNMENT INITIATIVES FOR AFFORDABLE HOUSING: AN EVALUATION OF INCLUSIONARY HOUSING PROGRAMS IN CALIFORNIA 5 (In press: Institute of Governmental Affairs, U. C. Davis, Dec., 1981) [hereinafter cited as Schwartz and Johnston]. Although the authors assert that growth restrictions have had an inordinate impact on land costs and, consequently, housing prices, they also attribute the increases to an expansion in the demand for housing. *Id.* at 5-6. This demand is itself aggravated by: 1) a growing number of families in the market for a home due to the baby boom and increased divorce rates, and 2) inflationary pressure that prompts potential buyers to view purchase of a home as an investment. *Id.* Increased interest rates on construction loans and delays inherent in the permit process were also cited as cost accumulators. *Id.* at 6.

5. See *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 429 U.S. 252 (1977); *Constr. Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

6. See generally, Deutsch, *Land Use Growth Controls: A Case Study of San Jose and Livermore, California*, 15 SANTA CLARA L. REV. 1, 38-39 (1974) (hereinafter cited as Deutsch); Hoffman & Killefer, *So You Want To Move To The Suburbs: Policy Formulation and The Constitutionality of Municipal Growth-Restricting Plans*, 3 HASTINGS CONST. L.Q. 803 (1976).

7. Accord, Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509 (1971); Note, *Exclusionary Zoning: The Responsibility of Local Zoning Authority to Non-Resident Indigents*, 23 SYRACUSE L. REV. 774 (1971). Some, however, hastened to note that all zoning is exclusionary in nature and that the primary impetus for formulating the ordinances was the extreme environmental damage, as well as the strain on municipal sources, that was resulting from uncontrolled growth. See Comment, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development* 26 STAN. L. REV. 585, 614 (1974). Cf. Deutsch, *supra* note 6, at 47 (minority groups and the less affluent are excluded even from suburban areas that do not utilize growth control measures; rapid growth engenders cost of living increases which preclude low income individuals from purchasing a home.)

designed to increase the supply of affordable housing in the affected area.⁸ Such programs, and the zoning used to implement them, are labeled "inclusionary"⁹ because, although they coexist in the plan with the (ostensibly) exclusionary regulations, the programs are devised to present all economic groups with a greater opportunity to reside in the community because they encourage the provision of housing for individuals earning low and moderate incomes.¹⁰

Inclusionary housing schemes now abound: formulated not only as a response to the need for a balance between the preservation of the economic and environmental health of the community, and the preservation of the sociological profile of the community, but also as a response to the recognition that the private market alone cannot address the present critical housing deficit.¹¹ As the state of the economy in general, and interest rates in particular, make critical some mandatory form of government involvement in augmenting the supply of affordable housing,¹² inclusionary housing programs have received heightened attention. While much of the commentary has been positive,¹³ some has been quite critical, preferring the theory that growth control plans

8. See generally Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015, 1036-1065 (1976) (hereinafter cited as Fox & Davis); Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low-Cost Housing*, 21 U.C.L.A. L. REV. 1432, 1438-1448 [hereinafter cited as Kleven].

9. The Ninth Circuit Court of Appeals, in *Constr. Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), rejected arguments that the primary purpose and effect of the Petaluma Growth Control Plan was to exclude potential residents, indicating instead that the plan was "inclusionary" in both aspects because it encouraged developers to construct low and moderate income housing by allotting points (a given number of points were necessary to obtain a building permit) for the provision of such housing in a project. *Id.* at 908, n.16.

10. Low income and moderate income have been determined by the Department of Housing and Urban Development as 50-80% of area median income, and 80-120% of area median income, respectively. Affordable housing is usually considered to be priced at a multiple of two and one half times these figures. Strauss & Stegman, *Moderate Cost Housing After Lafayette: A Proposal*, 11 URB. LAW. 209, 212 n.9 (1979) [hereinafter cited as Strauss & Stegman]; see 42 U.S.C. § 1437 (1976). *But see* note 36 *infra*.

11. See Ellickson, *The Irony of "Inclusionary Zoning,"* 54 S. CAL. L. REV. 1167, 1169 (1981) [hereinafter cited as Ellickson].

12. W. SMITH, HOUSING: THE SOCIAL AND ECONOMIC ELEMENTS 10-14, 34-39 (1970), reprinted in HOUSING IN AMERICA: PROBLEMS AND PROSPECTIVES 40 (R. Montgomery and D. Mandelker 1979) (most effective and efficient private housing industry cannot solve current problems without public investment).

13. See Kleven, *supra* note 8, at 1473 (inclusionary schemes yield affordable housing units).

have fostered the exclusionary zoning problem and suggesting that their elimination would result in the elimination of the current housing crisis and likewise the need for inclusionary schemes.¹⁴ In order to accept this hypothesis, however, it is necessary to accept the proposition that the "market" alone can control development in a manner that will protect the myriad of significant community interests and simultaneously render inclusionary schemes unnecessary.¹⁵ There is no indication that the market will in fact operate in this manner, and community development plans that include inclusionary housing programs currently promise a more expedient resolution of the problem. These programs not only facilitate the construction of affordable units, but also represent a long overdue compromise between governments, citizens, and developers interested in protecting both the economic and environmental health of a community without precluding residence in that community to the low and moderate income segments of the population. Inclusionary housing programs, or the more preferable nomenclature, affordable housing programs, are a positive step in the evolution of growth control plans. They offer an effective method for increasing the

14. See Ellickson, *supra* note 11, at 1168; Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 S. CAL. L. REV. 447, 475-77 (1981) [hereinafter cited as Lefcoe]. Cf. S. SCHWARTZ & R. JOHNSTON, *supra* note 4, at 5-6 (developer financing costs, demand factors, speculation, delay, and high rates also major contributors to increased production costs).

15. One commentator still asserts the effectiveness of the "trickle-down" process whereby additional affordable low and moderate income housing is produced through the use and deterioration of higher income conventional housing, which eventually lessens the quality and price of that housing. See Ellickson, *supra* note 11, at 1185. While this process may have been effective and acceptable in a more favorable economic climate, current conditions—primarily due to increasingly escalating interest rates—dictate that homeowners today do not change residences to the extent essential to implement this filtering process. Many families choose to forego a move that might have been commonplace ten years ago due to the necessity of meeting interest payments that may be much higher than the payments for their present housing. In addition, housing prices in the lower ranges have escalated out of the reach of many families. Therefore, even if one assumes the continued viability of the filtering process, the lowest priced homes on the cycle are often inaccessible to moderate income individuals. See *Crossroads*, *supra* note 4, at 811 (private market unable to adequately replace existing stock of low income housing). But cf. Lefcoe, *supra* note 14, at 477 (price of existing stock reflects rise in prices of new units; "inflationary ripple" pervades entire housing market). In addition, the process of gentrification or upgrading of older housing, reduces the number of units available to "filter down" to low and moderate income families. See generally LeGates & Hartman, *Gentrification-Caused Displacement*, 14 URB. LAW. 31 (1982). For an excellent exposition on the inadequacy of the filtering process for producing satisfactory affordable housing through the market mechanism, see Lowry, *Filtering and Housing Standards: A Conceptual Analysis*, 36 LAND ECON. 362 (1980). Finally, in areas such as Orange County, where the housing stock is characteristically of a more recent vintage, the filtering theory may operate even less effectively. Cf. Housing Element, *supra* note 3, at IV-4 (less units available for rehabilitation in incorporated area of Orange County).

affordable housing stock in the community and state,¹⁶ while allowing continued adherence to the goals of environmental and fiscal viability.

Inclusionary housing programs are a reality. The present focus should be upon further refining the programs through careful examination of the successes and failures of the presently operating schemes. Scrutinization as well as proliferation of inclusionary schemes is desirable not only because the schemes promote the community welfare,¹⁷ but also because the state legislature has indicated, through numerous statutory directives, that the housing shortage must be addressed at the local level. For instance, California law dictates that a community must respond to the problem of a present lack of affordable housing.¹⁸ The General Plan required of all local governments must include a Housing Element which catalogues the resources and indicates the means to be used by the locality to make "adequate provision for the housing needs of all economic segments of the community."¹⁹ The goal of this state mandate is to provide a decent home and healthy environment for all,²⁰ to be implemented through the case-law formulated "fair share" concept,²¹ which requires each

16. See Burton, *California Legislature Prohibits Exclusionary Zoning, Mandates Fair Share: Inclusionary Housing Programs A Likely Response*, 9 SAN FERN. L. REV. 19, 31 (1981) [hereinafter cited as Burton].

17. See text accompanying notes 11-16 *supra*.

18. CAL. GOV'T CODE § 65581 (West Supp. 1981).

19. CAL. GOV'T CODE §§ 65300, 65302(c) (West Supp. 1981). The Department of Housing and County Development Guidelines dictate that communities "make a good faith, diligent effort to provide opportunities for and to facilitate the . . . development of an appropriate variety and choice of housing for all economic segments of the community." CAL. ADMIN. CODE tit. 25, R. 6460 (1977).

20. CAL. GOV'T CODE § 65580(a) (West Supp. 1981). See also CAL. HEALTH & SAFETY CODE § 50002 (West Supp. 1981).

21. The concept that a community must accommodate a "fair share" of the low and moderate income citizens in the region originated in *Southern Burlington NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975), when the New Jersey Supreme Court stated that a municipality has an affirmative obligation "to plan and provide, by its land use regulations . . . an appropriate variety and choice of housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries." *Id.* at 179, 336 A.2d at 728. In a concurring opinion, Justice Pashman declared that when a local government engages in the control of land use, it concurrently assumes the responsibility to "act affirmatively to provide its fair share of the low and moderate income housing necessary to meet the regional housing needs." *Id.* at 209, 336 A.2d at 743 (Pashman, J., concurring).

The Supreme Court of California echoed similar sentiments in *Associated Home Builders of Greater East Bay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976) when it demanded that governments adopt a regional,

community to identify and make land available for housing for all levels of income, through affirmative zoning measures or other means.²²

Although some disagreement yet exists as to whether a local government is required to formulate an affirmative program for actually producing the affordable units,²³ Orange County, in recognition of its own severe housing shortage, anticipated the state

rather than merely local, perspective of the general welfare. The effect of an ordinance upon neighboring communities must be considered both by the enacting government and the reviewing court, and that effect must then be weighed against the other competing interests offered as rationales for the restriction. *Id.* at 607, 557 P.2d at 487, 135 Cal. Rptr. at 55. See generally, *Crossroads*, *supra* note 4, at 803-10. It should be noted, however, that the California court did not choose to adopt *Mount Laurel's* shifting of the burden of proof. *Mount Laurel* held that a prima facie showing of a lack of adequate housing opportunities is sufficient to invalidate a challenged ordinance unless the local government comes forward with evidence indicating that it is a permissible exercise of the police power. 67 N.J. at 180-81, 336 A.2d at 728. *Livermore*, on the other hand, left the burden of proof on the issue of invalidity with the plaintiff challenger, who must show that regional interests are being slighted. The court acknowledged, however, that when an ordinance operates to exclude various segments of the populace and thus impacts on the general welfare of the region, it could be invalidated.

It has been stated that California has legislated the same result as that reached in *Mount Laurel* by establishing a presumption that there will be an impact on the regional housing supply when a government limits the quantity of land available for development. CAL. EVID. CODE § 669.5 (West Supp. 1981). See *Burton*, *supra* note 16, at 23. Eschewing the classic deference to the legislative judgment, the Evidence Code places upon the local government the burden of showing that the ordinance "is necessary for the protection of the public health, safety, or welfare of the population. . . ." CAL. EVID. CODE § 669.5(b) (West Supp. 1981). *Burton* concluded that this provision of the Evidence Code, in conjunction with other legislative housing directives, not only dictates that local governments avoid implementing ordinances that limit the opportunities for low and moderate income housing, but also requires that programs be adopted that affirmatively address present shortages. *Burton*, *supra* note 16, at 24; CAL. GOV'T CODE § 65302.8 (West Supp. 1981).

22. See CAL. GOV'T CODE §§ 65302(c), 65583, 65913.1 (West Supp. 1981); *Burton*, *supra* note 16, at 23-31; *Crossroads*, *supra* note 4, at 793-94. Despite its seemingly lofty goals, the state legislation may be utilized by local governments merely to avoid their responsibility to affirmatively provide affordable housing. See *Lefcoe*, *supra* note 14, at 485. Elaborate studies and plans may be undertaken and prepared, but the ability to exclude will still exist, *id.*, and communities will manipulate the date collected to reach whatever percentage of the "fair share" they would have agreed to accept in the first place. *Id.* at 487. It has also been suggested that the assessment of a community's "fair share" is difficult, if not impossible, and entails the consideration and combination of such diverse factors as: the amount of undeveloped land, present proportion of low and moderate income families, condition of facilities and services, the community's past zoning history, future industrial expansion, current housing prices, forecast of future population, and evaluation of the present and expected number of low and moderate income families in the region. *Id.* at 486-87. See *Rose*, *Fair Share Housing Allocation Plans: Which Formula Will Pacify the Contentious Suburbs*, 12 URB. L. ANN. 3, 7-19 (1976).

23. See *Burton*, *supra* note 16, at 31; *Crossroads*, *supra* note 4, at 798, 799. See generally *Comment*, *California's Housing Element Guidelines and the Housing Crisis*, 10 GOLDEN GATE U.L. REV. 729 (1980) [hereinafter cited as *Crisis*]; L. Hampel, *What Are a City's Legal Responsibilities to Provide for Housing Needs* 5-14

directive and implemented an affordable housing program.²⁴ Although the County is not itself building the units, it has adopted a program that is responsible for the production of affordable housing.²⁵ A significant number of dwelling units have been constructed, and the initial predictions of a cessation of all development²⁶ as a result of the plan has not materialized. New housing is under construction,²⁷ and applications for additional permits are processed regularly.²⁸ In short, the program is not only working, but working well.

The purpose of this article is to present a detailed description of the Orange County Inclusionary Housing Program. Possible legal challenges to the program, already extensively addressed elsewhere,²⁹ will be discussed only when a provision presents a

(1979), reprinted in League of California Cities, Proceedings, City Attorney's Department, Spring Meeting, Monterey (April 25-27, 1979).

24. See Orange County Environmental Management Agency, Principles and Guidelines for an Inclusionary Housing Program, reprinted in Housing Element, Orange County General Plan (March, 1979) [hereinafter cited as County Guidelines].

25. See note 28 *infra*.

26. See, e.g., Smolker, *Inclusionary Housing, A Wrong Approach*, L.A. Daily J., March 21, 1980, at 4, cols. 4-8 [hereinafter cited as Smolker].

27. The majority of units constructed are condominiums; no single-family detached homes have been built. Schwartz and Johnston, *supra* note 4, at 37.

28. From August 1, 1981 to October 31, 1981, tentative approval by the County was given to 1,549 dwelling units in 14 projects. Thirty-four percent of those units were affordable. Memorandum from Orange County Information & Housing Development Office, Progress Report, Inclusionary Housing Program (December 29, 1981). [hereinafter cited as Progress Report].

29. See, e.g., Fox & Davis, *supra* note 8, at 1029-36; Kleven, *supra* note 8, at 1490-1528; Strauss & Steman, *supra* note 10 at 232-42 (1979); Comment, *Municipalities and The Increasing Need for Low and Moderate Income Housing*, 28 WASH. & LEE L. REV. 408, 414-423 (1971) [hereinafter cited as *Municipalities*].

The most common challenges to a basic inclusionary zoning program (challenges to resale restrictions will be addressed in the discussion of particular elements of the Orange County scheme, see notes 91-110 *infra* and accompanying text) include: 1) whether the ability to enact an inclusionary program is outside the scope of the police power of the local government; and 2) whether there is a violation of the equal protection, taking, or due process clauses.

Although California has impliedly granted the right to local governments to enact an inclusionary housing program, see CAL. GOV'T CODE §§ 65302(c), 65800 (West Supp. 1981), the issue merits discussion because the Supreme Court of Virginia, in Bd. of Supervisors v. DeGroff Enter., 214 Va. 235, 198 S.E.2d 600 (1973), invalidated the Fairfax County scheme, stating that communities did not have the power to enact such legislation. *Id.* at 238, 198 S.E.2d at 602 (localities permitted to enact only "traditional zoning ordinances"). Because of the clear legislative directive to expand the supply of affordable housing throughout the state, a similar challenge would not be successful in California. Ellickson, *supra* note 11, at 1211.

An inclusionary zoning scheme could precipitate an equal protection challenge

unique problem that portends litigation; such discussion will be

in that a developer might argue that the requirement is discriminatory in nature because a specific number of affordable units must be included in his project while other developers, who construct smaller, or different types of projects, or projects in other areas in the community, are not subject to such a restriction. Each of these attacks can be disposed of through arguments citing the distinctions of economic feasibility, changes in economic climate, environmental consequences, as well as the effects and availability of similar housing nearby. These distinctions are reasonable, and the variations in the applicability of the requirements are rationally related to the objective of providing affordable housing. See Fox & Davis, *supra* note 8, at 1032-34; Kleven, *supra* note 8, at 1502.

The most common challenge to an inclusionary program is that the scheme results in a taking without compensation because the developer is being required to dedicate a portion of his property to further the community's health, safety, and welfare. Similar attacks have been made on subdivision exactions, see *Municipalities*, *supra* at 414, and because both levy a form of "tax" on the developer, they can be compared. See Kleven, *supra* note 8, at 1496-1500. Subdivision exactions have been approved in California. The California Supreme Court, in *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), approved the concept of allowing fees in lieu of a dedication for park land based on the "general public need for recreational facilities caused by present and future subdivisions caused by the great growth surge in California and the limited quantity of open space." *Id.* at 648, 484 P.2d at 618, 94 Cal. Rptr. at 642. This recognition that it is reasonable to condition the grant of a permit to build on developer compliance with certain conditions is somewhat broader than had been previously articulated in other states. See, e.g., *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965) (rational nexus required between exaction and need). The California position would, therefore, appear to encompass and validate the exaction required by an inclusionary ordinance. The "general public need" for affordable housing is generated when new, conventionally-priced developments are constructed in an area. The services necessitated by the residents of these developments traditionally employ individuals in the low and moderate income segments of the population. It is thus reasonable to require that housing be provided for these individuals, adjacent to their places of employment, by the builders who helped to create that need. See Fox & Davis, *supra* note 8, at 1032; *Municipalities*, *supra* at 416. But see Kleven, *supra* note 8, at 1498 (causal connection between new development and need for affordable housing not as direct as in traditional subdivision exaction case). One author does not consider the number of low and moderate units produced under an inclusionary housing program to be sufficient to accommodate an increased labor force. Ellickson, *supra* note 11, at 1212. He further posits that communities can refrain from implementing inclusionary programs because workers are "willing" to commute and thus do not need housing proximate to their employment. *Id.* But cf. Smolker, *supra* note 26 (company has vested interest in supply of affordable housing; industry expansion stymied when high prices discourage relocation); Housing Element, *supra* note 3, at IV-6 (75-80% of employees of Orange County businesses cannot afford County housing).

Finally, it has been suggested that because there exists no vested right to develop land, the granting of the permit to develop is sufficient compensation for whatever exactions may be demanded to further the public welfare. See Fox & Davis, *supra* note 8, at 1032; Kleven, *supra* note 8, at 1495 (spillovers created by new development demand imposition of conditions on right to develop); *Municipalities*, *supra* at 417 (exaction is a reasonable requirement that would be a "condition precedent" to allowing subdivision and development). Finally, California law presently does not recognize a diminution in property value as a taking without just compensation, but instead characterizes a loss of "substantially all reasonable use" of the property as a deprivation of due process, which dictates invalidation of the offensive ordinance, not compensation. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979). See Bozung, *Judicially Created Zoning With*

subordinated to an examination and analysis of specific aspects of the plan. The primary objective of this article is to emphasize the success of the Orange County program in anticipation that other governments will choose to adopt a similar plan and that increased attention will assist the County, as well as other cities and counties, in further refinement of the inclusionary housing scheme.

II. THE ORANGE COUNTY INCLUSIONARY HOUSING PROGRAM

Orange County is the second largest county in California, encompassing an area of 786 square miles.³⁰ It is located in Southern California and possesses some of the most popular recreational areas in the state. While experiencing a population explosion similar to that in other desirable areas, Orange County has suffered from what it perceived to be a logical but serious consequence of that growth: a significant increase in the labor force of the County. This increase in the labor force³¹ has not been paralleled by a similar growth in the housing supply. The ratio of new jobs to new homes rose from 2.81 in 1976 to 7.50 in 1979.³² In addition, the cost of that new housing increased by fifty-two percent from 1977-1980,³³ and the number of families that could afford a median priced home in Orange County decreased

Compensation: California's Brief Experiment with Inverse Condemnation, 10 ENV'T'L LAW 67 (1979). *But see* San Diego Gas & Elec. v. City of San Diego, 450 U.S. 621, 646-48 (1981) (Brennan, J., dissenting) (California holding "flatly contradicts clear precedents" of the Supreme Court). Since an inclusionary housing program does not trigger a due process violation until substantially all reasonable use is taken from the property, a challenge under this constitutional banner, due to the profit available on the remaining conventional units, will seldom arise. When it does, a bonus density, *see* notes 47-67 *infra* and accompanying text, will serve to mitigate whatever loss in profit has been occasioned by the restriction. Given the state mandate to encourage the provision of affordable housing, such requirements will also satisfy the rational basis test of due process. Fox & Davis, *supra* note 8, at 1029-31.

30. F. Olson, Orange County's Inclusionary Housing Program 1-2 (October 1, 1980) (unpublished manuscript) (author is manager of the Information & Housing Development Office of the Orange County Environmental Management Agency) [hereinafter cited as Olson]. 366.8 square miles of this area lie in 26 cities.

31. *Id.* at 3. Although population growth averaged only 42,000 per year from 1975-1979, the work force increased by 70,400 annually. *Id.*

32. *Id.* at 9.

33. *Id.* Still, median family income experienced only a 19% increase. *Id.* Even with increasing incomes, the access to better quality housing may be hampered by the immobilities of the market itself. H. PERLOFF & L. WINGO, ISSUES IN URBAN ECONOMICS 423, 425-26 (1968) (comments of A. Downs).

from twenty-nine to twenty percent in the same period.³⁴ In response to what it perceived to be a worsening crisis due to a dearth of affordable housing units, the Board of Supervisors, in January, 1979, adopted an Inclusionary Housing Program as a component of the Housing Element of the General Plan, applicable to the 419.2 square miles of the unincorporated area of the County.³⁵ Designed to increase the supply of housing for low and moderate income households, the Program dictates that each development include twenty-five percent affordable housing.³⁶

The twenty-five percent requirement of affordable housing is divided into three specific categories based upon the median income of Orange County residents: Category I provides that ten percent must be accessible to families earning eighty percent or less of the median income; Category II provides that ten percent must be accessible to families earning from eighty-one to one hundred percent of the median income;³⁷ and Category III pro-

34. Olson, *supra* note 30, at 11. See generally UNITED STATES DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, FINAL REPORT OF THE TASK FORCE ON HOUSING COSTS 2-4, 117-18 (1978). Due to the presence of affordable housing in Riverside and San Bernadino Counties, business relocations threatened the economic health of the county. County of Orange, History, Rationale, Implementation and Alternatives Regarding the Anti-Speculation and Continued Affordability Policies for Affordable Housing 1 (January, 1982) [hereinafter cited as History].

35. Olson, *supra* note 30, at 10.

36. *Id.* "In order to provide for maximum creativity in the building industry and to encourage innovative financing," Orange County defines an affordable unit as one that is actually sold to and will be occupied by a person earning 80%-120% or less of the County median income. County Guidelines, *supra* note 24, at 4. It has been suggested that state law may require the provision of affordable housing coincident with the construction of industrial development. See *Crisis*, *supra* note 23, at 732 n.18 (the author opines that not only zoning, but the issuance of building permits, must be consistent with the General Plan). Because the Housing Element of the General Plan must insure the reservation of land for affordable housing, a grant of a building permit for industrial development would contravene the consistency requirement if it could not be demonstrated that adequate housing would be available for those employed by the enterprise. *Id.*

37. Olson, *supra* note 30, at 17. It is recognized that some form of funding (federal, state, or local) is necessary in order to produce housing for Category I (80% or less of median income level). *Id.* at 17-18. If no funding is available, the amount necessary under Category I is added to the two higher brackets such that the percentage required under Category II is increased to 15% and the percentage required under Category III is increased to 10%. The Housing Coalition of Orange County recently expressed concern over the ability to satisfy the Category I affordability range through additions to the other categories. The Coalition believes that such an allowance results in a minimal number of units available in the 80% median income level and an overabundance of units in the 120% median income range. Memorandum from Revenue Bond Advisory Committee to Housing Coalition of Orange County 2 (February 10, 1982). It is believed that a number of factors have created this problem. For instance, a rise in the prices of homes has occurred because builders are defining affordability based upon what they can afford to build as opposed to what buyers can afford to purchase. Also, the Orange County median income has escalated, causing the affordability range (which is based upon that median income figure) to likewise increase. Finally, because § 8

vides that five percent must be accessible to families earning from 101-120% of the median income.³⁸ The median income for Orange County residents is presently \$29,500.³⁹ The twenty-five percent requirement may be satisfied through a transferable credit system⁴⁰ and will be required only if adequate housing opportunities for such income categories do not exist in the area in which the development is to be built. The County has been divided into twenty eight Community Analysis Areas and some of these areas have been determined to already possess the necessary twenty-five percent housing: builders wishing to locate a project in these regions are exempt from the Inclusionary Program.⁴¹

To avoid various constitutional challenges and assist developers in gaining a reasonable profit, a number of cost-ameliorating features of the Program were formulated. For instance, bonuses are

funding is expected to diminish, builders will forego construction of low income units and will continue to substitute the higher-priced units. *Id.* at 2-3. The Housing Authority recommends the termination of such substitution as well as the elimination of the requirement of the 5% Median II units, believing that housing should be provided only for families in the 80-100% median income range. *Id.* at 3.

38. Rather than attempt to draft a formula to determine the price of the units, the County chose to require only that the units would be considered affordable so long as they were sold to families within the designated income levels. Memorandum from F. Olson, Third Progress Report, Inclusionary Housing Program 1 (March 27, 1980) [hereinafter cited as Third Progress Report]. Steve Mabs, an Associate Planner in Orange County, indicates that the County and developers have been able to arrive at prices that are mutually satisfactory. Interview with Steve Mabs, Associate Planner, Orange County (February 9, 1982) [hereinafter cited as Interview with Steve Mabs]. The County has also issued guidelines that limit the amount of rent or mortgage payments for each of the categories of housing. Rent payments may not exceed: 1) \$515 for low/moderate units, 2) \$770 for Medium I units, and 3) \$925 for Medium II units. These figures include principal, interest, taxes, and insurance and are calculated on the assumption that there will be a 10% down payment. If the down payment exceeds that amount, monthly payments must be correspondingly reduced. County of Orange, Environmental Management Agency, Housing Affordability Table, (effective January, 1981). Payments may also be increased if there are more than two bedrooms, more than 1400 square feet, or if the unit is a single family detached home. *Id.* Yearly income for the three categories may not exceed \$24,625, \$30,780, or \$36,935 respectively. *Id.*

39. Interview with Steve Mabs, *supra* note 38.

40. Interview with Steve Mabs, *supra* note 38. See notes 70-76 *infra* and accompanying text.

41. Olson, *supra* note 30, at 18. If the 10% requirement of low and moderate housing (Category I) is exceeded in a project, the County allows a 1.5 credit for each additional unit to be applied towards meeting the remaining two categories. Information & Housing Development Office, Orange County Environmental Management Agency, Housing Element Consistency Information 1 (report). For instance, if a developer builds 10 extra units of low-moderate income housing, he can apply 15 units (10 x 1.5) to satisfy the percentages demanded in either or both of the other two categories.

given so as to increase the density allowed for each project parcel, standards for development may be waived, and measures calculated to streamline the permit-granting process have been introduced.⁴² Additionally, in order to guarantee that low and moderately priced units are not lost to the County upon resale of the units, deed restrictions have been implemented both to limit the initial owner's ability to gain a windfall profit and to guarantee a continued moderate price.⁴³ The County has also experimented with a number of schemes designed to fund land acquisitions and diminish the burden of mortgage financing, but current economic conditions, the bond market in particular, somewhat hamper the efforts to maintain an affordable price level of the units.⁴⁴ Yet, even in the face of this economic crisis, the Program has yielded commitments to construct 5,057 affordable units thus far, and there are over 800 units currently existing and occupied.⁴⁵ That success is due to the effectiveness of the various features of the Program.⁴⁶

A. Density Bonus

Recognizing that a requirement of twenty five percent affordable housing could engender a claim by a developer that the affected property was being taken for a public use without just compensation,⁴⁷ the County adopted a bonus density plan to facil-

42. A common criticism of any inclusionary housing scheme centers upon the inequity of these provisions since it is believed that they effectively grant a "subsidy" to buyers of affordable homes. See Ellickson, *supra* note 11, at 1173-76. But subsidies of various forms have been available to middle-income buyers for many years. See Silverman, *Subsidizing Tolerance for Open Communities*, 1977 WIS. L. REV. 375, 453-54, 481 (1977) [hereinafter cited as Silverman]; *Crisis*, *supra* note 23, at 735 n.37 (the middle class, not the poor, are the primary beneficiaries of current federal policy; federal tax subsidies for middle and higher income families are "several times" that given low and moderate income families.)

43. Olson, *supra* note 30, at 20-21.

44. Progress Report, *supra* note 28, at 2-3.

45. *Id.* at 1. The Orange County Housing Authority handles all advertising for affordable projects, screens buyers to guarantee that they are income qualified, and administers the resale program. In addition, an arm of the Authority, the Orange County Housing Information Directory (ORCHID), disseminates information on currently available units to prospective buyers, as well as information on prospective buyers and their geographical preference to developers. Minutes of the Orange County Board of Supervisors Meeting 3-4 (November 12, 1980).

46. The County chose to adopt the program as part of the Housing Element of the County General Plan instead of adopting it as a zoning ordinance in the hope that increased flexibility would be possible. Interview with Rhonda M. Evans, Assistant Planner, Environmental Management Agency, Information and Housing Development Office, Orange County (February 6, 1981).

47. See note 29 *supra*. Financial effects of mandatory inclusionary housing programs are normally ameliorated by grants of various forms of compensation to the developer. See Fox & Davis, *supra* note 8, at 1028. For a discussion of various mandatory and voluntary programs, see *id.* at 1036-65.

itate implementation of the mandatory program.⁴⁸ This plan is designed to allow a developer, who is required to include a given percentage of low-cost housing in a project, to diminish the financial detriment that may ensue from that requirement by increasing the density of structures that can be built on the parcel.⁴⁹ In other words, the density bonus allows a builder to construct the same amount of units as originally intended, except that those units can now be placed on a smaller parcel of land.⁵⁰ Land costs are therefore reduced, and the resulting savings can be used to offset any losses occasioned by the inclusionary requirements.⁵¹

There are also benefits, in addition to those accruing to the developer, which derive from an inclusionary housing program that utilizes bonus densities. For instance, it is believed that the dispersal of a limited number of low income units among conventionally priced housing is preferable to past practices, where

48. Olson, *supra* note 30, at 33. See Fox & Davis, *supra* note 8, at 1027. The guidelines dictate that the "[s]tandard density bonus is 10% above the maximum density range allowed by the land use designation or 25% above the zoning, whichever is greater." Resolution of the Board of Supervisors of Orange County, California 5 (February 5, 1980).

49. The density range of the Land Use Element for residential areas is between 6.5 and 12.5 dwelling units per acre. Olson, *supra* note 30, at 36. It is assumed that, given the restrictions imposed by the capacity of the service infrastructure, density will (without a density bonus) vary within this range to average out at approximately 9.5 dwellings units per acre. *Id.* An example of the unit increase achieved through a density bonus is illustrated below:

Land Use Element Range:	6.5 - 12.5 DU*/AC**
Project Area:	10 AC
Developer Expected Approval:	
Without Bonus:	9.5 DU/AC × 10 AC=95 DU with no affordable units
With Bonus:	110% × 12.5 DU/AC=13.75 DU/AC × 10 AC=137 DU with 34 affordable units (137 × .25) and 103 conventionally-priced DU.

*DU=disposable units

**AC=acre

Id. at 37.

50. See Baade, *Required Low-Income Housing in Residential Developments: Constitutional Challenges to a Community Imposed Quota*, 16 ARIZ. L. REV. 439 (1974) (marketability of low-income housing dependent upon some form of subsidy) [hereinafter cited as Baade].

51. See Fox & Davis, *supra* note 8, at 1067 (public housing programs are ineffective in meeting housing problems; private industry may succeed if aided by subsidies.)

developments were either solely conventional or solely low-income.⁵² Research indicates that communities prefer dispersal of the affordable housing among market priced units, as opposed to concentration of the units in exclusively low-income projects.⁵³ In addition, the quality of dwelling maintenance is often higher due to an increased pride of ownership that may be fostered by community identification.⁵⁴ Access to better educational and employment opportunities is also increased,⁵⁵ and the inclusion of low and medium income groups in the community discourages formation of separate societies and lessens divisiveness among economic groups.⁵⁶ Given the current state of the economy, it is equally significant that there is now a larger percentage in the low and moderate income categories who are unable to qualify for home ownership. Many individuals who would previously have been home buyers can no longer afford either the mortgage rates or a down payment. For instance, retirees and young adults comprise two segments of the population often excluded from the housing market due to escalating prices.⁵⁷ The migration of those diverse groups from a region because of prohibitive housing costs only encourages further class and age homogeneity in a community. A bonus density plan, by providing an incentive to builders to construct and disperse moderately-priced units into their housing projects, directly addresses these issues.

In addition to these sociological considerations, better quality construction of the moderate cost units may result when dispersal is effected through use of a bonus density system. Developers may be more likely to build quality housing developments when market and low income units are intermingled than when projects consists only of low income units.⁵⁸

A density bonus plan thus has both social⁵⁹ and financial advan-

52. See Kleven, *supra* note 8 at 1458.

53. Kleven, *supra* note 8, at 1465.

54. Kleven, *supra* note 8, at 1461.

55. *Crossroads*, *supra* note 4, at 794; *Crisis*, *supra* note 23, at 733.

56. *Crossroads*, *supra* note 4, at 793-94. See Silverman, *supra* note 42, at 380-81 & n.10, where the author indicates that the federal tax subsidies to middle-class homeowners were around four times larger in 1974 than subsidies for low income housing. *Id.* at n.10. He also suggests that FHA policies encouraged, if not promoted, the migration of the white middle class to the suburbs and the corresponding class separation that occurred. *Id.* at 380.

57. Baade, *supra* note 50, at 439, 442.

58. *Id.* at 461.

59. See *id.* 50, at 457 (harmful when portion of society lacks option to secure adequate shelter: governmental ability to arrest conditions of poverty impeded); Strauss & Stegman, *supra* note 10, at 233-34 (state objective of providing for a supply of affordable housing reflects belief that healthy housing market decreases crime and unemployment levels and generally promotes welfare of community).

tages.⁶⁰ The community benefits through the construction and dispersal of affordably priced housing, and the developer benefits due to the increased allowable density on the property. While it is not clear whether this bonus is sufficient to totally offset the decrease in profit that may be experienced by the developer when affordable units are included in a project,⁶¹ there are indications that the bonus may significantly reduce, if not eliminate, that loss.⁶² Moreover, the right to develop land has always been a qualified right, with the planning process dictating when and where development will occur. When a local government requires the construction of affordable units as a condition precedent to allowing the development and additionally grants a density increase, a reasonable exchange has taken place between the developer and the community.⁶³

60. The State of California has recognized that meeting the goals of supplying affordable housing and encouraging the dispersal of such units throughout the community is facilitated by a density bonus program. See Burton, *supra* note 16, at 34. The state dictates that when a builder agrees to produce 25% low and moderate income housing, the local government must either grant a 25% bonus density or two other incentives, such as waivers of standards. CAL. GOV'T CODE § 65915 (West Supp. 1981). See 63 Op. Cal. Att'y Gen. 478 (1980); see notes 78-85 *supra* and accompanying text. The Attorney General has determined that the density bonus allowances or waivers of standards do not constitute a "direct financial contribution" that would require the 30-year deed restrictions dictated by the Government Code. 64 Op. Cal. Att'y Gen. 370 (1981). See CAL. GOV'T CODE § 65916 (West Supp. 1981).

61. Even the most generous density bonus may be inadequate given the present cost of some parcels of land.

62. In fact, a study conducted at Stanford University School of Business Administration indicates that a developer can glean a *more* profitable return on investment when an inclusionary housing requirement is coupled with a bonus density option than when he constructs a conventional complex, due to the compensation from the bonus units. See Fox & Davis, *supra* note 8, at 1028; accord Ellickson, *supra* note 11, at 1181. One commentator argues that, at the very least, the profit margin will not diminish. Kleven, *supra* note 8, at 1480. There is some sentiment for the position that the owner of the raw land is the party most likely to suffer economic detriment under an inclusionary housing program, not the developer or the home buyer. Kleven, *supra* note 8, at 1483; Ellickson, *supra* note 11, at 1188. Because the property is undoubtedly zoned for residential uses, the landowner may possess few options for disposal of that land and will be forced to lower its price in order to sell. Kleven, *supra* note 8, at 1483; Ellickson, *supra* note 11, at 1191. For a discussion of the various participants in the development process and the possible effect of inclusionary housing on each, see Schwartz & Johnston, *supra* note 4, at 62-64.

63. See Fox & Davis, *supra* note 8, at 1032 (no viable taking argument exists because there is no vested right to develop; a building permit provides adequate compensation). The process of land use planning allocates a limited resource through the control of the development of land. In Orange County, for instance, the average total valuation of building permits issued between 1975 and 1979 was

Bonus density provisions, however, because they allow greater densities in all residential zones throughout the community, may be perceived as a threat to the achievement of General Plan objectives, such as environmental and open space preservation and adequate maintenance of public services.⁶⁴ Growth in population and increased intensity of development, both logical consequences of a density bonus, may overload community services and impair environmental quality. Although such results may be anticipated, they have not yet occurred in Orange County because most developers have not yet chosen to take advantage of a density bonus.⁶⁵ This allowance of an increase has not been attractive since the densities available under the General Plan adequately accommodate the densities desired by builders in most of the projects recently approved in the County. This fact is not immediately obvious because most developers, prior to the inception of the Inclusionary Program, did not use these higher densities that were permitted under the General Plan but instead built, in response to the market, low density single family projects.⁶⁶ The developed areas of many zoning districts now appear to be low density when in fact they allow a wide range of development concentrations. Because of these higher densities presently available under the General Plan, no compromise of that Plan has yet resulted from the adoption of the Inclusionary Program and density bonus provision. It is possible, however, that the issue may become critical in the future when developers begin to make extensive use of density bonuses. At that point in time, problems posed by unanticipated increases in population and development may occur.⁶⁷

\$1.5 billion. Olson, *supra* note 29, at 5. The developer that consumes land for an economically unbalanced development is also consuming the very resource that must be used to remedy the imbalance. Baade, *supra* note 50, at 458-59.

64. See Ellickson, *supra* note 11, at 1180.

65. Only 11% of the projects approved between February, 1979 and July, 1980 utilized a density bonus to increase the number of units allowable per acre. Olson, *supra* note 30, at 38. The County stresses, however, that it should not be assumed that this practice will continue for the remainder of the Program. *Id.*

66. *Id.* at 36.

67. Even in the situation where a bonus density program is utilized extensively by developers, the criticism that the local government is abandoning its own plan, adopted to promote the health, safety and welfare of the community, lacks merit. A density bonus program, rather than resulting in an abandonment of standards essential for the general welfare of the public, represents a compromise between the critical goals of providing a quality environment and providing housing for all segments of the population. Moreover, the County Density Bonus Guidelines specifically require an evaluation of infrastructure capacity prior to the granting of a density bonus. Resolution of the Board of Supervisors of Orange County, California 4 (February 5, 1980).

B. Flexible Regulation: Waivers of Standards, Process Acceleration, and Program Alternatives

In addition to the allowable bonus density, and in a further effort to guarantee a reasonable profit margin for the developer, the County offers assistance to builders in the form of various waivers of standards ordinarily imposed as a condition precedent to development. The County also offers an accelerated permit process designed to reduce the time and cost involved in gaining ultimate approval of a project.⁶⁸ Finally, under the Orange County program, options, such as transfer of development credits between projects or the dedication of undeveloped land, are available to a developer who does not wish to include affordable units in each project.⁶⁹

The ability to transfer credits reflects the County's belief that complete dispersal (twenty-five percent in each project) of affordable units is not mandatory.⁷⁰ As long as the requisite percentage of low and moderately priced housing exists within each of the twenty-eight designated areas of the unincorporated region, the dispersal is considered sufficient.⁷¹ Credit transfers may thus take place between different owners and developments.⁷² For instance, if one developer chooses to include 50 affordable units in a

68. Olson, *supra* note 30, at 21-22.

69. In-lieu-fees were originally proposed but were abandoned when the State Attorney General determined that, following the passage of Proposition 13, the fees must be treated as a tax and require approval of two-thirds of the county electorate. 62 Op. Cal. Att'y Gen. 673 (1979); Olson, *supra* note 30, at 18.

70. Olson, *supra* note 30, at 19. See Ellickson, *supra* note 11, at 1198-1202 (economic integration is seen not only as inefficient but undesirable if attempted at block or project level).

71. In the initial period from April, 1979 to January, 1981, 34 of the 64 approved projects chose not to locate the affordable units on site. Schwartz & Johnston, *supra* note 4, at 35.

72. Olson, *supra* note 30, at 19. This flexibility within the dispersal parameters may also assist developers in alleviating whatever problems they may perceive due to reluctance to purchase on the part of middle income individuals who may not be comfortable living in a mixed income project. See Kleven, *supra* note 8, at 1473-74. The author suggests that inclusionary ordinances may either hurt the marketability of projects in this manner or hamper financing. *Id.* at 1473. *But see Municipalities*, *supra* note 29, at 419 & n.81, where the author suggests that it is possible to overcome this problem through architectural design. *Id.* at 419. To prove this point the author recounts an instance where residents of a development, upset over the imminent construction of a low income project, met to discuss the issue. They were surprised to discover that their own development possessed units for low and moderate income levels that they had never noticed. *Id.* n.82. Exterior treatment serves to hamper identification of affordable units in nearly all of the interspersed projects in Orange County. Schwartz & Johnston,

100 unit conventionally-priced project (Project #1), he has thereby exceeded the twenty-five percent requirement by 25 units or twenty-five percent. Credit for those excess units can be utilized in another project of that developer, e.g., a 100 unit project (Project #2), which would now not need to include any affordable units because the twenty-five percent requirement was already satisfied in Project #1.⁷³

At present, the County government participates in the credit transfer process only to grant final approval of the transfers as a means of insuring that an undue concentration of the affordable units is avoided in each of the designated areas.⁷⁴ The County has not chosen to intervene as a "broker" to buy and sell the credits in order to maintain a market for them by controlling the supply and demand.⁷⁵ The County has not intervened in this manner because it believes that the transfer of credits should be implemented by the private sector. In addition, the credits are currently in great demand, and their prices adequately reflect the present value of the transfer.⁷⁶

While the option to donate land to the County instead of building the affordable units is possible, no developer has chosen to satisfy the requirement in that manner.⁷⁷ The high cost of land has been cited as a possible reason for this response.

The County not only grants waivers of various development standards on a case-by-case basis, but it also exempts all projects from certain requirements following an appropriate analysis of the possible ramifications of such action. The County has an ongoing evaluation process to determine those standards which, if eased or eliminated, will have the greatest potential for reducing a developer's costs without causing major health and safety consequences.⁷⁸ With respect to case-by-case waivers, the County has, in various combinations, reduced the number of required

supra note 4, at 38. When necessary, landscaping and characteristics of the natural terrain are used to separate the conventional from the affordable units. *Id.*

73. *Id.* As of December, 1981, 45 projects have been granted transfers of credit. Progress Report, *supra* note 28, at 1.

74. Transfer approval is also contingent upon location of affordable units in close proximity to jobs, public transportation, shopping, and other community services. Resolution of the Board of Supervisors of Orange County, California 3 (December 12, 1979).

75. See Comment, *Land Use Planning In the Coastal Zone: Protecting A Sensitive Ecosystem With Transferable Development Credits*, 21 SANTA CLARA L. REV. 439, 468 (1981).

76. There exists some concern that, due to various incentives such as the available funding, the present success of the Program may dissipate somewhat as developers accumulate credits and discharge their obligation. See Schwartz & Johnston, *supra* note 4, at 47.

77. Olson, *supra* note 30, at 18-19.

78. Third Progress Report, *supra* note 38, at 3.

parking spaces, eliminated the carport requirement, modified building setbacks, and amended recreational facilities requirements.⁷⁹ As of December, 1981, out of a total of fifty-one projects with on-site affordable units, thirty-two projects had received an accommodation or elimination of at least one development standard.⁸⁰

In addition to those modifications, the County is also experimenting with methods that will shorten the time necessary to obtain a building permit. One such scheme implements a rather innovative and accelerated process where a coordinator shepherds the project through the various administrative obstacles.⁸¹ Other methods are also utilized to truncate the numerous stages of permit approval.⁸² For example, the Environmental Management Agency recently created an application form that implements the "single-stop" approach advocated by many builders who have become critical of the often redundant and always time consuming conditions required as a prerequisite to development by numerous governmental entities.⁸³ Instead of requiring multi-stage project evaluations, which may frequently result in duplication of information, Orange County now intends to require completion of only this single form.⁸⁴ Any progress made by the County in streamlining the application procedure promises to save each developer at least a portion of the costs usually in-

79. *Id.*; Memorandum from F. Olson, Second Quarterly Progress Report—Inclusionary Housing Program 5 (November 15, 1979) [hereinafter cited as Second Progress Report].

80. Progress Report, *supra* note 28, at 1.

81. Olson, *supra* note 30, at 21. This coordinator acts as a liaison between the developer and the County. Responses concerning the effectiveness of the coordinator have been mixed. Interview with Steve Mabs, Associate Planner, Orange County (March, 1982).

82. *Id.* Douglas Gfeller, Orange County developer, states that processing times have been reduced by almost 50%. Interview with Douglas Gfeller, Gfeller Development (February 1, 1982) [hereinafter cited as Interview with Douglas Gfeller].

83. See, e.g., Brown, *Reducing Housing Costs Through Regulatory Reform*, 7 CURRENT MUN. PROBS. 215, 218 (1981); Marsh, *Innovative Programs and Proposals for the Reconciliation of Private and Public Interests in the California Coastal Zone*, 10 NAT. RESOURCES LAW. 257, 265 (1979).

84. Progress Report, *supra* note 28, at 2. The zoning and subdivision processes can also be combined through this process in order to telescope many sequential steps into one. Third Progress Report, *supra* note 37, at 4. In addition, the concept of a program environmental impact report is also under consideration. See Housing Element, *supra* note 3, at VI-19.

curred as a result of lengthy permit processes.⁸⁵

As with the granting of bonus densities and waivers of standards, abbreviated permit procedures could precipitate the challenge from members of the community that environmental quality and the viability of services are being compromised in a rush to provide affordable housing. The measures used to streamline the process may be perceived as special privileges granted to developers. The failure of Orange County to consider the cumulative impact of the faster and more concentrated development resulting when these waivers are granted could also be viewed as an abdication of the planning function.⁸⁶ In addition, developers that operated in the County prior to the advent of the Inclusionary Program may assert that they agreed to construct their development in adherence to certain standards in exchange for the County's assurances that future builders would also comply with the same constraints. Those developers may consider it a breach of that agreement for the County to give special exemptions from various standards to new developers simply because there is now a shortage of low and moderately priced housing.⁸⁷

As mentioned previously, Orange County has not yet been asked to approve an inordinate number of bonus density requests because the zoning and land use designations are sufficient to accommodate all density increases that builders presently need. In addition, the assistance and benefits granted to builders represent a *quid pro quo* for their commitment to supply affordable housing.⁸⁸ If there is compromise of the dual community goals of envi-

85. If a developer has not obtained financing for a particular project, every additional day spent waiting for approval portends the possibility that interest rates will escalate and the project will become more expensive. Even if funding has already been acquired, the developer's holding and interest costs will increase, thus producing an eventual rise in the price of the completed unit. See Housing Element, *supra* note 3, at VI-23.

86. See A.B.A. REPORT, *supra* note 4, at 238-39 (negative externalities may be imposed on a community when various incentives offered to encourage building of affordable housing.)

87. Although this is mentioned as a potential problem for governments, Orange County has reported no such protests from builders and indicates that the Building Industry Association has consistently sought reductions in building standards.

88. Moreover, it has been argued that the housing industry is a business "affected with a public interest," see Baade, *supra* note 50, at 451-52, and that developers have a responsibility to provide affordable housing. The argument is made that other professions and businesses, such as attorneys, banks, and insurance companies, must accept unprofitable accounts as their responsibility to society, and it is only reasonable to expect the housing industry to do likewise. *Id.* It is also suggested that the current dearth of affordable housing can be attributed to "skimming off [the] cream" by developers who have constructed only conventional units. *Id.* at 451.

ronmental quality⁸⁹ and continued maintenance of County services,⁹⁰ it is made in the interest of promoting the general welfare by making residence in the County available to an economic mix of the population.

C. Deed Restrictions

While limiting the price of twenty-five percent of the homes in each new project so that they are affordable to individuals with incomes from 50-120% of the County median⁹¹ may immediately result in an increase in the stock of affordable housing, it is essential to additionally implement restrictions that will insure the availability of these units to those income levels of the community on a continuing basis.⁹² Establishing an affordable price will be of long term benefit to the community only if that price level is preserved for future buyers. Although limiting the initial selling price will benefit the first owner of the unit, it will do little to fulfill the commitment to provide and insure a supply of affordable housing for the County in the future. In addition, if developers suffer financial loss on their projects as a consequence of the directive to include low income housing,⁹³ the County must not allow the first buyer of a unit in one of those projects to recoup and pocket the difference between the designated affordable price and the market price by later selling the unrestricted unit. The seller reaps an unconscionable profit,⁹⁴ while the developer and the community suffer a loss. A prohibition of these sales protects the interests of developers and assists the growth and maintenance of an affordable housing stock.

Orange County has elected to prohibit such resales through a

89. It should be noted that environmental interests are not totally ignored by the housing element. For instance, one of the policies of the Program is to situate affordable housing within a 30-minute peak traffic travel time from major employment centers in order to maintain air quality and reduce congestion. Housing Element, *supra* note 3, at V-5.

90. *But see* Silverman, *supra* note 42, at 440-41 (although fiscal impact of lower income development may appear burdensome, actual effects may be limited in terms of increased community tax rate).

91. *See* notes 36-39 *supra* and accompanying text.

92. *See* Burton, *supra* note 16, at 34.

93. *See* note 62 *supra*.

94. It must be noted, however, that some developers favor these windfall gains because they anticipate that such funds can be used to purchase their higher priced units.

deed restriction.⁹⁵ It is an option, exercisable by the County, to purchase the unit upon notice that the present owner intends to sell. The owner is directed to issue a "Notice to Sell" in writing to the County, and, after receipt of this notice, the County has the option to issue a "Notice of Acceptance" informing the owner that the County or its designee will exercise the right to purchase the subject property. If the County fails to exercise the option within sixty days, the unit may be sold through conventional market channels at the current market price. If the owner fails to notify the County, the County still retains the option to buy, exercisable upon discovery of the sale.⁹⁶ The County may then, if it wishes, choose to forego its right to purchase and instead collect from the seller the surplus of the actual resale price over the designated allowable Purchase Price as that term is defined in the restrictions.⁹⁷

The restrictions dictate that the figure used to calculate the allowable Purchase Price be equal to the lesser of three possible amounts: 1) the purchase price agreed upon by the owner and County; 2) the appraised value; or 3) the Adjusted Base Price. The Adjusted Base Price is determined by adding the price that the owner paid for the unit (Base Price) to the figure reached when the Base Price is multiplied by the percentage of increase in the median income for the area.⁹⁸ Once that amount is determined, the lesser of the three figures is ascertained, and expenses, such as prepayment charges, resale fees, and capital improvements with a value exceeding one percent of the Base Price of the property, are added to it.⁹⁹ The total is then reduced

95. See note 145 *infra* for a discussion of proposed changes in these restrictions. Although it was originally intended that restrictions only be placed on subsidized units, a County developer indicates that nearly all projects in the County have been sold with deed restrictions. Interview with Douglas Gfeller, *supra* note 82. Steve Mabs indicates that units receiving no subsidy are only under a five year deed restriction, and that this is necessary to satisfy the Housing Element requirement for "first buyer" speculation controls. Interview with Steve Mabs, *supra* note 39.

96. Attachment to Grant Deed, Grant of Preemptive Right to Purchase to the County of Orange 5 [hereinafter cited as Preemptive Right]. The deed restriction utilizes methods which were employed to maintain affordability of homes in Palo Alto, California. History, *supra* note 34, at 4. Other features were formulated by Blythe Eastman, Paine Webber, and the law firms of Rutan and Tucker, and Irell and Manella. *Id.*

97. *Id.* The present owner receives the amount that would have been gained if the County had exercised its option, see notes 95-96 *supra* and accompanying text, while the County receives any surplus over the purchase price. Preemptive Right, *supra* note 96, at 5. It is suggested that in order to recoup this surplus, it may be necessary for the County to initiate legal proceedings.

98. *Id.* at 8.

99. *Id.* at 8-9. These improvements must be in accordance with all applicable codes and have a useful life greater than five years. *Id.* at 9.

by the amount of expenses necessary to render the unit "saleable," as that term is defined by the County.¹⁰⁰

During the thirty year period that the option to purchase is in effect,¹⁰¹ the owner may not rent, lease, sell, or assign the property or any portion of it without the County's permission. Permission is dependent upon whether the conveyance is consistent with the goal of "creating, preserving, maintaining, and protecting low and moderate price housing in Orange County."¹⁰² The County does allow the transfer of the property to a spouse or issue through gift, devise, or inheritance, to a surviving joint tenant, and to a spouse in a divorce or dissolution proceeding and the option to purchase held by the County continues to run with the title to the subject property.¹⁰³

Because of their nature, these restrictions could be challenged as an unreasonable restraint on the alienation of property. However, Carolyn Burton, legal counsel for the California Department of Housing and Community Development, has addressed this issue and concluded that because they satisfy each of the recognized exceptions to the prohibition against unreasonable restraints on alienation, these restrictions are valid.¹⁰⁴ First, the preemptive right exception recognizes the validity of an option clause which dictates that the grantee must offer the property first to the grantor or some recognized person. Even when the exception is conditioned by the Restatement position that the preemption must be reasonable, the Orange County restriction complies since the production of affordable housing in the County is a reasonable objective.¹⁰⁵ Second, the statutory requirement exception permits a restraint on alienation when that restraint is established by statute or rule of law. Because the Board of Supervisors has implemented the restrictions through an express

100. *Id.* at 9.

101. *Id.* at 11.

102. *Id.* at 10.

103. *Id.*

104. Memorandum from Carolyn Burton, Legal Counsel, Department of Housing and Community Development, Legality of Inclusionary Zoning Ordinances 2-5 (September 11, 1978) [hereinafter cited as Memorandum]. Other commentators have argued that these resale restrictions are valid. They have compared them to price controls and determined that the restrictions are similarly acceptable as long as the inclusionary housing programs are structured to preserve reasonable developer profit. *See e.g.*, Kleven, *supra* note 8, at 1516-24.

105. Memorandum, *supra* note 104, at 3-4. *See*, RESTATEMENT (SECOND) OF PROPERTY § 15.2 (1976). *See also* Strauss & Stegman, *supra* note 10, at 238-39.

legislative act, they fall within this exception.¹⁰⁶ Finally, the rule of reasonableness exception is satisfied because the owner purchased the unit, fully aware of the restrictions, and although that owner will not gain a significant profit upon resale of the unit, he will retain his original investment.¹⁰⁷ Other low and moderate income purchasers will probably be anxious to purchase the unit, and even where they are not (or are financially unable)¹⁰⁸ and the County chooses to forego its option to purchase, the owner is then free to offer the unit at the market price.¹⁰⁹ Any argument, therefore, that the restrictions constitute an unreasonable restraint on the alienation of property would not be accepted by a California court.¹¹⁰

D. Findings

Irrespective of whether the current lack of affordable housing was precipitated by various regulatory techniques or the depressed state of the economy, the problem exists. Housing starts are low, housing prices are high, and a significant segment of the population is excluded from home ownership. Although the rise in the general inflation rate has been paralleled by a rise in housing prices, the increase in housing prices has been greater. This disproportionate rise exists because lenders must take the expected increase in the general inflation rate into account when calculating mortgage interest rates. In order to guarantee a reasonable profit margin, the customary percentage of profit together with an amount that reflects the percentage of increase in the inflation rate is included in the interest rate.¹¹¹ Consequently, mortgage interest rates are, at any given time, higher than the general inflation rate.¹¹² Borrowers' incomes do not, therefore, keep up with interest rates, and the resulting discrepancy be-

106. Memorandum, *supra* note 104, at 4.

107. *Id.* at 5.

108. See notes 111-113 *infra* and accompanying text.

109. *Id.* Moreover, the limited effect on the owner can be reasonably subordinated to the goal of the government to increase the supply of affordable housing.

110. Challenges to the rental and use restrictions as limits on the free use of property would be equally unsuccessful in Burton's opinion. *Id.* at 6. The anti-trust ramifications of inclusionary zoning techniques have also been examined. See Strauss & Stegman, *supra* note 10, at 216-32. The authors determine that the regulations establishing price are valid if implemented by the public sector in accordance with California statutes. *Id.* at 232.

111. *Id.*

112. S. MAISEL, STABILIZATION AND INCOME DISTRIBUTION POLICIES AND HOUSING PRODUCTION, FROM RESOURCES FOR HOUSING, PROCEEDINGS OF THE FIRST ANNUAL CONFERENCE 139, 142-49 (1975) reprinted in HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES 264 (R. Montgomery and D. Mandelker ed. 1979) [hereinafter cited as MAISEL]. In inflationary times, the lender tries to include a sufficient amount of

tween the requisite monthly mortgage payment and the amount the potential homeowner can actually afford to pay is a serious one. Although the income of potential purchasers may, over time, increase to a figure which would allow them to eventually afford the mortgage payments, the initial disparity is prohibitive in many cases.¹¹³ The market has created this situation, and many believe that the market may be able to remedy it. However, as the economy continues to deteriorate, local governments have realized that they should intervene in the process in order to guarantee the provision of low and moderate income housing.¹¹⁴

There are currently a number of available methods for effecting such an intervention: Section Eight financing, federal funding under the Community Block Grant Development Program,¹¹⁵ or the sale of tax exempt revenue bonds.¹¹⁶ While Section Eight funding has been used in the context of rental housing,¹¹⁷ financial assistance for new home construction in the County has been achieved primarily through the Block Grant and bonding programs.¹¹⁸

The Community Block Grant Development Program is federally

interest so as to be reimbursed for the loss of purchasing power. *Id.* See S. SCHWARTZ & R. JOHNSTON, *supra* note 4, at 4.

113. MAISEL, *supra* note 112, at 264-65.

114. See Baade, *supra* note 50, at 439-40; Kleven, *supra* note 8, at 1467. One developer notes that few builders would choose to build low and moderate cost housing were it not for the present state of the economy and the alleviating provisions of the Inclusionary Housing Program. Interview with Douglas Gfeller, Orange County County Developer (February 19, 1982). Lower profits and lengthy battles with members of the community discourage most developers from engaging in such construction. *Id.* At the present time, however, building is nearly impossible without some form of governmental assistance, and the availability of County funding tends to make construction of low and moderate cost housing particularly attractive. *Id.*

115. A.B.A. REPORT, *supra* note 4, at 519 (the most significant federal subsidy sources are § 8 and County Development Block Grant Funds established by the Housing and County Development Act of 1974.)

116. For a detailed discussion of revenue bonds, see Broadus, *The Mortgage Subsidy Bond Tax Act of 1980: A Step in the Wrong Direction*, 9 FLA. ST. U.L. REV. 469 (1981) [hereinafter cited as Broadus] and Comment, *Revenue Bonds Financing Home Mortgages: Can This Governmental Role Overcome Constitutional and Pragmatic Obstacles*, 12 U. TOL. L. REV. 429 (1981) [hereinafter cited as *Revenue Bonds*].

117. Cf. Silverman, *supra* note 42, at 386 n.35 (§ 8 basically provides the difference between the market value rent and affordable rent). The § 8 Rental Supplement Program is presently the primary source of funding in the County for those individuals earning 80% or less of the median income. See Housing Element, *supra* note 3, at VI-12.

118. The County is also using a limited amount of California Housing Finance

financed yet locally directed.¹¹⁹ Funds are distributed to cities and counties to be used for purposes that further the objective of the enabling legislation, the Housing and Community Development Act of 1974. Local governments can choose to fund anything (subject to various restrictions) from the rehabilitation of older units to the purchase of land for affordable housing projects.¹²⁰

Orange County has opted to purchase available project sites at their current market price with Community Block Grant Development funds and then sell those sites to developers at reduced prices.¹²¹ One such land purchase made possible a project with fifty-one percent low-moderate income housing (twenty-five percent of this was for very low income purchasers below fifty percent of the median income).¹²² Although these funds are limited, other sales are being negotiated, and an additional number of project sites are under consideration.¹²³

Agency low-interest money for mortgages for affordable projects. Second Progress Report, *supra* note 29, at 4.

119. See HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES 221-22 (R. Montgomery and D. Mandelker ed. 1979).

120. *Id.*

121. Interview with Steve Mabs, Chief Planner, Orange County Housing and County Development (February 9, 1982). The Attorney General has determined that the County may sell the property, purchased with federal funds, to a developer without soliciting competitive bids and at below-market price. 63 Op. Cal. Atty. Gen. 445, 446 (1980).

For a more detailed financial statement of County Development Block Grant Funds, see County of Orange, Housing and Community Development Block Grant, Monthly Status Report 94-104 (December 31, 1981) and County of Orange, Urban County Performance Report, Year VI, 1980-1981, at 122 (Copies on file with author). The California Housing Finance Agency also makes low-interest rate loans to developers in order to assist them with the costs of building low and moderate income housing. These loans are financed through the sale of tax-exempt bonds. See *Crisis*, *supra* note 23, at 735 & n.38; Strauss & Stegman, *supra* note 10, at 210 n.5.

122. Interview with Amy Oda, Junior Planner, Housing and Community Development Program Office (February 16, 1982). A number of the projects have been completed in conjunction with the Orange County Housing Corporation, a non-profit agency which funds construction of the affordable units. *Id.*

123. Interview with Joe Tram, Housing and Community Development Department, Orange County (February 5, 1982). The advantages of government involvement in such a program, seen as a limited variety of land banking, extend beyond merely the partial funding of the purchases. In addition, the local government is also able to acquire the property when it is available and hold it for whatever period is necessary before resale to a builder. In this manner it is possible to circumvent the lengthy process the developer would have to undertake if he wished to obtain federal funding for purchase of the property. That process is typically time consuming and somewhat involved, and the desired property is often sold before the transaction is completed. Green, *The Housing Problem, Realizing the Needs of a City* (1979), reprinted in *League of California Cities, Proceedings, City Attorney's Department, Spring Meeting, Monterey* (April 25-27, 1979). Such transfers of land are viewed as valid expenditures of public funds because the public purpose of providing low and moderate income housing is furthered. *Id.* at 16. Cf. *Winkleman v. City of Tiburon*, 32 Cal. App. 3d 834, 108 Cal. Rptr. 415 (1973) (public

The County also, in August, 1980 issued \$100 million worth of revenue bonds,¹²⁴ which made it possible to offer new homeowners mortgages at reduced interest rates.¹²⁵ For instance, if the present interest rate is seventeen percent, it is possible, through the bonds, to offer mortgages with interest rates of only fourteen percent to prospective homeowners. This is because municipal bonds are generally free from federal taxation,¹²⁶ and although they are offered at a lower interest rate than is offered on conventional bonds, municipal bonds are purchased by taxpayers who would rather receive the tax break than the higher interest earned on a conventional bond.¹²⁷ Orange County can thus competitively enter the bond market and gain the funds necessary to offer decreased interest rate mortgages to County homebuyers.¹²⁸

purpose served by land acquisitions); *Revenue Bonds, supra* note 116, at 439-40 (although bond programs bring only indirect gain to general public, housing shortage alleviated by government financing and public obligation limited).

124. There are two basic types of bonds offered by governments: general and limited obligation bonds. General obligation bonds are backed by the taxing (full faith and credit) power of the government and are considered the most secure of the two varieties. Limited obligation bonds, or revenue bonds, place the risk of default on the bondholder, and the government pledges only to repay the bonds from the revenue generated by the project. Broadus, *supra* note 116, at 472-73; *Revenue Bonds, supra* note 116, at 430-431.

125. Olson, *supra* note 30, at 22. The revenue from these bonds is expected to supply permanent financing for about 1600 affordable homes to be built over the next 3 years. *Id.* The funds have already been allocated at the following percentages and interest rates:

Percentage of Funds	Interest Rate	Income Category
20	8.75%	80%
40	10.625%	81-100%
40	11.50%	101-120%

Id.

126. See *Revenue Bonds, supra* note 116, at 431. There have been some modifications which have limited this federal exemption. See Broadus, *supra* note 116, at 469-70, 482-83. These new restrictions may serve not only to hamper the ability of households to relocate but to encourage the process of gentrification in urban areas. *Id.* at 482-83.

127. Broadus, *supra* note 116, at 473; *Revenue Bonds, supra* note 116, at 431-32. This is the very feature that distresses the federal government because it prefers to reap the revenue that would be gained if the bonds were taxed. *Id.*

128. *Revenue Bonds, supra* note 116, at 431-32. Due to their tax exempt status, the County is able to offer these bonds at a rate lower than that of conventional investments. If the bonds are sold at 8-10% and the prevailing rate for current mortgages is 12-13%, the funds gained from the offering can be made available to home buyers (through a lending institution) for mortgages at 10-11%, a substantial reduction. Revenue would also be available from the transaction to provide the resources for administration of the sale of the bonds. See Housing Element, *supra* note 3, at VI-3.

The revenue gained from the municipal bonds has been used to reduce interest rates to 8¾-11¾% on one development and has been allocated for use on a number of other projects as well.¹²⁹ In March of this year, the county issued another \$105 million in revenue bonds to be used in a similar manner to lower mortgage interest payments.¹³⁰

The ability to use funds generated through the sale of municipal bonds has become sufficiently attractive to spawn a market in bond allocations. Developers who have been granted these allocations and later are unable to proceed with the proposed project sell the allocations to other developers who wish to utilize the funds to lower mortgage interest rates for units in their projects. In this fashion, the allocations have attained the status of a property right. Douglas Gfeller, an Orange County developer involved in and familiar with the home construction market in the County, believes that the sale of these property rights may represent a potential source of income for the County.¹³¹ Because the ability (the property right) to offer a prospective buyer a reduced interest rate on the mortgage was created through the expenditure of public funds, Gfeller argues that it would be reasonable for the County to recoup that expenditure when the allocation is transferred to a second developer.¹³² Although the builder who initially gained the right paid a commitment fee, it can be argued that he should not reap a financial benefit, beyond the cost of that fee, from its sale. Capital gained through sales of the allocations could be recycled into the Program in order to finance additional low interest rate mortgages.¹³³ Depending upon the costs of administering the sales to the County, the monetary gains could be significant.¹³⁴

III. PRESENT AND POTENTIAL PROBLEMS

One of the current major problems with the Orange County Inclusionary Housing Programs is the loss of units from the supply of affordable housing. As explained previously, when an owner wishes to sell an affordable unit, notification must be given to the County, and the Housing Authority then attempts to locate a

129. Interview with Steve Mabs, *supra* note 39.

130. See Progress Report, *supra* note 28, at 3. Requests for over \$300 million in bond allocations have been received from developers by Orange County. Orange County Administrative Office, Summary of Information Meeting for Developers Submitting Letters of Interest for the County of Orange's Second Mortgage Revenue Board Issue (February 8, 1982).

131. Interview with Douglas Gfeller, *supra* note 82.

132. *Id.*

133. *Id.*

134. *Id.*

buyer for it. If no buyer is found within sixty days, the option to buy as well as the deed registrations are extinguished. The owner can then offer the unit at market prices.¹³⁵ Given the current high interest rates, it is often impossible for low and moderate income borrowers to afford the requisite monthly mortgage payments. A shortage of prospective buyers thus results, with a consequent loss of the affordable homes due to the sixty-day limitation and subsequent conventional sale.¹³⁶ The County recently examined various alternatives to the present deed restrictions in an effort to address these problems as well as to consider implementation of a mechanism to control speculation, and decided to retain the present deed restrictions, but reduced the duration to twenty years.¹³⁷ It was also recognized that additional forms of government financing must therefore be created and made available to potential buyers in order to facilitate the purchase of these units.

Mr. Gfeller, however, believes that the resale restrictions must

135. Attachment to Grant Deed: Grant of Preemptive Right to Purchase to the County of Orange 3.

136. Interview with Steve Mabs, *supra* note 38. Thirty-two notices of intent to sell have been received by OCHA as of February 11, 1982. The option has thus far been waived on nine of those homes due to expiration of the 60-day period. Thirteen additional units are presently available for resale. *See* History, *supra* note 34, at 5.

137. Interview with Steve Mabs, Senior Planner, Orange County, March 24, 1982. The time period for the deed restrictions on unsubsidized units remains five years. *Id.* *See* note 95 *supra*. One of the alternatives under consideration was a Home Resale Plan, proposed by Orange County Supervisor Roger R. Stanton. This plan utilized a county-controlled second trust deed in the amount of the difference between the market rate mortgage payments and the revenue bond-financed interest rate payments over the life of the loan. Environmental Management Agency Analysis of the Proposed Home Resale Plan 1 (February 25, 1982). If there is also a discrepancy between the purchase price and the market price, the trust deed will include that amount as well. In order to effect an "anti-speculation control," the trust deed is due upon sale to an unqualified (i.e., not low or moderate income) buyer. In order to facilitate maintenance of an affordable housing supply, the sum gained through the sale would be utilized to fund mortgages for other low and moderate priced units. *Id.* If the purchaser is qualified, however, the deed is assumable and will accumulate interest at the bond mortgage rate for 10 years. After that period, assuming a qualified party is still in ownership, the deed is forgiven at a rate of 10% per year for the remainder of its 20-year life. Memorandum from Supervisor Roger R. Stanton to Orange County Board of Supervisors 2 (July 7, 1981). In neither of the sale alternatives is the resale price controlled. Continued affordability is thus effected only through the availability of funds from the trust deed upon sale to an unqualified buyer, or as a result of assumption of the second trust deed by a qualified buyer. *Id.* at 5. This contrasts with the present restrictions which, although they effect affordability by tying the purchase price to the County median income, may expire after 60 days due to the lack of a qualified buyer. *Id.*

be eliminated.¹³⁸ He argues that by placing a ceiling on the amount of appreciation which may be realized from the sale of a unit, these restrictions¹³⁹ preclude realization of appreciation and thereby discourage the current practice of purchasing a home as an investment.¹⁴⁰ Families in recent years have been able to augment their net worth as a result of the inflationary explosion that has caused the price of their homes to steadily increase. Because they preclude realization of this gain from property appreciation, the deed restrictions discourage buyers from purchasing until a revitalized economy renders such a purchase more affordable and also more attractive as a long-term investment.¹⁴¹ Unfortunately for the developer, vacant units are the result of this buyer reluctance to acquire a home subject to the deed restrictions.¹⁴²

In response to the argument that removal of the restrictions would cause the price to escalate out of the affordable range, Mr. Gfeller advances a counterargument. If the County were to dictate the construction of smaller units and discontinue mandatory incorporation of amenities in the projects, Mr. Gfeller feels the costs of the units would reflect their true worth.¹⁴³ He contends that the County had required amenities in these projects which have increased their value and cost, and necessitated the use of deed restrictions to maintain the affordable price.¹⁴⁴ Eminently more logical, Gfeller believes, would be the abandonment of deed

138. Interview with Douglas Gfeller, *supra* note 82.

139. See Attachment to Grant Deed: Grant of Preemptive Right to Purchase to the County of Orange 7-9.

140. Interview with Douglas Gfeller, *supra* note 82. *But see* History, *supra* note 34, at 7, where the County notes that a homebuyer will accumulate \$35,000 over a five year period of ownership of an affordable unit, and a substantial return will be realized even after only one year. The deed restrictions, therefore, do not seem to preclude significant unit appreciation. *Id.*

141. *Id.* Professors Schwartz and Johnson, however, dispute this theory, arguing that owners of affordable units can realize an appreciation of between 20% and 30% yearly on their housing investment. See SCHWARTZ & JOHNSON, *supra* note 4, at 69. This amount is also not taxable while the owner is in the house or if the owner invests in a more expensive residence. *Id.* While this return may not equal that experienced during the more extreme periods of inflation in the recent past, it is still substantial. *Id.*

142. Interview with Douglas Gfeller, *supra* note 82.

143. Conference with Douglas Gfeller, *supra* note 82. *Cf.* Kleven, *supra* note 8, at 1445 n.40 (maximum price might arguably be cost of unit if land costs minimal and construction modest in nature).

144. *Id.* *But see* SCHWARTZ & JOHNSTON, *supra* note 4, at 37, where the authors state that the affordable units in their sample study are all considerably less spacious than those offered at market prices. They additionally note that the elimination of amenities is one method used by developers to lower costs. *Id.* at 38. Steve Mabs also noted that he could not recall any situation where the County had insisted on the provision of amenities. Interview with Steve Mabs, *supra* note 39.

restrictions¹⁴⁵ along with County-recommended project amenities. This would allow developers to construct an affordable unit that would remain affordable over time.¹⁴⁶ A stimulation of sales would result and developers would then be encouraged to build in the County.¹⁴⁷

There is also a need for Orange County to ascertain the identity of the individuals intended to be beneficiaries of the Inclusionary Housing Program. This determination is itself dependent upon establishing whether the purpose of the Inclusionary Housing Program is to increase the supply of affordable housing in the county or to assist low and moderate income households to purchase a home, or both.¹⁴⁸ Dual determinations as to both the function of the Program and its intended beneficiaries would address the question of whether it is wise to allow acquisition of af-

145. See SCHWARTZ & JOHNSTON, *supra* note 4, at 38. Although alternative deed restrictions have been proposed, they do not promise to deflect such criticism. These restrictions dictate that during the first two years after purchase the Orange County Housing Authority (OCHA) has 90 days to find an eligible buyer at the designated price. If the search is unsuccessful, the owner can: 1) find an eligible buyer in the low-moderate income range, or 2) find another buyer and sell that unit at market price, but remit the difference between the designated affordable selling price and the market price to the Authority, whereupon the option is permanently extinguished. Alternative Speculation Control and Continued Affordability Mechanism 1 (Draft). After two years the owner can: 1) follow option #2 above; 2) follow option #1 above; or 3) submit a notice to sell, allowing OCHA to find an eligible buyer. *Id.*

146. *Id.* In addition, the objectives of the Program are to facilitate home ownership for low and moderate income individuals and to increase the affordable housing stock in the County. The Program is not designed to raise the standard of living by providing various amenities in the projects.

147. Professors Schwartz and Johnston, in their study of various inclusionary housing programs in California, surveyed a number of Orange County developers to determine the impact of the requirements on their business. See SCHWARTZ & JOHNSTON, *supra* note 4, at 41-42. The reactions were mixed. Some developers indicated that building in Orange County would no longer be financially possible; others noted that the program had impacted positively on their business, while another opined that it was "keeping some companies alive." *Id.* at 41.

Schwartz and Johnston also attempted to assess the actual losses experienced by builders on each unit. See SCHWARTZ & JOHNSTON, *supra* note 4, at 43-44. The responses ranged from a \$10,000 loss to no loss per unit. *Id.* at 44. It should be noted that this amount of difference between cost and dictated price was often diminished by various benefits and accommodations of standards. *Id.* at 44. The majority of developers interviewed did, however, indicate that they believed that they were taking a loss by constructing the affordable units. *Id.* Professors Schwartz and Johnston pointed out that there may be no inequity in whatever losses developers are experiencing because those developers were previously gaining excess profits, possibly at the expense of homebuyers. See SCHWARTZ & JOHNSTON, *supra* note 4, at 61.

148. See Fox & Davis, *supra* note 8, at 1015.

fordable units by the "temporarily poor." The temporarily poor are individuals with the potential to earn high incomes but, who, because of various reasons, are presently in the low to moderate income classification.¹⁴⁹ When those individuals, such as law and medical students, can command higher incomes, they will have no need for affordable housing.¹⁵⁰ If the only objective of the Inclusionary Housing Program is to increase the supply of affordable housing, catering to the temporarily poor evokes no objection. However, if alleviating the financial burden experienced by those in the low to moderate income category is at least an equally desirable objective, some method of determining the eventual income of purchasers may be necessary so as to limit the market to only this target income category.¹⁵¹

IV. CONCLUSION

Affordable housing can be found in Orange County. A viable building industry continues to exist in the County, and the units are of a higher quality than is customary in low income projects.¹⁵² Although some developers argue that they are suffering losses, others maintain they are enjoying a reasonable profit, and still others suggest that the Program may be sustaining the housing industry in Orange County. Further innovations in waivers of standards and assistance to developers in abbreviating the permit process are undergoing experimentation and implementation. A spirit of cooperation between developers and planners, missing in the planning process for many years, currently exists and compromises are being made.¹⁵³ Orange County recognizes that although past actions and conditions may have caused the price of housing to escalate out of the reach of many citizens, positive steps can be taken to address not only environmental and fiscal problems, but housing problems as well.¹⁵⁴ The Orange County Inclusionary Housing Program typifies the evolution of

149. Smolker, *supra* note 26.

150. *Id.*

151. See SCHWARTZ & JOHNSTON, *supra* note 4, at 60. A survey of homebuyers in five projects indicated that out of 253 responses, over 20% had completed more than four years of college. Data Profiling the Buyer of an Affordable Dwelling Unit, Orange County 5. It is recognized that the determination of eventual income would be difficult, if not administratively impossible.

152. Previously, builders responded primarily to the higher income market and produced luxury, rather than affordable, housing. The Inclusionary Housing Program, by requiring inclusion of low and moderate units in each project, has encouraged innovation in the construction of such units. SCHWARTZ & JOHNSTON, *supra* note 4, at 72.

153. Interview with Douglas Gfeller, *supra* note 82.

154. The Program has also been beneficial for the business community because it indicates the County's willingness to produce housing available to potential em-

planning, even planning once termed exclusionary, into a tool that meets the varied needs of all segments of the population.

ployees of companies wishing to locate in the area. SCHWARTZ & JOHNSTON, *supra* note 4, at 74.

