

Density Bonus Zoning to Provide Low and Moderate Cost Housing

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Introduction

Housing remains an important and unresolved problem for the American people. Demand for new housing has increased in recent years, particularly within the suburban fringe around metropolitan areas. Because the private construction industry has been unable to build sufficient units to meet this demand there is an insufficient amount of housing available, and it sells at too high a price for a growing number of families.² The escalation in housing expense shows no sign of abating and the trend could have broad social and

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1. The following cities and counties were contacted during the housing density bonus survey: San Francisco, California; Oakland, California; Twin Cities, Minnesota; Marin County, California; Cherry Hill, New Jersey; San Jose, California; Del Mar, California; Novato, California; Davis, California; Los Angeles, California; Miami, Florida; Montgomery County, Maryland; Berkeley, California; Arlington County, Virginia; New York, New York; El Cerrito, California; Larkspur, California; Mountain View, California; Livermore, California; Lewisboro, New York; New Castle County, Delaware; Palo Alto, California; Lakewood, Colorado; Boulder, Colorado; Fremont, California; Plymouth, Minnesota; Eden Prairie, Minnesota; Fairfax County, Virginia; Edina, Minnesota; Bloomington, Minnesota. Information received during the bonus density survey is on file in the offices of the *Hastings Constitutional Law Quarterly*.

2. New housing prices have escalated more than 55% between 1970 and 1976 to a new national median price of \$50,000. See San Francisco Chronicle, Oct. 26, 1976, at 51, col. 4.

economic consequences. Communities are recognizing that the problem of providing adequate housing at moderate cost affects not only the urban poor, but also the moderate wage earners within their town borders.³ These individuals—senior citizens living on a fixed income, young married couples with children, single-parent families, the handicapped, and the unemployed—are the people who most need assistance in locating and financing new housing.

Traditional solutions have failed to remedy the problem. The federal government's response has been a series of expensive housing subsidy programs that have proved largely inadequate because of budgetary limitations. The private construction industry, however, cannot produce housing at a reduced cost without some type of financial assistance. The need for innovative, nonfederal solutions at the municipal level has led to the recent emergence of the *housing density bonus* as a means of encouraging the construction of moderate cost housing by private developers within the community.⁴

A housing density bonus program has two main goals. The principal goal is to help meet the critical needs of low and moderate income people by expanding the supply of moderately priced housing in the community. The secondary purpose is to assure the dispersal of such housing throughout the developing areas of the community. To achieve these goals, local governments require developers to provide a certain percentage of newly constructed units at a price below the prevailing market price for such units. The city provides a *quid pro quo* by permitting the developer to exceed the density limits provided in the zoning ordinance. The extra income from the sale or rental of the bonus units offsets the cost of providing some of the original units for sale or rent below the existing market price.⁵

This study discusses the problems encountered in formulating and implementing a comprehensive housing program that utilizes a density

3. *E.g.*, Boulder, Colo., City Council Resolution 115 (1973); LOS ANGELES, CAL., MUNICIPAL CODE §§ 12.03, 12.39, 13.04, *as amended by* ORDINANCE 145,927 (1974); MONTGOMERY COUNTY, MD. CODE c. 25A (1974).

4. *See generally* E. ERBER & J. PRIOR, THE EMERGENCE OF THE HOUSING DENSITY BONUS (N.C.D.H. Information Series No. 4, 1975) [hereinafter cited as HOUSING DENSITY BONUS]; Klevin, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers To Build Low Cost Housing*, 21 U.C.L.A.L. REV. 1432 (1974).

5. For example, the net effect of a density bonus system in a conventional 100-unit development, assuming a density bonus of 20%, would be that the developer builds 120% of the units originally proposed, rents or sells 100 at the prevailing market price, and rents or sells 20 at a figure below market price.

bonus. Initially, the shortage of moderate cost housing is discussed, the causal factors are analyzed, and the persons most seriously affected by it are identified. The paper then presents the use of zoning as a solution to the shortage and briefly sketches the problem of exclusionary zoning and the recent emergence of inclusionary zoning as a remedy. The housing density bonus is analyzed as a possible means of providing housing at below market price through zoning policies that do not rely exclusively on federal or state subsidies. Finally, the study presents information gathered during an empirical survey of different local community zoning practices that sought to provide moderate cost housing through a variety of techniques.

I. Defining the Problem: The Housing Shortage and Its Causes

Housing costs are increasing at an annual rate of ten to twenty percent, with the 1976 median selling price of a new home approaching \$51,000, compared to \$38,000 in February 1975.⁶ Similarly, land costs have increased as a result of businesses relocating in the suburbs and families finding the outlying areas an attractive alternative to metropolitan living.⁷ Additionally, a rising concern by environmental groups and legislatures for preserving our natural resources has limited the amount of land available for development and has made construction upon such land more onerous.⁸ The competition for this limited amount of available land has also increased housing costs.

6. See note 2 *supra*.

7. In the decade 1960-1970, the population of metropolitan areas increased by 19.8%, representing a 15.9% growth of suburban areas, and an increase of only 3.9% in central cities. See 1 URBAN LAND INSTITUTE, MANAGEMENT AND CONTROL OF GROWTH 492 (1975) [hereinafter cited as MANAGEMENT AND CONTROL OF GROWTH]. For the period 1960-1967, 65% of all industrial buildings and 52% of all commercial structures were constructed outside the inner cities; more than 50% of the new jobs created in the sixties were located outside the central cities. See BUILDING THE AMERICAN CITY—REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS (Douglas Commission) 11 (1968). An example of this continuing migration is the Irvine Industrial Complex East in Orange County, California. This new industrial and commercial center is expected to employ 54,000 persons upon completion. An estimated 70% of the businesses located in the center will be migrating from Los Angeles. Because Irvine is essentially a new city, and available houses near the employment center cost over \$40,000, many employees relocated from Los Angeles will be compelled either to make long and expensive commutes or to move out of Los Angeles to intermediate areas having moderately priced housing. See ATTORNEY GENERAL'S REPORT ON LOW AND MODERATE INCOME HOUSING 19-20 (1976) [hereinafter cited as CALIFORNIA HOUSING REPORT].

8. For an example of legislation imposing statewide controls on coastal development, see the California Coastal Zone Conservation Act, CAL. PUB. RES. CODE §§ 27000-

Federal and state housing programs either have purchased relatively expensive vacated land in already developed metropolitan areas in order to construct moderately priced housing,⁹ or have merely promoted the private construction of lower priced housing.¹⁰ But subsidized housing programs, originally perceived as the means to provide new low income residential accommodations, became too expensive and have been terminated and replaced by subsidized rental programs.¹¹ Unassisted private construction of new, low income housing has also been largely unsuccessful, inasmuch as the majority of new housing is priced above \$40,000 and therefore beyond the financial means of approximately eighty percent of United States families.¹²

50 (West Cum. Supp. 1976). A growth-restricting plan adopted by Petaluma, California, was upheld in *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). A sequential growth ordinance of the Township of Ramapo, New York, also met with judicial approval in *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

9. The federal public housing program originated in the United States Housing Act of 1937, ch. 896, 50 Stat. 888, *as amended*, 42 U.S.C. §§ 1401-36 (1970), and construction of housing projects under the program had two specific purposes: to alleviate present and recurring unemployment, and to strengthen the housing construction industry. In 1949 the original slum clearance and urban renewal program was enacted by Title 1, Housing Act of 1949, *as amended*, 42 U.S.C. §§ 1441-90(c) (1970). Although the federal public housing program went through numerous changes during later decades, its basic structure was little altered; stated simply, the federal government provided financial support for the production of housing that was planned and operated by local housing authorities, which were established and operated in accordance with local laws. *See generally* Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF. L. REV. 642 (1966).

10. *See* H. FRANKLIN, D. FALK & A. LEVIN, *IN-ZONING* 59-69 (1974) [hereinafter cited as *IN-ZONING*].

11. *See* Federal Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-17 (Supp. V 1970). This act terminates categorical grant programs relating to urban renewal, code enforcement (*id.* § 1468), interim assistance (*id.* § 1469(a)), neighborhood development (*id.* § 1469), model cities (*id.* § 3301), water and sewer facilities (*id.* § 3102), and open space, urban beautification, and historic preservation (*id.* § 1500). The new act favors revenue sharing of block grants to state and local governments. New housing may be partially financed under title II, section 8 of the act, which provides rent subsidies for existing units, substantially rehabilitated units, and newly constructed units. Section 8 replaces section 23 of the leased housing program. Under the 1974 act, many communities that have never been recipients of Department of Housing and Urban Development funds will receive allocations for community development activities. On the other hand, many large metropolitan areas will eventually receive fewer funds than under previous federal programs. *See generally* Kushner, *Community Planning and Development Under The Housing and Community Development Act of 1974*, CLEARINGHOUSE REVIEW, JANUARY SUPPLEMENT 661 (1975).

12. *Los Angeles Times*, June 20, 1976, pt. VII, at 1, col. 3. The 1976 California Attorney General's *Report on Low and Moderate Income Housing* analyzed a recent housing cost study done for the Orange County, California, area that identified eight

The need for resolving the housing dilemma is as urgent as ever. As land and construction costs increase, only people earning the highest wages will be able to afford to buy houses.¹³ The result will be a continued proliferation of overcrowded urban conditions.¹⁴ Insofar as federal and state programs have been unable to supply adequate low and moderate cost housing, alternative methods of accommodating the housing needs of the American people must be pursued.¹⁵ One such method is for local governments to assist the housing market through the exercise of municipal zoning powers.

basic categories of housing costs and the degree to which each cost category was rising. Direct costs were identified as: (1) land; (2) site improvements; (3) community amenities (defined as public dedications for greenbelts, streets and highways, schools, parks, open space, and community facilities); and (4) construction (labor and materials). Indirect costs were identified as: (5) financing; (6) sales and marketing; (7) profit; and (8) overhead and contingencies. The analysis revealed the following average allocation of costs in producing new homes:

<i>Direct Costs:</i>	(1) Land	12%
	(2) Site improvements	12%
	(3) Community amenities	3%
	(4) Construction	
	Labor	16%
	Materials	35%
	Total	= 78%
<i>Indirect Costs:</i>	(5) Financing	6%
	(6) Sales and marketing	4%
	(7) Gross profit	9%
	(8) Overhead and contingencies	3%
	Total	= 22%

The study concluded that during the past few years, at least in Orange County, the overall annual increase in the cost of new housing has been 11%. The principal factors contributing to this are:

Labor	1.6%
Materials	5.3%
Land	1.0%
Site Improvements	2.4%
Financing	0.7%

The study did not attribute any annual cost increases from community amenities, sales and marketing, profit, or overhead and contingencies. Because the bulk of the annual increases are due to the price of materials and labor, the study underscores the fact that it is primarily *inflation* and a facet of inflation, high interest rates, which are responsible for the rapid rise in housing costs. CALIFORNIA HOUSING REPORT, *supra* note 7, at 13-15.

13. Wall St. J., Aug. 2, 1976, at 1, col. 6.

14. San Francisco Chronicle, Oct. 26, 1976, at 51, col. 4. "According to housing experts, however, it is clear that the continuing increases are alienating two large blocs of voters who are being locked out of the housing market—young people . . . who are now reaching home buying age; and old people with fixed incomes." *Id.*

15. The upward spiral in the price of new home construction has led the California Attorney General's office to state that "reliance on the market mechanism alone to eventually provide adequate housing for low and moderate income families will prove fruitless." CALIFORNIA HOUSING REPORT, *supra* note 7, at 23.

II. Zoning as a Solution to the Housing Shortage

A. Zoning: Its Origins and Authority

Popularized in the 1920s as a means for municipalities to protect "private property in the face of rapid and unsettling changes in the urban scene,"¹⁶ zoning is the division of a city, county, or region into districts by legislative regulation. Each district is subject to restrictions on the designs of buildings and the scope of permissible uses of land.¹⁷

The authority by which a city or county regulates land emanates from the operation of the state constitution, from enabling legislation, and from the municipality's police power, which is designed to promote the public's health, safety, and general welfare.¹⁸ State enabling legislation describes the purposes for which this police power may be exercised. Although variations exist, typical state enabling legislation provides that municipalities shall have the power to regulate the use of land so as

[to] lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewage, schools, parks and other public requirements.¹⁹

Local governments are able to mix, separate, or prohibit uses, control density, preserve open space, and exact land dedications.²⁰ Often these regulations make the community a more attractive and pleasant area in which to live. Frequently, however, the local powers are employed to restrict access to land and to perpetuate social and cultural homogeneity.²¹

16. J. DELAFONS, *LAND USE CONTROLS IN THE UNITED STATES* 23 (1962).

17. See generally *MANAGEMENT AND CONTROL OF GROWTH*, *supra* note 7, at 187-89.

18. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Miller v. Board of Pub. Works*, 195 Cal. 477, 234 P. 381 (1925), *quoted with approval in* *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976).

19. U.S. DEP'T OF COMMERCE, *STANDARD STATE ENABLING ACT* § 3 (1926).

20. See CAL. GOV'T CODE § 65850 (West Cum. Supp. 1976): "Pursuant to the provisions of this chapter, the legislative body of any city or county by ordinance may:
(a) Regulate the use of buildings, structures, and land as between industry, business, residents, open space, including agriculture, recreation, enjoyment of scenic beauty and use of natural resources.

...

(c) Regulate location, height, bulk, number of stories and size of buildings and structures; the size and use of lots, yards, courts and other open spaces; the intensity of land use."

21. See note 24 and accompanying text *infra*. Projections based on recent trends

B. The Problem of Exclusionary Zoning

All zoning is exclusionary to the extent that it separates and classifies,²² but unless arbitrary or capricious, zoning ordinances are presumed valid.²³ Courts have approved restrictive zoning imposing minimum lot sizes, minimum frontages, set backs, sideyards, backyards, maximum building areas per lot, minimum floor areas, and height limitations.²⁴

Pursuant to the principles of equal protection, municipal land use regulations that discriminate against individuals on the basis of race have been declared invidious and subjected to strict judicial scrutiny.²⁵ Classifications based on wealth, however, have not been given strict judicial scrutiny,²⁶ and housing is not a fundamental right,²⁷ so housing regulations having a disproportionate impact according to wealth are adjudicated in accordance with a rational basis standard.²⁸ Consequent-

show that between 1970 and 1985, central cities could lose 2.4 million, or 5%, of their white population, but gain 10 million nonwhites, a 94% increase. This would mean that nonwhites would increase from 18% to 31% of the population of the central cities. Clearly there is a growing pattern in population and housing distribution toward what the Kerner Commission reported as its central and most alarming thesis: "[O]ur nation is moving toward two societies, one black—one white, separate and unequal." REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (Kerner Commission) 1 (1968).

22. The Supreme Court in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), did not mention the exclusionary implications of zoning, which had been one of the grounds on which the lower federal court had declared the zoning ordinance invalid. The lower court judge predicted that "[t]he plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a straight jacket. . . . In the last analysis, the result to be accomplished is to classify population and segregate them according to their income or situation in life." *Euclid v. Ambler Realty Co.*, 297 F. 307, 318 (N.D. Ohio), *rev'd*, 272 U.S. 365 (1926).

23. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Ex Parte Ellis*, 11 Cal. 2d 571, 81 P.2d 911 (1938).

24. See HAGMAN, CALIFORNIA ZONING PRACTICE (CEB) (1969); Simons, *Home Rule and Exclusionary Zoning: An Impediment to Low and Moderate Income Housing*, 33 OHIO ST. L.J. 621 (1972); Note, *Exclusionary Zoning: The Responsibility of Local Zoning Authority to Non-Resident Indigents*, 23 STAN. L. REV. 744 (1971).

25. *E.g.*, *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970). See generally Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971); Note, *The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge*, 81 YALE L.J. 61 (1971).

26. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). See generally Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969) [hereinafter cited as Sager].

27. *Lindsey v. Normet*, 405 U.S. 56 (1972).

28. *Id.*

ly, local ordinances that make it more onerous for individuals of limited wealth to acquire housing have generally been upheld.²⁹

With increasing frequency, cities are enacting ordinances that directly limit the number of people who may live within their borders.³⁰ These communities desire "a quiet place where yards are wide, people few and motor vehicles restricted."³¹ The demand and necessity for adequate housing, however, makes the retention of these characteristics impracticable. The dilemma, then, is whether a community may unilaterally determine its rate of expansion if the exercise of its inherent authority impedes the fulfillment of housing demands.

C. Inclusionary Zoning: Duty or Choice?

While several court decisions have invalidated ordinances that restrict housing availability according to race, recent decisions have begun to invalidate ordinances that deprive individuals with low incomes of adequate housing. In a series of Pennsylvania cases, strict judicial scrutiny has been applied to municipal ordinances that hinder broad socio-economic access to housing.³² The New Jersey Supreme Court in *Southern Burlington County NAACP v. Township of Mount Laurel*³³ concluded that all New Jersey cities experiencing growth demands must affirmatively make available an appropriate variety of housing for different economic groups.³⁴ The California Supreme Court in *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*³⁵ most recently adopted the *Mount Laurel* concept of regional general welfare for purposes of determining a city's duty to provide low to moderate income housing. In *Board of Supervisors v. DeGross Enterprises*,³⁶ however, the Virginia Supreme Court held

29. See generally R. BABCOCK, *THE ZONING GAME* (1966) [hereinafter cited as *THE ZONING GAME*]; Anderson, *Introduction to Symposium: Exclusionary Zoning*, 22 SYRACUSE L. REV. 460 (1971).

30. See Note, *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) [hereinafter cited as *Municipal Growth-Restricting Plans*].

31. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

32. E.g., *Appeal of Kit Mar Builders*, 439 Pa. 466, 268 A.2d 765 (1970); *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970); *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965); *Willistown Township v. Chesterdale Farms, Inc.*, 7 Pa. Commw. Ct. 453, 300 A.2d 107 (1973).

33. 67 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975).

34. *Id.* at 187-88, 336 A.2d at 731.

35. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

36. 214 Va. 235, 198 S.E.2d 600 (1973).

that the purpose of zoning was only to regulate physical characteristics; the zoning authority was not available for "socio-economic objectives."³⁷

The United States Supreme Court in *Hills v. Gautreaux*³⁸ upheld a federal court order requiring the Chicago Housing Authority and the United States Department of Housing and Urban Development (HUD) to implement a remedial metropolitan housing program to compensate for past racial discrimination in the construction and rental of public housing. The extensive involvement of HUD in financing local housing programs increased the potential influence of *Gautreaux* on an evolving federal duty to implement inclusionary zoning and housing policies.

The duty of municipalities to implement inclusionary programs, however, was recently restricted in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*³⁹ The Supreme Court held that absent proof that a city had purposefully discriminated against racial minorities in the past, the municipality has no duty to zone inclusionarily now to accommodate people traditionally excluded by the housing market. In addition to severely curtailing the trend of jurisdictions requiring inclusionary zoning, *Arlington Heights* applied a deferential standard of review to equal protection claims based on race, a standard enunciated during the previous term in *Washington v. Davis*.⁴⁰ *Arlington Heights* seems to require an extraordinary evidentiary showing before a local zoning decision will be held invalid on grounds of racial discrimination.

In those jurisdictions imposing no duty to provide access to housing for various income levels, state legislative solutions may be necessary. One possible solution is to implement inclusionary zoning through the affirmative application of a local government's regulatory powers over land. The general goal of inclusionary zoning is to insure an adequate allocation of space within the community to permit a wide variety of housing types for a broad racial and socio-economic spectrum of residents. Advocates of inclusionary zoning hope that the implementation of such programs will ameliorate the problems caused by the separation of population by income and reflected in the concentration of race and distortion of home and job relationships.⁴¹ Specifically, these objectives would be achieved by: (1) provid-

37. *Id.* at 237, 198 S.E.2d at 602.

38. 425 U.S. 284 (1976).

39. 45 U.S.L.W. 4073 (U.S. Jan. 11, 1977).

40. 426 U.S. 229 (1976).

41. See IN-ZONING, *supra* note 10; Sager, *supra* note 26.

ing better access to expanding job opportunities for workers with low incomes; (2) offering higher quality education for disadvantaged minority and central city children; (3) establishing quantitative goals for newly-constructed low income housing; and (4) encouraging social heterogeneity.⁴²

There are two major stumbling blocks to implementation of a successful inclusionary zoning program. First, municipalities are generally under no judicial or legislative obligation to impose inclusionary programs. Although courts in some jurisdictions have imposed obligations on municipalities to adopt inclusionary programs,⁴³ and enabling legislation in other jurisdictions has imposed some obligations by requiring cities and counties to adopt comprehensive zoning plans,⁴⁴ localities in most jurisdictions have no obligation to use the zoning power to provide housing for individuals of various income levels. Within these latter jurisdictions, only voluntary enactment of inclusionary programs by local governments will increase the housing stock. Secondly, many of those municipalities that desire to implement inclusionary programs cannot do so without federal subsidies. In order to implement a successful inclusionary zoning program, it is necessary to provide techniques that enable land use regulations to be administered flexibly and profitably to meet the changing needs and desires of communities as population pressures increase.

III. The Housing Density Bonus as a Zoning Policy

A. Introduction

The previous discussion of zoning emphasized the traditional community policies of prohibiting undesired uses of land and protecting the homogeneity of residential areas. The detached single-family home has been the preferred dwelling for most people, and higher density, multi-family projects have historically engendered antagonistic responses from suburban residents in single-family dwellings.⁴⁵ Re-

42. *IN-ZONING*, *supra* note 10, at 52-59.

43. *E.g.*, *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965).

44. *E.g.*, CAL. GOV'T CODE §§ 65300, 65320, 65860(a) (West Cum. Supp. 1976). "The housing element of the plan shall make adequate provision for the housing needs of all economic segments of the community." *Id.* § 65302(c).

45. In his majority opinion sustaining an ordinance that restricted land use to single-family dwellings, Justice William O. Douglas stated that "a quiet place where yards are wide, people are few and motor vehicles restricted are legitimate guidelines

cently, however, the environmental strains caused by the common suburban sprawl have been recognized.⁴⁶ A 1974 housing study, *The Costs of Sprawl*,⁴⁷ concluded that planning to some extent, and low densities to a much greater extent, increase economic costs, environmental costs, natural resource consumption, and some personal costs.⁴⁸ Not only do high density multi-family developments thus appear to cause less environmental strain than single-family dwellings, but high density residential projects also produce municipal financial savings. The New Jersey County and Municipal Government Study Commission⁴⁹ analyzed the fiscal effects of city zoning practices and made two significant conclusions: (1) municipal expenditures are not substantially affected by the type of housing being constructed in the community, but instead are affected by municipal size and growth rate far more than anything else;⁵⁰ and (2) almost all multi-family housing types studied (garden apartments, townhouses, high-rise apartments) generate more reve-

in a land use project addressed to family needs." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974). See generally STATE OF NEW JERSEY COUNTY AND MUNICIPAL GOVERNMENT STUDY COMMISSION, HOUSING AND SUBURBS, FISCAL AND SOCIAL IMPACT OF MULTI-FAMILY DEVELOPMENT, Ninth Report (1974) [hereinafter cited as NEW JERSEY HOUSING REPORT].

46. The California Attorney General's office states that "the general conclusion that can be drawn from studies on housing and the realities of our deteriorating urban environment is that it is no longer economically and environmentally feasible to rely on the construction of new single family detached housing in traditional subdivision developments on the outskirts of urban areas in order to eventually meet the housing needs of low and moderate income families—even if such housing is stripped of frills and is smaller than traditional size (e.g., 1,000 sq. ft. to 1,500 sq. ft.)." CALIFORNIA HOUSING REPORT, *supra* note 7, at 24-25.

47. This study by the Real Estate Research Corporation was commissioned by the Environmental Protection Agency, HUD, and the Council on Environmental Quality.

48. REAL ESTATE RESEARCH CORPORATION, THE COSTS OF SPRAWL 18 (1974). The report studied three prototype developments:

(1) *Low Density Sprawl*: single-family homes; 75% laid out in the traditional tract grid pattern; 25% clustered; neighborhoods situated with little contiguity;

(2) *High Density Planned*: 40% high-rise apartments (6 or more stories); 30% walk-up apartments; 20% townhouses; 10% clustered single-family homes; all in a unitary community;

(3) *Combination Mix*: an even mix of high-rise apartments, walk-up apartments, townhouses, single-family clustered units, single-family detached houses; half in subdivisions and half in Planned Unit Developments.

The study revealed that: (a) low density sprawl communities use four times as much land for residential purposes as high density planned communities; (b) in terms of total investment costs, high density planned communities are distinctly less expensive: 44% less than low density sprawl and 21% less than combination mix; (c) the largest savings are in construction costs; and (d) high density planned communities use 35% less water and 40% less energy than do low density sprawl communities. *Id.* at 17-18.

49. Authors of the NEW JERSEY HOUSING REPORT, *supra* note 45.

50. *Id.* at 1.

nues than costs to the municipality and school district in which they are located, in contrast to detached, single-family dwellings.⁵¹

The New Jersey study also determined that opposition to multi-family developments was substantially less than opposition to low and moderate income housing projects, which were commonly perceived as requiring government subsidies. The study reported that opposition largely derived from preconceived notions of subsidized housing projects as a fixture of the urban core and of the inappropriateness of low and moderate income housing projects in the suburbs. In contrast, most towns in which some subsidized housing already exists appear much more willing to accept additional moderate cost housing. Similarly, fiscal considerations do not appear to be prominent in the minds of those resisting subsidized housing; policies likely to change the cost-revenue balance of such housing developments do not impress them as being significant enough to change the perspective they presently hold.⁵² The conclusions of the study indicate that any housing program may encounter serious opposition from a community if the developments are predominantly multi-family projects constructed or rented with public subsidies.

The National Committee Against Discrimination in Housing (N.C.D.H.) published a report⁵³ indicating that housing for the low to moderate income group could be provided as part of standard residential construction by private builders utilizing the housing density bonus.⁵⁴ Such a program may appeal to suburban communities that object to the low to moderate cost housing project image. The authors of the N.C.D.H. report explained why they believe that privately built units under the density bonus system would be more acceptable:

[I]n the absence of race as an issue, suburban communities are not only prepared to facilitate provision of housing within the means of less affluent local employees, but are willing to do so under conditions of "*income mixing*," i.e. scattering "density bonus" units among the higher income occupants who pay standard market rates. Income differences are viewed as less of an obstacle to residential compatibility than are racial ones.⁵⁵

51. *Id.*

52. *Id.* at 99.

53. HOUSING DENSITY BONUS, *supra* note 4.

54. *Id.* at 3.

55. *Id.* at 3-4. See generally D. RYAN, ALL IN TOGETHER: AN EVALUATION OF MIXED-INCOME MULTI-FAMILY HOUSING (1974), a summary report of a Massachusetts Housing Finance Agency-sponsored review of the social consequences of economically mixed multi-family housing projects. Based on a study of sixteen of the agency's earliest financed projects, which have been in operation for several years, the authors

Dispersing low and moderate cost housing within a city may therefore mitigate community opposition to housing programs designed to provide a socio-economic mix of dwellings.

B. The Housing Density Bonus

A housing density bonus program requires developers to provide a certain percentage of newly constructed units at a price below the prevailing market price of the new units. The city provides an incentive by permitting the developer to exceed the density limits provided in the zoning ordinance. For example, a city may require that large residential developments will include twenty percent of the total units as below market price ("bmp") dwellings. In return, the developer may be granted a twenty percent increase in the total number of units as a "bonus" to encourage his participation in the program and perhaps to compensate his decreased revenues from the bmp dwellings. The net effect is that the developer builds 120 percent of the units originally proposed and rents or sells 100 percent at the prevailing market rate and 20 percent at a price below the market price. Because bonus units are constructed on land already purchased for the original housing project, the streets, sewers, water mains, driveways, and landscaping are already provided. The additional units therefore add relatively few costs for site preparation, and the increased density permitted on the site offsets the costs of constructing the bmp units.

Cities and counties often differ over the definition of a low or moderate cost housing unit. A general rule is that the unit is rented or sold for fifteen to twenty percent less than existing market prices, but even with that reduction such a unit usually is too expensive for very low income people.⁵⁶ This study therefore will utilize the more relevant concept

found that broad income mixing within developments did not reduce tenant satisfaction when the developments were otherwise superior in design, construction, and management.

56. For example, our survey of Palo Alto, California, indicated that in 1974 the median family income for the San Jose area, of which Palo Alto is a part, was \$16,500. According to HUD criteria, the limiting income for a four-person *low* income family is 80% of the area median income, in this case \$13,200. The limiting income for a four-person *very low* income family is 50% or less than the area median income, in this case \$8,250. Annual average income is \$10,725 for the low and moderate income families in the area. According to HUD general guidelines, the maximum a family should pay for housing is 25% of its annual income, which is \$223 per month for the average low to moderate income family in Palo Alto. But the actual market rate for rentals in the area is significantly higher than \$223 for a three or even a two bedroom apartment. Consequently, families are occupying housing for which they pay more than 25% of their income for housing that is physically inadequate.

of the "below market price" (bmp) unit. This term focuses on the critical ingredient for providing adequate housing to potential moderate income inhabitants by reducing the cost to twenty percent below market.

Community zoning policies may either require a *mandatory* percentage of bmp units from each developer of a residential project or merely encourage *voluntary* developer compliance. A mandatory bmp provision is usually accompanied by compensation to the developer in the form of either relaxed zoning restrictions, federal subsidies, or bonus units added to the project. A voluntary provision is usually accompanied by incentive zoning measures that reduce the developer's total construction costs in order to offset the added expenses of providing bmp units.

A computer study prepared by students of the Stanford University School of Business Administration⁵⁷ analyzed housing policies with different percentages of bmp requirements and with bonus units allowed as compensation to the developer. The results of the study indicate that the developer would receive a more profitable return on his investment under a housing density bonus program than he could expect from a normal project, even though he provides some of the units at below market price, primarily because of the incremental compensation from the bonus units.⁵⁸ The community, however, would have to bear the administrative costs of the city planning agency as well as the unquantified environmental costs of larger project structures, increased population, traffic, and pollution.

C. Legal Ramifications of a Housing Density Bonus Program

Housing density bonus programs are a relatively new phenomenon and have received little judicial interpretation. Thus most of this analysis of the constitutionality and legal ramifications of the programs is drawn by analogy from other zoning practices.

Although the recent Supreme Court decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*⁵⁹ suggests that there is no constitutional duty of cities to zone for the inclusion of all racial and economic groups, municipalities nonetheless may choose voluntarily to implement programs that provide housing for low

57. EDENS, LEWIS & McINTYRE, A MODEL APPROACH TO DENSITY BONUS ZONING VARIANCES FOR LOW/MODERATE INCOME HOUSING IN PALO ALTO, CALIFORNIA (1975) [hereinafter cited as STANFORD HOUSING STUDY]. See Appendix B *infra*.

58. *Id.*

59. 45 U.S.L.W. 4073 (U.S. Jan. 11, 1977).

and middle income families. Enactment of such programs may be motivated by desires for an integrated community, by efforts to avoid costly and divisive litigation over alleged discrimination, or by constitutional and statutory arguments that such inclusionary plans are necessary. As this study's community survey indicates, many cities are enacting local programs that involve bmp housing, a density bonus award for providing such housing, or a combination of such features. These relatively new zoning practices raise many constitutional issues to be considered by local planners, legislators, and the courts.

The Constitution guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."⁶⁰ Additionally, no state shall "deny to any person within its jurisdiction the equal protection of the laws."⁶¹ These three clauses—due process, just compensation, and equal protection—are the most important constitutional provisions against which a bmp housing program must be measured.

1. *Due Process*

Although housing programs with bmp unit requirements and density bonuses are subject to the same procedural due process requirements as other local legislation,⁶² such programs may involve special substantive due process problems. The reasonableness of both the objectives of the programs and the means of their achievement may be open to question.

A policy decision by a local legislature to encourage or to require bmp housing in new residential developments must fall within the permissible scope of the police power or statutory authority.⁶³ Courts tend to interpret the police power expansively to allow reasonable regulations for purposes of public health, safety, and general welfare.⁶⁴ As the housing shortage for low and moderate income people becomes more severe and less remediable by mere private action,⁶⁵ local legislatures may determine that the general welfare requires government action through zoning. If local governments may require slum reha-

60. U.S. CONST. amend. V.

61. U.S. CONST. amend. XIV.

62. See generally *MANAGEMENT AND CONTROL OF GROWTH*, *supra* note 7; *IN-ZONING*, *supra* note 10; *THE ZONING GAME*, *supra* note 29.

63. See text accompanying note 18 *supra*.

64. *Id.* See *Municipal Growth-Restricting Plans*, *supra* note 30.

65. See notes 6-15 and accompanying text *supra*.

bilitation,⁶⁶ preservation of historical sites and natural areas,⁶⁷ clustering of structures to maintain open space,⁶⁸ mixture of land uses within zones,⁶⁹ exactions of land as a condition of permit approval,⁷⁰ and granting of tax preferences to preserve agricultural lands,⁷¹ then construction of low and moderate cost housing logically falls within the permissible exercise of the police power. The objective of solving a housing shortage is within the concept of the "general welfare" but the legal techniques of providing dwellings may be vulnerable to due process restraints.

A housing density bonus, as a means of encouraging construction of low and moderate income housing, must be rationally related to the legitimate objectives of the police power. The requirement of bmp units is directly and clearly related to the objective of providing housing, and bonus units operate as an economic incentive (or compensation) to the developer. The bonus is therefore an indirect, although rational, means of ensuring that exercise of the police power through zoning will result in additional housing for low and moderate income people. Legislative line-drawing for the threshold size of a residential development to be subject to a bmp unit requirement, and the correlative determination of the percentage of total units that must be bmp units, are policy decisions normally reserved to local governments. The courts usually do not independently judge the reasonableness of such zoning enactments, but instead honor a presumption of validity concerning legislative decisions.⁷² As enunciated in *Village of Euclid v. Ambler Realty Co.*,⁷³ and embraced by the Supreme Court for over fifty years, a zoning ordinance will meet the requirements of due process unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."⁷⁴

66. *E.g.*, *Berman v. Parker*, 348 U.S. 26 (1954).

67. *See, e.g.*, 1 ANDERSON, AMERICAN LAW OF ZONING §§ 7.12-.24, .29 (1968) [hereinafter cited as AMERICAN LAW OF ZONING].

68. *See, e.g.*, D. HAGMAN, CALIFORNIA ZONING PRACTICE §§ 5.16-.20 (Supp. 1975).

69. *E.g.*, *Rudderow v. Township Comm. of Mount Laurel*, 121 N.J. Super. 409, 297 A.2d 583 (1972); *Orinda Homeowners Comm. v. Board of Supervisors*, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (1970).

70. *E.g.*, *Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

71. *E.g.*, California Land Conservation Act of 1965 (Williamson Act), CAL. GOV'T CODE §§ 51200-95 (West. Cum. Supp. 1976); CAL. REV. & TAX. CODE §§ 421-32 (West Cum. Supp. 1976).

72. *See generally Municipal Growth-Restricting Plans, supra* note 30.

73. 272 U.S. 365 (1926).

74. *Id.* at 395.

Granting of a density bonus should be upheld under such a deferential standard of review.⁷⁵

2. *Taking Without Just Compensation*

Although housing density bonus programs may meet due process standards of reasonableness, the mandatory inclusion of bmp units raises issues of a taking without just compensation. Excessive regulation of land is controlled by the doctrine of inverse condemnation and the constitutional mandate of just compensation.⁷⁶ A landowner may recover damages or have an ordinance judicially declared invalid for the injury he suffers from excessive regulation.⁷⁷

Many jurisdictions now recognize that reasonable expenses incurred by a city in the exercise of municipal zoning authority can be imposed on the regulated landowner.⁷⁸ A permit applicant can be required to pay reasonable permit fees, and an increasing number of state courts are upholding exactions of land in lieu of fees or other property as a condition for issuance of a development permit.⁷⁹ Exactions can include dedication of land for streets, parks, schools, and any other public facility rationally related to a general public need that would be increased by the proposed development.⁸⁰ The requirement of bmp units operates as an exaction of property and must meet the same standard of rational relationship to a permissible public objective, that is, construction of housing for low and moderate income people.

Opponents of bmp housing programs argue that the exactions require a developer to resolve a social problem and confer a public benefit without receiving just compensation for his expenditures. The local legislature, however, presumably has determined that the past trend of private residential development not only has failed to ameliorate a shortage of low and moderately priced housing, but has contributed to the problem. Just as zoning bodies may require dedication of land for other permissible public purposes, so too can they require the construction of bmp housing. The extent of the exaction and its diminu-

75. *Contra*, Board of Supervisors v. DeGroff Enterprises, 214 Va. 235, 198 S.E.2d 600 (1973).

76. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Candlestick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970).

77. *Id.*

78. *See* note 70 and accompanying text *supra*.

79. *See generally* IN-ZONING, *supra* note 10.

80. *See* note 70 and accompanying text *supra*.

tion of the developer's property value, however, will determine whether a taking has occurred.⁸¹

State courts differ in their tests for determining a taking. California is on one end of the legal spectrum, finding no taking unless the landowner is denied any reasonable use of his property,⁸² whereas Virginia is on the other end in finding a taking upon a showing only that the developer's property values are diminished because of a public regulation for social purposes.⁸³ A mandatory bmp provision may reduce potential profits, and may be vulnerable to a taking argument if no compensation is given to the developer. If there is no vested right to develop land,⁸⁴ however, mere issuance of a development permit may be sufficient compensation to avoid the taking argument. If the landowner demonstrates a right to develop, some additional compensation must be provided to insure against an excessive diminution in property value. The density bonus may be considered such compensation, in addition to its value as an incentive to construct bmp units. The bonus would protect, or possibly enhance, the developer's land values while providing low and moderate cost housing that might not otherwise be constructed. The program involves reciprocal benefits to the developer and regulatory agency, yet under the stringent test used in Virginia⁸⁵ such a program may nevertheless be vulnerable to the taking argument. State courts would probably weigh the reasonableness of the bmp requirement against the criteria for permit approval with or without density bonus. It would appear that the more generous the density bonus allowed, the more likely a bmp requirement is to be upheld against the taking argument. The courts have not yet, however, resolved this difficult constitutional issue.

3. *Equal Protection*

Commentators have urged that for purposes of equal protection analysis in zoning cases, courts should apply strict scrutiny to wealth as a suspect classification and to housing as a fundamental interest.⁸⁶ The

81. *E.g.*, *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

82. *E.g.*, *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976).

83. *E.g.*, *Board of Supervisors v. DeGroff Enterprises*, 214 Va. 235, 198 S.E.2d 600 (1973).

84. *See generally* IN-ZONING, *supra* note 10.

85. *See* note 83 and accompanying text *supra*.

86. *See generally* Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509 (1971); Feiler, *Metropolitanization*

Supreme Court has expressly rejected both notions, holding that legislation that utilizes wealth classifications or affects access to housing need only be examined under the deferential rationality test of equal protection analysis.⁸⁷ Therefore, a local program requiring bmp housing, which inherently is based on wealth criteria for housing availability, need only meet a standard of rationality.

Developers of land may argue that imposition of bmp requirements force them to deal with a social problem common to the area rather than specifically related to their land. In requiring them to provide housing for low and moderate income people, the local government allegedly discriminates against developers who are no more responsible for a housing shortage than other members of society. Additionally, bmp requirements would usually be imposed on relatively large developments, and developers may argue that the local government unconstitutionally discriminates between large and small developments. The different state positions on exaction law, previously discussed in connection with the taking argument,⁸⁸ would be relevant to these equal protection arguments. If state law permits exactions for purposes of a general public need to which the development would contribute, a bmp requirement would not seem to deny equal protection. Local legislatures may determine that traditional residential projects tend to develop land, increase housing prices, create environmental problems, and fail to meet the need for low and moderate cost housing, all with the past implicit approval of the zoning authority. Relatively large developments tend to accelerate these social problems, and local solutions, therefore, logically should begin with the largest contributors to the shortage of low cost housing. The Supreme Court has consistently held that legislatures may attempt to solve problems in a piecemeal fashion,⁸⁹ and imposition of bmp requirements on relatively large housing projects presumably would be permitted as rationally related to the objective of providing housing for low and moderate income people. In granting a development permit with conditions requiring

and Land Use Parochialism—Toward a Judicial Attitude, 69 MICH. L. REV. 655 (1971); Sager, *supra* note 26; *Municipal Growth-Restricting Plans*, *supra* note 30; Note, *Exclusionary Zoning: The Responsibility of Local Zoning Authority to Non-Resident Indigents*, 23 STAN. L. REV. (1971).

87. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (wealth classifications *per se* not suspect); *Lindsey v. Normet*, 405 U.S. 56 (1972) (housing *per se* not a fundamental interest).

88. See notes 76-83 and accompanying text *supra*.

89. *E.g.*, *New Orleans v. Dukes*, 96 S. Ct. 1148 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

bmp units, the local government exercises its police power for the general welfare. A developer attacking such conditions must show that they are unconstitutionally arbitrary and discriminatory, which is a heavy burden to bear under the rationality standard of equal protection analysis.

Purchasers of market priced units within a development having bmp units may argue that they are forced to pay higher prices to underwrite the developer's expenses in providing the bmp units. Because of the many expenses incurred by a developer, the cause of any increase in price can only be speculated upon. For example, dedication of land for roads, parks, schools, and other public facilities necessarily increases the developer's expenses, which are in turn passed on to the housing purchasers. Additional expenses for constructing bmp units fall within the same category of facilities provided for public objectives and benefiting the developer's land. Moreover, higher prices for purchasers theoretically would not be necessary if the developer received a density bonus for providing bmp units.⁹⁰ The bonus would allow the developer to construct more units, thereby increasing his total revenues and offsetting his additional expenses. Neither the developer of a housing project nor the purchasers of dwellings, therefore, would likely prevail on equal protection grounds against a bmp requirement coupled with a density bonus.

4. *Problems of Program Implementation and Enforcement*

Assuming that the terms of a housing density bonus program are upheld against constitutional arguments, problems nevertheless remain concerning the validity of restraints on alienation, the enforcement of bmp requirements, the extent to which the local government's police power can be restricted by contract, and whether private individuals or public agencies will administer a rental program of bmp units.

Legislatures and courts generally honor the common law prohibition of restraints on alienation of land.⁹¹ If the restraint is for a reasonable period of time and is imposed under the municipal police power in furtherance of the general welfare, however, the public policy arguments against the restraints appear to evaporate. For example, a bmp housing program that restricts sale of units for five years furthers the public policy of providing low and moderate cost housing while encumbering the property owner for only a legislatively defined period

90. See notes 57-58 and accompanying text *supra*.

91. See generally R. POWELL & P. ROHAN, *THE LAW OF REAL PROPERTY* §§ 839-48 (1976).

of time. When compared to the seemingly more stringent land use restrictions imposed through local controls,⁹² such time limitations on sale of the bmp units seem reasonably related to the legitimate exercise of the police power. As the time period during which an owner is restrained from selling or renting the units increases, however, so may the vulnerability of the program to the argument of a taking without just compensation.

If bmp units are rented rather than sold to low and moderate income families, the same restraints on alienation must apply to the renters as apply to the original developer. The public policies of providing bmp dwellings for a segment of the population that experiences a housing shortage, while safeguarding against windfall profits by the developer who sells the units, also apply to buyers and renters of bmp units. If their units were not similarly restricted, the buyers could sell them at a substantial profit, thereby reducing the housing stock for low and moderate income families. This potential problem raises the issue of who should administer a bmp housing rental program.

A bmp rental provision is explicitly enacted for public purposes, and the program logically should be administered by a public agency. If the developer retains ownership of the land and the agency holds only a leasehold interest, however, the developer may sell the bmp units to a buyer who could speculate on the future unencumbered value of the land. Moreover, renters would pay regular installments to an agency while knowing that their tenancy was limited to a definite number of years after which they presumably would re-enter the regular market for housing. If the developer acted as the administrator of a rental program, the land use regulatory agency nonetheless would oversee the evenhanded implementation of the program or depend upon aggrieved renters to identify problems. The ability of the developer to sell his interest in the rented units should militate against reliance on private administration of a rental program.

If a developer, buyer, or renter of bmp units breaches the conditions of the development permit, the regulating agency must be able to enforce the restrictions. Conditional zoning, or the closely related technique known as contract zoning,⁹³ relies upon restrictions that are imposed through the municipal police power upon a permit applicant as legally binding conditions. For example, as explained in *Scrutton v.*

92. See notes 66-71 and accompanying text *supra*.

93. See generally Comment, *Toward a Strategy for Utilization of Contract and Conditional Zoning*, 51 J. URB. L. 94 (1973).

County of Sacramento,⁹⁴ a land use regulatory agency possesses a variety of enforcement procedures for permit violations, including suit for breach of contract, breach of restrictive covenant, and breach of equitable servitude. "The police power to zone and rezone may not be restricted by contract,"⁹⁵ however, and the local government therefore perhaps cannot be restrained from breaching *its* obligations under a development permit. Courts may rule that if the terms of permits cannot be enforced by both parties, they shall not be enforceable by either.⁹⁶ The trend seems to be toward the validity of conditional zoning, particularly when extensive legislative findings of fact support the restrictions imposed on landowners as reasonable and nondiscriminatory.⁹⁷

This discussion of the constitutionality and problems of administering bmp housing programs coupled with a density bonus is by no means definitive, particularly inasmuch as the relatively new housing programs have not been interpreted by the courts. And quite aside from their legality, the actual results of bmp housing programs have been mixed, as indicated in the community survey.

IV. The Community Survey

A. Introduction

This section will present information gathered in an empirical survey of community zoning practices that sought to provide bmp housing through a variety of inclusionary techniques. These techniques included: (1) mandatory housing programs with or without the housing density bonus as a means of compensation; and (2) voluntary programs with or without density bonus as a means of incentive. The survey was conducted by personal interview, by telephone conversations, and by accumulation of planning data. Approximately thirty communities were contacted and of that number ten will be presented in this section.⁹⁸

B. Mandatory Inclusionary Ordinances Without Density Bonus Compensation

Several communities have adopted mandatory ordinances re-

94. 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969). See also AMERICAN LAW OF ZONING, *supra* note 67, at § 8.21.

95. 275 Cal. App. 2d at 417, 79 Cal. Rptr. at 876 (1969).

96. *E.g.*, Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1959). *Contra*, Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969).

97. Note, *Contract and Conditional Zoning: A Tool for Zoning Flexibility*, 23 HASTINGS L.J. 825 (1972).

98. See note 1 and accompanying text *supra*.

quiring developers to include a minimum amount of subsidized or low cost housing in their conventional housing projects. No density bonus units are offered; rather, the provision of bmp units is considered to be one of the preconditions of a development permit for which no compensation or bonus is necessary.

1. *Lakewood, Colorado*

Lakewood is a suburban community located on the periphery of the greater Denver metropolitan area. New commercial developments have strained the available housing supply in town by bringing in additional workers. In 1975 the median income of the town was approximately \$14,000, and the average sales price of a new, detached, single-family dwelling was \$38,000; as a result, many of the residents of Lakewood with incomes below the area median have been unable to afford the new houses being constructed.

Lakewood's planning commission attempted to alleviate the shortage of bmp housing by implementing a policy requiring that housing projects of fifty or more units provide ten to fifteen percent of the units at below market price.⁹⁹ No compensation is offered to the developer other than federal subsidies to offset the cost of building the bmp units. While the city council has not adopted the commission's guidelines as official city policy, there is a veiled implication that a building permit will not be granted in the absence of compliance.¹⁰⁰

The bmp agreement between the city and the developer is by contract and is written on the zoning plat. The contract requires the developer, his successors, transferees, and assigns: (1) to construct bmp units comprising at least ten percent of the units of the subdivision and to sell these units to persons meeting reasonable eligibility criteria established by the city for the purchase of moderate income housing; and (2) to sell houses with a minimum down payment, maximum repayment terms, and minimum interest rates available from commercial or governmental sources. All deeds and contracts of sale or purchase with respect to these units are subject to restrictive covenants running with the land for twenty-one years from the date of initial sale. If the city does not provide financing or locate moderate income purchasers within sixty days of completion of the units, they may be sold free of

99. Lakewood, Colo., Planning Commission Policy No. 15 (1973).

100. Telephone interview with E. Anne Huttlinger, Housing Planner, Lakewood, Colo. (Dec. 1975).

the restrictions.¹⁰¹ The restrictive covenants provide that a prospective seller shall notify the city of any offer to purchase, and the city shall have an option of first refusal, exercisable within thirty days, to buy at terms no less favorable than the offer but in no case at a price more than the initial sales price plus seven percent per year. If the city does not exercise its option the seller may accept a bona fide offer.

Inasmuch as the bmp requirement is only a planning commission guideline and not a formally adopted city policy, the city is uncertain about how it would proceed against a developer who decided to default. This has not been a problem, however, because in the absence of federal financing for bmp units, there has been nothing to enforce.¹⁰² With average home building costs in excess of \$40,000, the cost of construction of the units is too high for developers to meet the bmp criteria. It has been suggested that the city demand a cash donation to its housing authority to build bmp housing rather than having developers provide the bmp units.¹⁰³ The city is considering the feasibility of adopting this idea, but none of the different approaches except federal financing has been tested or implemented.

2. *Boulder, Colorado*

Boulder is a university community with a population of 70,000. The median family income is \$14,400. Residential development in the town was restricted in the early 1970s due to a no-growth environmental policy; however, the city is now adding land by annexation, and new developments are expanding on the periphery of the town. In 1972, the Denver Regional Council of Government (DRCOG), of

101. Lakewood, Colo., Official Development Plan Stipulation Agreement (1974). There has been some conflict among the planning staff over the definition of low and moderate income persons. The agency has relied upon the federal HUD guidelines, note 56 *supra*, but these general criteria have been unsatisfactory. The federal guidelines define "moderate income persons" to be those within 80% of the area median income; but the staff found that this is still too high a figure to meet the needs of many area residents. The planning commission staff envisions the provision of moderate income units priced at \$20,000. Developers have insisted that they cannot afford to provide units at that price without financial assistance and that no federal subsidies have been available. Letter from E. Anne Huttinger, Housing Planner, Lakewood, Colo. (Aug. 8, 1975).

102. Letter from E. Anne Huttinger, Housing Planner, Lakewood, Colo. (Nov. 28, 1975). The breakdown of developer commitments is as follows:

Hutchinson Homes	125 single-family detached units
Union Square	100 condominiums
Concept 80	37 condominiums

103. *Id.*

which Boulder is a member, performed a study of the need for low and moderately priced housing in the Denver metropolitan area. The study focused on the existence of substandard housing units in the area and the disparity between the number of low and moderate income families and the available units within each income range. It concluded that additional bmp housing was required, and formulated a regional allocation model to be implemented by each municipality by 1977. Boulder's allocation amounted to 359 low and 1014 moderate cost units during the five year period. An independent study by Boulder of the DRCOG proposal indicated that its goals were accurate and re-emphasized the need to develop programs that would achieve the goals set forth in the regional allocation.

To accomplish the DRCOG objectives Boulder adopted a resolution applicable to developers desiring to annex land to the city or to receive water or sewer services under a revocable contract.¹⁰⁴ In developments exceeding fifty units, fifteen percent of all units developed, whether for rental or for sale, must be made available to low and moderate income families.

Implementation of the program begins with a contractual arrangement between the developer and the city housing authority. The economic levels for low and moderate income are set by using current HUD guidelines. The city enforces the ordinance by refusing to provide water or sewage service to the new project until the required bmp units are rented or sold, at which time a certificate of compliance is issued. The only compensation for the provision of bmp units is the issuance of a building permit.¹⁰⁵

The developer has several means available to meet the bmp unit requirements. First, he can provide bmp units on the same project site. Thus, if the new units are rentals, the developer must provide that fifteen percent of the units available will meet HUD requirements for low or moderate price rental.¹⁰⁶ Similarly, if the units are primarily for sale, fifteen percent must be priced for persons meeting HUD income level requirements.¹⁰⁷ Second, the developer can provide the fifteen percent bmp units by making available acceptable low and moderately priced housing units elsewhere in the community. One developer has

104. Boulder, Colo., City Council Resolution 115 (1973).

105. Telephone interview with Joseph Cavanaugh, Department of Community Development, Boulder, Colo. (Dec. 1975).

106. See note 56 *supra*.

107. See note 56 and accompanying text *supra*.

already agreed to build two units off-site. The Knollwood II project provided two bmp units from a total of twenty-four new townhouses in their project by converting and renovating a duplex located in another part of town at the developer's expense.¹⁰⁸ Such off-site renovation, however, could tend to center bmp housing in the older areas of Boulder, whereas the purpose of the program is to provide low cost housing in the city's periphery. Third, the developer has the alternative of fulfilling the bmp requirement by selling the necessary number of improved lots to the Boulder Housing Authority at the developer's certified costs. These lots would be used by the authority for developing low cost housing in the community. The city is not encouraging this alternative because it might put them into the land banking business.¹⁰⁹

Although twelve development projects have been designed to provide fifteen percent bmp units, and the number shows promise of increasing, very few units have been constructed under the provisions of the resolution.¹¹⁰ Only two developments have been completed, and the bmp units provided by them are being sold as moderate income units priced between \$30,000 and \$35,000. The bmp units are townhouses, and in many cases one of the bedrooms is left for purchasers to complete.¹¹¹

The first development was Shanahan Ridge, a townhouse development in South Boulder. The development is located in a peripheral city area with no other subsidized housing nearby. Shopping, schools, and recreation facilities are nearby, and bus routes directly serve the development, providing access to all other parts of the city. With the use of clustered housing the developers were able to provide nearly half (195 out of 433) of the units in a range within the financial means of moderate income persons, while still maintaining a uniform high quality throughout the development.¹¹² The second development, Wonderland Hills, is located at the north border of Boulder. It provides fourteen bmp townhouses out of a total project number of ninety-six. A village

108. Housing Statistics, Boulder, Colo. (Dec. 1975).

109. See note 105 *supra*.

110. See generally Abstract, Boulder, Colo., Proposal to the Housing and Urban Development Office of Policy Development (1974). The city has twice attempted to finance construction and private home ownership by requesting HUD to allow federal rental subsidies as mortgage payments. The city would buy bmp units and then lease them to persons of moderate income. After a number of years, the lessee could purchase the home and then continue to pay off the mortgage with rental subsidies. HUD has firmly refused to allow rental funds to be used for this purpose.

111. See note 108 *supra*.

112. *Id.*

center with shopping facilities is within walking distance, and bus routes serve the development directly.¹¹³

The absence of federal funding and the refusal of HUD to allow low income rental payments to be used for private mortgage payments has resulted in the inability of the city to require construction of all the bmp units for which the developers covenanted.¹¹⁴ The use of other private or local incentives has not been considered. The city has usually allowed developers to proceed with construction of units in the new projects at market price and to postpone construction of bmp units until federal subsidies become available.

3. *Los Angeles, California*

The City Council of Los Angeles, California, pursuant to the city's home rule powers, adopted an ordinance designed to confront an emergency housing shortage that posed a threat to the public health, safety, and general welfare.¹¹⁵ The ordinance requires developers of housing projects of five units or more to make every reasonable effort to build at least six percent of the total number of units at a cost that would allow such units to be rented or sold to low income persons at "the fair market value."¹¹⁶ Additionally, at least nine percent of the new units must be rented or sold to low or moderate income people at the fair market value. The ordinance thus imposes a total requirement of fifteen percent bmp units with government subsidies and establishes the following standards for construction of the units:

(1) The bmp units shall be reasonably dispersed throughout the development.

(2) The bmp units should generally reflect the average number of bedrooms per dwelling unit for the development as a whole.

(3) The bmp units should be designed to harmonize with other residential structures and units in the development.¹¹⁷

The emergency ordinance defines "housing developments" as any apartment house, apartment hotel, multiple group dwelling, residential condominium development, or cooperative apartment having five or more

113. *Id.*

114. See note 110 *supra*.

115. LOS ANGELES, CAL., MUNICIPAL CODE §§ 12.03, 12.39, 13.04, as amended by Ordinance No. 145,927 (1974).

116. *Id.* § 12.39. The price difference between what moderate income persons can afford and the fair market value of the units must be paid by the local government.

117. See note 115 *supra*.

dwelling units. The ordinance also provides means to establish and to control residential planned unit developments (PUDs). PUDs are expressly required to comply with the provisions for low and moderate income housing described above. Subdivision sales of condominiums are also required to comply with the fifteen percent criterion.

As originally conceived, the ordinance relied exclusively on federal construction subsidy programs, with HUD criteria used to define the different economic levels of low and moderate income. Thus, local homebuilders were to receive neither optional methods nor density bonuses for meeting the percentage requirement.¹¹⁸

Implementation of the ordinance depends primarily on funding considerations. If developers can build the bmp units at cost without incurring a loss on investment, they must make the units available at the local area's fair market value either to the housing authority or to low or moderate income households approved by the authority. In order to assure the achievement of this objective, the developers are to execute an agreement with the housing authority that will assure the continued availability of these units as low or moderate cost dwellings. The agreements bind the developer and his successors in interest, and the ordinance establishes no time limit.

If the housing authority determines either that units meeting the specified federal standards cannot be developed at less than fair market value, or that no subsidies are available to permit low or moderate income households to rent the units at fair market value, then the developer shall meet the bmp requirements by giving the housing authority an express, continuing right of first refusal to lease at fair market value any of the units in the development. Alternatively, the housing authority can require that a possible maximum of fifteen percent of such units be leased at fair market value only to approved low or moderate income households. The housing authority may exercise this right of first refusal at the existing fair market value when any unit becomes vacant and fewer than fifteen percent of the units in the development are occupied by low or moderate income households. The same provisions are made for ownership units that cannot be subsidized or built at a price that would make them available to low or moderate income households.

118. Local building associations nevertheless endorsed the measure after the city assumed responsibility for arranging subsidies, leaving the builders responsible only for providing the required number of units. See HOUSING DENSITY BONUS, *supra* note 4, at 9-10.

Prior to the approval of any building permit or final tract map, the housing authority must find that the developer has complied with the requirements of the ordinance. A developer is required to bring his preliminary plans to the housing authority before obtaining a permit from the Building and Safety Department. The authority then analyzes the plan, focusing on the requirement that the developer make every reasonable effort to comply with the ordinance, even though he may not be compelled to agree to a specific plan. The developer must submit a financial feasibility study and the housing authority will then give its estimate of the potential number of units that can be provided at either low or moderate prices. The authority and the developer will then sign an agreement for that number.¹¹⁹ The housing authority is granted the power to enter recorded agreements with developers and purchasers and to take other steps necessary to assure that the units will be provided and that they will be continuously available to or occupied by low and moderate income households.

The enforcement system first seeks an estimated completion date for the project, and the project developer will then be certified to continue with construction. When the bmp units are ready for marketing, the developer is to make the six and nine percent low and moderately priced units available to the housing authority at qualifying rentals. The city insures that it maintains a right of first refusal by requiring prompt notification of vacancy of those units that were not initially occupied by low or moderate income families.¹²⁰ If the developer is dissatisfied with the housing authority's determination, an appeal is available. The city council may reverse or modify by resolution any determination or requirement made by the housing authority. The action of the authority becomes final and conclusive after a denial of review by the city council, which may be assumed if no vote is taken within sixty days after an appeal has been made. The housing authority will perform its functions under a contract with the city made pursuant to the city charter, and the ordinance is to become effective upon the operative date of such a contract. Compliance with the provisions of the ordinance will be investigated prior to the issuance of a certificate of occupancy.

Los Angeles was the recipient of a federal HUD subsidy under a program for "recently completed housing."¹²¹ The subsidy has been

119. Telephone interview with a staff member of the Los Angeles Housing Authority (Aug. 1976).

120. *Id.*

121. See note 11 *supra*.

allocated for the use of 400 units that have not yet been selected. The subsidy is restricted to one and two bedroom units. HUD has set the maximum qualifying rent levels at seventy-five percent of new construction fair market rents, a figure the housing authority believes is still too low to obtain the desired housing, in light of the recent property tax increases that have added significantly to the cost of new units.¹²²

4. *Berkeley, California*

Berkeley, California, is located directly across the bay from San Francisco. Berkeley is a slowly growing city, having its biggest population increase of 33 percent from 1940 to 1950 and experiencing a slight decrease of 2.2 percent during the 1950s. The population comprises a large number of blacks, as well as members of other minority groups.¹²³ The presence of the University of California campus has a significant impact on Berkeley's rental housing stock and on the housing needs of the various population groups. The young adult population, ages twenty to thirty-four, increased by 15,823 between 1960 and 1970.¹²⁴ Berkeley has almost twice as many renter occupied households as owner households (29,732 to 15,932), and the median number of persons per unit is 1.8. Berkeley is therefore representative of many American towns that sustained great growth at the time of World War II but have now attained an equilibrium in terms of both population and physical development.

Almost half of Berkeley's housing units are single-family dwellings; fewer than twenty percent were built after 1940, and half are in need of rehabilitation. From 1960 to 1970 the median price of owner occupied housing increased from \$16,300 to \$26,500. The median rent rose from \$78 to \$137. The vacancy rate in 1970 was a low 3.6 percent and has since declined to approximately 1.4 percent. In 1975 the median income of owner households in Berkeley was \$11,700 and the median value of owner occupied units was \$26,600.¹²⁵ A majority of owner households with annual incomes of less than \$10,000 occupied homes valued at substantially more than twice the annual household income. "Moreover, a sizeable number of households with an an-

122. See note 119 *supra*.

123. During the thirty year period from 1940 to 1970, the black population increased from 3,395 to 27,421. During this same period the population of other ethnic groups in the city increased from 1,885 to 10,254. BERKELEY, CAL., HOUSING ASSISTANCE PLAN, I-4 (1975).

124. *Id.* at 5.

125. *Id.* at 9.

nual income of less than \$3,000 occup[ied] units valued at \$20,000 or more."¹²⁶

Over the past twenty years Berkeley's housing supply has increased largely because of the construction of relatively large apartment buildings and dormitories where either older single-family homes had been removed or on the few vacant parcels of land. All areas of the city have reacted to this trend. Many neighborhood residents have persuaded the city to enact more restrictive zoning to prevent the building of additional high density apartments.¹²⁷ Reclassification has put large areas into density restricted zones. The result is a continuing need for moderate income units in the Berkeley area and a simultaneous need to avoid large scale, high density developments.

In 1973 Berkeley enacted the Neighborhood Preservation Ordinance.¹²⁸ The stated purpose of the ordinance was to deal with an emergency situation "arising from current development trends in the City of Berkeley."¹²⁹ The current development trends included demolition of older houses to provide space for new dwellings, which reduced the stock of decent, low priced housing; the imposition of high rents for new dwellings of low quality; disregard of the special needs of the aged and handicapped in the design of new dwellings; and increased taxes as a result of high density developments failing to pay for the additional city services they require.¹³⁰

The ordinance resolves that housing that has not met the needs of underserved people in the community must become a priority in any consideration of local land use, and that the environmental impact of new housing construction is another major concern. Accordingly, the ordinance mandates that all new developments of four or more units must make twenty-five percent of the new units available to low income households,¹³¹ while other provisions enable environmental impact

126. *Id.* The Secretary of HUD has established the median income for the San Francisco-Oakland area at \$15,500. According to HUD guidelines, those households with an annual income of \$12,400 or less are lower income households. There are 30,617 households in Berkeley in that category. Twenty percent of Berkeley's families have annual incomes of less than \$5,000. An estimated 22,623 lower income households are in need of housing assistance, which represents 77% of all lower income households and 52% of all households in the city. BERKELEY, CAL., HOUSING ASSISTANCE PLAN, II-4 (1975).

127. *Id.* at III-1.

128. Berkeley, Cal., Ordinance No. 4641 (1973).

129. *Id.* at § 2.

130. *Id.*

131. *Id.* at 4. Low income household is defined by HUD criteria. See note 56 and accompanying text *supra*.

analysis by establishing restrictions on demolition and neighborhood review of all development.

The Berkeley Neighborhood Preservation Ordinance is by its terms a set of interim regulations intended to operate until the city's new master plan has been submitted to the city council.¹³² Two years were provided for this revision, but an extension has been granted. The ordinance, in the meantime, *mandates* that all new housing projects of four or more units provide twenty-five percent of the new dwelling units below the local sale or rental price, and that noncompliance will result in the denial of a building permit.

The Berkeley plan has not produced the results envisioned by its advocates. High interest rates and a dearth of federal subsidies have severely curtailed multi-family dwellings. The only major new project as of 1975 is a FHA-assisted senior citizen apartment building of ninety-one units under construction.¹³³ The only other applications for development have been for structures with three or fewer units, and most of these have been for single-family dwellings. There have been no legal challenges to the ordinance, but the twenty-five percent bmp requirement has been considered unreasonable and arbitrary by many developers, especially in the absence of any form of compensation.

C. Mandatory Inclusionary Ordinances With Density Bonus Compensation

1. *Montgomery County, Maryland*

Montgomery County, Maryland, is a residential suburb near

132. There has been no substantial revision of the Berkeley Master Plan since its adoption in 1955. The plan does not contain a housing element, which is required for the city's continuing eligibility to participate in various federal programs. Neither the master plan nor the zoning ordinance contains provisions insuring the development of low to moderate income housing. There are no provisions insuring the preservation of land on which low or moderate income housing could be located if public or private funding becomes available in the future. For these reasons, the findings in the Neighborhood Preservation Ordinance conclude that until these deficiencies are corrected the critical conflict between current development trends and the public welfare will continue. The *California Attorney General's Report* reports that Berkeley is not alone in such deficiencies. CALIFORNIA HOUSING REPORT, *supra* note 7. Despite the clear and mandatory language in the State Planning and Zoning Law (CAL. GOV'T CODE § 65302 (West Cum. Supp. 1976)), cities and counties have been lax in adopting and implementing adequate housing elements that utilize the full range of municipal powers to meet the needs of low and moderate income residents. As many as 35% of the cities and 20% of the counties in the state have yet to adopt a housing element, even though the law has required their adoption since 1969. Many of the housing elements that have been adopted consist only of vaguely worded goals and have virtually no implementation components or strategies. CALIFORNIA HOUSING REPORT, *supra* note 7, at 28.

133. BERKELEY, CAL., HOUSING ASSISTANCE PLAN, III-1 (1975).

Washington, D.C. Rapid growth began in the thirties and increased during the late forties. Each expansion of the federal government has caused a population influx and a corresponding increase in the demand for housing. The population doubled in each decade between 1940 and 1960.¹³⁴ As a result of the continuous population increase, Montgomery County's housing supply became severely strained. The unavailability of low and moderately priced housing increased demand; and consequently, low priced housing became part of the general housing stock for middle income families. Low income families were thereby priced out of the housing market.

Early efforts of the county to ameliorate the housing shortage focused on persuading builders to produce housing at moderate prices. Several years ago the county initiated the CHOICE (Cost-Effective Home Ownership in an Improved Contemporary Environment) program, a proposal to expedite the development process by waiving some development regulations. Little housing was constructed pursuant to the program, however, and that which was built and sold at moderate prices has been resold at greatly increased prices. Another effort was made to reduce housing costs by permitting higher zoning densities for moderately priced housing construction in the county. Thus, housing for the elderly at increased densities is permitted in several residential areas, but only nonprofit organizations have constructed a significant amount of such housing; builders have apparently found it impossible to realize any savings or benefits under the provision.¹³⁵

134.

	<u>Number of People</u>	<u>Percent of Change</u>
1940	83,912	
1950	164,601	95.9%
1960	340,928	107.4%
1970	522,809	63.3%

The migration patterns of recent decades have changed. Fewer families are moving out of the D.C. urban core; most movement is among the suburbs. Of the 38,223 migrant families in the last decade, only 4% came from D.C.; 24% came from other parts of the greater metropolitan area and 17% came from other regions of the nation. Much of the growth is the result of new suburban development. There seems to be a high preference for Montgomery County and an increased mobility as personal income rises. The predominant movement patterns are migration of white families from outside the region, particularly from the north and west of Washington. Montgomery County can expect continued growth, influenced particularly by growth in government, the professions, and service industries. Currently, nine thousand new jobs are being created annually. A recent study of employers found that these new jobs are 55% professional or managerial, although jobs are being created at all income levels. Most employees drive to work; 70% own their own cars. See MONTGOMERY COUNTY OFFICE OF COMMUNITY DEVELOPMENT, HOUSING CHOICES 7 (1973) [hereinafter cited as HOUSING CHOICES].

135. *Id.* at 12.

The failure of these incentive programs has made county officials aware of a local government responsibility to assume a more positive role in producing low cost housing, particularly for commuting workers.¹³⁶ Recently a study by the Montgomery County Project of the Metropolitan Washington Planning and Housing Association developed the projected housing requirements of the 90,000 new workers that are expected to join the county work force between 1970 and 1980. A survey of the characteristics and housing needs of present workers was applied to the projected work force. The study revealed a probable future need for housing for 23,640 lower income workers for the ten year period; about 7,400 of these would need some form of government subsidized housing.¹³⁷

a. Legislative Program

The county government has adopted the Council of Government's Fair Share Formula, a process that allocates to Montgomery County twenty-six percent of the federal funds for the District of Columbia metropolitan area.¹³⁸ This effort to balance the supply of subsidized housing throughout the region, however, has been restricted by limited funding. In recent years other efforts have been made to encourage construction of moderately priced housing through zoning incentives permitting increased densities and through relaxation of some building and subdivision regulations. But the voluntary approach has yielded very little moderately priced housing.¹³⁹ Responding to the need for moderate cost housing, in 1973 the Montgomery County Council enacted, over the veto of the County Executive, a Moderately Priced Dwelling Unit (MPDU) Ordinance.¹⁴⁰ The County Council declared it to be the public policy of the county:

136. *Id.* at 17-43.

137. *Id.* at 41-42. Other potential future needs include those of young persons who have grown up in the county and who may wish to reside there, regardless of their work location, the needs of elderly residents, the attrition rate of new buildings, and the vacancy rate, which is at 1% or less.

138. *Id.* at 3.

139. *Id.* at 4.

140. Montgomery County Council Bill No. 3-72, MONTGOMERY COUNTY, MD., CODE 25A (1974). The County Executive vetoed the legislation on the basis of the County Attorney's opinion, which stated: "3. Because Bill No. 3-72 requires developers to deal with the resolution of a problem common to the County as a whole, for which they are no more responsible than other citizens, it constitutes an unreasonable discrimination and, therefore, violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States of America. "4. Because Bill No. 3-72 requires developers at their own expense to provide a benefit, public in nature, without

- (1) To implement the general plan goal of providing for a full range of housing choices, conveniently located in a suitable living environment, for all incomes, ages and family sizes;
- (2) To provide for moderate income housing to meet existing and anticipated future employment needs in the county;
- (3) To assure that moderately priced housing is dispersed within the county consistent with the general plan and with area master plans;
- (4) To encourage the construction of moderately priced housing by providing for optional increases in density in order to reduce land costs for such moderately priced housing;
- (5) To require that all subdivisions of fifty or more dwelling units include a minimum number of moderately priced units of varying sizes with regard to family needs; and
- (6) To insure that private developers constructing moderately priced dwelling units pursuant to the requirement of this chapter incur no loss or penalty as a result thereof, but rather, that they can, by virtue of the optional density bonus provision of this chapter as implemented by a companion amendment to the Zoning Ordinance for the County, realize a reasonable profit from their endeavors in this regard.¹⁴¹

The ordinance mandates that all applicants submitting a plan for a housing development of fifty or more units at one location must submit a written agreement guaranteeing that fifteen percent of the new dwelling units in the development will be sold or rented to moderate income families. Alternatively the developer can pay a fee to the county in lieu of such construction. The Montgomery County ordinance does not distinguish between low and moderate income families and does not tie the income limits to federal housing programs; instead, the ordinance specifies maximum income levels for occupants of each type of dwelling unit, subject to periodic adjustments.¹⁴² The ordinance

assuring a return of fair or just compensation for their expenditure of private funds and resources, it constitutes a taking for a public purpose without the payment of just compensation in violation of Section 40A of Article III of the Constitution of Maryland, Article 33A of the Annotated Code of Maryland, and the Fifth and Fourteenth Amendments of the Constitution of the United States of America." County Attorney's Memorandum, Oct. 22, 1972, at 1-2 (unpublished).

141. Montgomery County Council Bill No. 3-72, MONTGOMERY COUNTY, MD., CODE 25A-2 (1974). The County Council enacted the ordinance over the veto of the County Executive, in response to extensive legislative findings detailing the housing shortage for low and moderate income people.

142. The 1975 Montgomery County Price Guidelines include the following:

<i>Sale Units:</i>	<i>Detached/Semi-Detached Dwellings</i>	
	2 bedroom (semi-detached)	\$30,600
	5 bedroom (detached)	44,400
	<i>Townhouse/Multiplex Dwellings</i>	
	1 bedroom	24,900
	5 bedroom	40,200

allows a density bonus of one additional market priced unit for every two moderately priced units, up to a twenty percent overall increase, for those developers providing the lower cost housing. For example, a normal fifty unit subdivision may receive ten extra units if the developer provides twenty moderately priced units out of the sixty total units.

b. Program Implementation

In return for construction of bmp units or payment of fees, the MPDU Ordinance provides developers with density bonuses of up to twenty percent. An applicant may also elect to transfer to the county, as finished lots, the land necessary for construction of the designated number of moderately priced dwelling units. If the applicant chooses this option, he will be reimbursed for the actual costs incurred in developing the land, but not for the cost of the lots themselves.

The ordinance also provides that an applicant shall not avoid the legislative intent by submitting piecemeal applications. In determining whether fifty or more dwelling units are involved in a project, all land at one location under common ownership or control (including land owned by a separate corporation in which any developer has ten percent or more of the stock) is included in the accounting. An applicant may submit for approval a plan for less than fifty units provided that he contractually agrees to comply with the provision of the ordinance if the total number of requests at one location reaches fifty or more dwelling units.

The ordinance authorizes the county executive to designate the levels of income that qualify as "moderate income" within the meaning of the ordinance, provides for definition of moderately priced dwelling units, and establishes maximum sales and rental prices. The ordinance also creates single-family zones for one-family detached, semi-detached, and townhouse units, allowing variances from traditional lot sizes, front

	<i>Dwelling Units in Multi-Family</i>	
	efficiency	\$15,700
	4 bedroom	28,600
<i>Rental Units:</i>	<i>Detached/Semi-detached Dwellings</i>	
	2 bedroom (semi-detached)	\$355
	5 bedroom (detached)	490
	<i>Townhouse/Multiplex Dwellings</i>	
	1 bedroom	295
	5 bedroom	445
	<i>Dwelling Units in Multi-Family</i>	
	efficiency	215
	4 bedroom	325

yards, side yards, rear yards, and building height limitations for a percentage of dwellings, including the moderately priced dwelling units. Multi-family zones allow variances from requirements regarding parking space, green space, yard size, setbacks, and distances between buildings. The office of housing encourages developers to distribute the bmp units throughout the project or subdivision, either as individual buildings or units in an apartment project, or as small clusters of dwellings in cul-de-sacs or buildings.

There is a five year period restricting resale or rental of bmp units at higher prices. This restriction must be placed in the sales contract by the developer when he markets the units, and it must be recorded with the deed to act as a covenant running with the land. Waiver may be granted to an applicant for development under extraordinary conditions.¹⁴³

c. Housing Developments Under the Program

Five developments with moderately priced dwelling units have been constructed in Montgomery County.¹⁴⁴ Eleven additional projects have been approved, with bmp units included.¹⁴⁵ Generally, the lack of construction is represented by a sharp reduction in authorized dwelling units for the last year and is due to a county-wide sewer moratorium. The moratorium has been in effect for the past four years and will continue indefinitely. In 1975 only two thousand building permits were authorized, as compared to the normal yearly range of permits for eight to ten thousand units. Priority for interim sewer

143. Extraordinary conditions are defined as follows: (1) Because of exceptional topographic or other extraordinary conditions or situations of specific parcels of land, strict application of the requirement of the law would impose unusual practical difficulties or hardship upon the applicant; or (2) the applicant is prevented by law or other good reason from being able to use the optional zoning provisions available for the construction of the bmp units. "All waiver requests will be considered individually and limited to a minimum. In the event that a waiver is granted because of the inability of the applicant to construct bonus units, the percentage of moderately priced dwelling units to be required shall be in the same proportion as that of the bonus units that can be built." ADMINISTRATIVE GUIDELINES TO THE MODERATELY PRICED HOUSING LAW, MONTGOMERY COUNTY, MD. 15-16 (1975).

144. Telephone interview with Gary Cuddeback, Office of Housing, Montgomery County, Md. (Jan. 22, 1977).

145. *Id.* The committed bmp units include 193 detached single-family dwellings, 889 townhouses, and 150 apartments.

treatment is now given to those projects that comply with the low and moderate cost housing requirements.

One project that has already been completed is Montgomery Village, a large development that utilized the twenty percent density bonus. The total of 1,060 units includes 305 single-family units at market price, 543 townhouses at market price, and 212 townhouses at below market price. The bmp townhouses are three story units, located back to back. They are clustered in the development because the developer believed that construction of more than a hundred similar units at one time and in one location would help keep project costs down. The bmp units are not mixed with the market priced units because the architectural styles of the two types of units are incompatible. The bmp townhouses are primarily two bedroom dwellings, comprising fifteen hundred square feet and selling for \$30,950, with some three and four bedroom models available, selling for \$32,055 and \$34,950, respectively.¹⁴⁶ The standard market priced units in the project, which are larger and more luxurious, retail at about \$50,000 for the townhouses and \$70,000 for the single family houses.

When the bmp units were completed the developer notified the housing authority, and announcements were made in the local media. Approximately 280 households applied and were found to be eligible under a formula of maximum yearly income.¹⁴⁷ The Community Development Office told interested applicants to contact the developer. Of the original 280 eligible applicants, only 140 appeared at the project site and 51 purchased units. The housing office again advertised through the public media and also contacted local employers. Three to four thousand people signed up and all the units were sold.¹⁴⁸

A large problem with the program is the five year limitation on income restrictions. It is possible to rent the required fifteen percent of new units for five years at the reduced cost and then evict the tenants and sell the units at market rates.¹⁴⁹ Such a practice could be a major

146. The bmp units in this project offer 95% financing, swimming pool, tennis courts, carpeting, air-conditioning, storm windows, smoke detectors, and self-defrosting refrigerators. Interview with Gary Cuddeback, Office of Housing, in Rockville, Montgomery County, Md. (Aug. 11, 1976).

147.	<u>Family size</u>	<u>Gross income</u>	<u>Family size</u>	<u>Gross income</u>
	1	\$10,900	5	\$19,600
	2	\$14,500	6	\$21,000
	3	\$16,300	7	\$22,500
	4	\$18,100	8	\$13,900

148. See note 146 *supra*. The demand for bmp housing appears to be greater for sale units than for rentals. Moderate income persons seek to own their own housing.

149. The Office of Housing is considering an amendment to the law that would re-

difficulty if a developer is willing to build all of his units in the same manner, take the loss on the fifteen percent bmp units for five years, and then resell them to recoup his investment.¹⁵⁰

2. *Fairfax County, Virginia*

Fairfax County Virginia, another suburb of Washington, D.C., more distant than Montgomery County, comprises large areas still rural in character. For the past two decades the County has grown as a "bedroom community" for government employment centers located in Arlington and Washington, and its nearly 560,000 residents make it the most populous political subdivision of the Commonwealth of Virginia.

The cost of all housing has risen sharply in recent years and has become a major concern to many citizens. The median value of a new house was approximately \$25,000 in 1970 and \$54,950 in 1973, a fifty-eight percent increase.¹⁵¹ The rapid rise in housing costs in the county has contributed to pricing large percentages of middle and moderate income households out of the market. The 1975 Preliminary Countywide Plan states that regardless of the rate of growth, the necessary supply of low, moderate and median income housing will not be provided under present market conditions.¹⁵² The plan therefore recommends that the county take affirmative steps to ensure that such housing is provided.

In September, 1971, Fairfax County attempted to intervene in the housing market by enacting an amendment to the zoning ordinance.¹⁵³ The amendment required all developers of fifty or more dwelling units in any of five zoning districts to commit at least fifteen percent of those dwelling units as low or moderate income housing within the definitions promulgated from time to time by the Fairfax County Housing and Redevelopment Authority and HUD. The Virginia Supreme Court in

quire sale of MPDU units if the other market priced units in a development were offered for sale rather than rental.

150. The constitutionality of the law was challenged by a Montgomery County contractor, but the suit was withdrawn. Letter from Gary Cuddeback, Office of Housing, Montgomery County, Md. (Jan. 21, 1977).

151. Preliminary staff studies project that the median price of single-family dwellings in 1990 will be \$106,000 (in 1973 dollars). FAIRFAX COUNTY, VA., OFFICE OF COMPREHENSIVE PLANNING, PRELIMINARY COUNTYWIDE PLAN 33 (1975).

152. *Id.* at 33. The county needs housing: (1) to replace units lacking adequate plumbing (2075 units); (2) to relieve overcrowded units (4262 units); and (3) to accommodate commuters (7399 units); a total need for 13,736 units.

153. FAIRFAX COUNTY, VA. CODE ch. 30 (1961), *as amended by* Amendment 156 (1971).

*Board of Supervisors v. DeGroff Enterprises*¹⁵⁴ held the housing program unconstitutional. The court recognized that providing low and moderate income housing serves a legitimate public purpose. The court decided, however, that in establishing maximum rental and sale prices for fifteen percent of the units in the development, the amendment exceeded the authority granted by the state's enabling act to the local governing body because "it is socio-economic zoning and attempts to control the compensation for the use of land and improvements thereon."¹⁵⁵ The court concluded that the program constituted an unconstitutional taking of private property for public use without just compensation.

The Board of Supervisors of Fairfax County responded with the revised program of Planning Land Use System (PLUS) in February, 1973. The purpose of PLUS was to implement a comprehensive planning program that would update the countywide plan and fourteen district plans. The Preliminary Countywide Plan, completed in June of 1975, included the following recommendations about housing:

(1) The county should continue to uphold the existing policy of the board of supervisors for fifteen percent low to moderate income housing in developments of fifty units or more;

(2) All who live or work in Fairfax County should have the opportunity to purchase or rent safe and decent housing, within their means, in decent neighborhoods;

(3) The county should provide an adequate supply of housing to meet current and future needs of people unable to pay market price for housing; and

(4) The county should provide equitable housing distribution.

A new county zoning ordinance has been approved that provides for an optional density bonus of twenty-five percent for developments providing a percentage of moderately priced housing.¹⁵⁶ The new housing program will include the following:

(1) In order to benefit from the housing incentive provisions, the developer must indicate on his development plan, prior to the time of zoning, how many moderately priced units he will provide. If the zoning is approved, and the proffered number of moderate cost units

154. 214 Va. 235, 198 S.E.2d 600 (1973).

155. *Id.* at 237, 198 S.E.2d at 602.

156. FAIRFAX COUNTY, VA. CODE ch. 30 (1961), as amended by Amendment 249 (1975). At the time of this survey the new zoning ordinance had been adopted in principle, but implementation awaited the completion of the countywide remapping process.

accepted, the developer shall enter into an agreement with the housing authority of the county.

(2) "Moderately priced housing unit" (MPH unit) is to be defined periodically by the county's redevelopment and housing authority pursuant to applicable federal, state, or local laws and regulations. Similar provisions are made for defining "low income family" and "moderate income family." The current definition of a low income family of four is one having a maximum annual income of \$9,050, and a moderate income family of four, \$14,500.

(3) Additional incentives to the developer to produce MPH units include various permits and bonds, on-site and off-site improvements, and financial assistance from the county to offset the cost of sewer and water tap fees.

(4) Applicants may eventually be able to provide land in lieu of the MPH units or to make payments to a county housing assistance fund.

(5) Finally, MPH units, when completed, may be leased or sold directly to the individual or to the housing agency.

The county has yet to adopt a mechanism that will insure the maintenance of MPH units in the housing stock and will also prevent windfall profits at county expense at the time of resale of the units.

D. Voluntary Inclusionary Ordinances Without Density Bonus Compensation

The City of Palo Alto is located on the southwestern edge of San Francisco Bay. The city's attractions include Stanford University, a rural atmosphere, and proximity to San Francisco. The overall demand for housing exceeds the supply in Palo Alto. In 1974 the gross vacancy rate in the area was one percent, which placed Palo Alto in a "tight" market situation. Current low and moderate income levels in Palo Alto are defined as up to \$6,500 and \$8,000 to \$12,000 gross annual income, respectively. Census figures indicate that approximately twenty percent of the owner-occupied housing in Palo Alto is occupied by families of low and moderate income. Therefore, any housing construction that includes less than twenty percent low and moderately priced dwellings may cause further imbalance in the proportion of such units available.

1. *The Legislative Program and Its Implementation*

Palo Alto responded to the apparent need for new housing by passing a resolution designed to establish interim planning goals and policies to constitute the state-required housing element of the city's general plan.¹⁵⁷ The city expressed its intent to offer a wide range of housing opportunity for all people and to facilitate the provision of adequate and sanitary housing for the presently disadvantaged in the housing market.¹⁵⁸ It specifically approved and encouraged the use of zoning to provide a variety and mix of housing for low and moderate income families.¹⁵⁹ In anticipation of other implementation problems, the city also expressed a policy to remedy the unbalanced cost and supply of housing and developed environmental regulations to preserve open space from sprawl-type development.¹⁶⁰

Palo Alto therefore adopted an inclusionary land use program and implemented it by rezoning specific sites for higher density uses when individual development proposals for those sites included enough low cost units to meet the community's pre-stated housing policy. The key characteristic of this process was the review of each zoning decision on the basis of the individual merits of the development proposal, which had been reviewed by the city's planning staff and were found to provide needed bmp units without serious adverse side-effects on the neighborhood.¹⁶¹ For example, the "Foothill Green" developers asked the city to rezone a site by reducing the minimum lot size from 10,000 to 6,000 square feet. During negotiations the city asked the developer if he could construct two of the proposed twenty-nine units at lower prices to the public by utilizing the now discontinued federal housing subsidies under the National Housing Act.¹⁶² The developer then suggested that he could build two duplexes, thereby providing

157. Palo Alto, Cal., City Council Resolution No. 4577 (1972).

158. *Id.*

159. *Id.*

160. *Id.*

161. This type of ad hoc decision-making and selective site rezoning may be declared invalid by a court for being "spot zoning," inconsistent with the community's comprehensive plan, and intended to promote the private interests of the landowner. To counter this possibility, parcel-by-parcel rezoning can be returned to the theoretical framework of comprehensive zoning through the advance legislative enactment of a comprehensive inclusionary program. What is needed, and what a comprehensive program would provide, are criteria by which the citizenry, developers, and the courts can evaluate each permit approved by the city council. See IN-ZONING, *supra* note 10, at 116-24; THE ZONING GAME, *supra* note 29, at 6-11.

162. 12 U.S.C. § 1715 (1970).

four units to be sold at cost. The city agreed and the lots were rezoned accordingly to fit the new density requirements. The market priced houses in this development contained four or five bedrooms and sold for \$60,000 to \$70,000. The bmp duplexes were sold at cost, which was \$26,700 for a two bedroom unit and \$30,700 for a three bedroom unit. The entire development consisted of two clusters, with the bmp duplexes located at the end of each cluster.¹⁶³

The city enacted a subsequent resolution in 1973, declaring its policy to distribute low to moderate income housing throughout the city and proposing to use its zoning ordinance to achieve this distribution.¹⁶⁴ In furtherance of this policy, proposed residential developments were subjected to a "social impact analysis."¹⁶⁵ Developers of new housing with twenty units or more were encouraged to include twenty to forty percent low and moderate income units, but compliance was not made mandatory. The planning department and city attorney's office believed that a voluntary approach was preferable and less vulnerable to legal challenge, because although a mandatory requirement was believed to be legally enforceable, city officials decided that the probability of lawsuits and enjoinderment of the statute during the pendency of any litigation would make such a compulsory statute counter-productive.¹⁶⁶

The planning commission staff analyzed the resolution and concluded that:

(1) A bmp policy that applies only to projects of twenty or more units will probably lead to projects of fewer than twenty units.

(2) A policy requiring that twenty percent of the units be priced at ten percent below market does not promise realistically to provide units affordable by households of low to moderate income.

(3) A policy requiring that twenty-five percent of the units be priced at twenty-five percent below market can provide units affordable by moderate income households (i.e., priced under \$30,000) but does not offer a high enough rate of return to attract investment consistently until there is a relative adjustment in the price of land. A density bonus of one additional market unit for each low or moderate income unit may provide a sufficient incentive in certain instances.

163. Telephone interview with Cherie Charles, Planning Department, Palo Alto, Cal. (Sept. 30, 1975).

164. Palo Alto, Cal., City Council Resolution 4725 (1973).

165. *Id.* A social impact analysis involves the determination by the planning staff of the probable impact of a proposed project upon the environment and upon the existing character of the neighborhood area, as well as its effect upon the housing stock of Palo Alto.

166. STAFF REPORT OF PALO ALTO, CAL., PLANNING COMMISSION 4 (Oct. 10, 1974).

(4) A density bonus of two additional market units for each low to moderate income unit provided in conjunction with a policy requiring that twenty-five percent of the units be priced at twenty-five percent below market, has the potential to provide low and moderate income units and to offer an attractive return on investment.¹⁶⁷

The Stanford University Graduate School of Business Administration analyzed the economic profitability of the new resolution.¹⁶⁸ Using computer models, the study predicted that developers would not build a project composed only of market priced units and bmp units because of the loss on investment. The study then analyzed the effect of a twenty to forty percent density bonus on a project with a percentage of bmp units. The report indicates that several density bonus policies theoretically would provide a significant amount of bmp housing while still assuring the developer a profitable return on his investment. A density bonus would ensure a project with bmp units a *greater* profit than if it consisted only of market priced units. This is because the incremental costs of building the bonus units are lower than the costs attributable to construction of the original project units. As the bonus units are rented or sold at market price they yield a larger profit than the original market priced units, which cost more to build. The extra income from the bonus units offsets the cost of providing some of the original units at less than the existing market price. The Stanford study indicates, therefore, that a density bonus is a feasible and desirable method for encouraging bmp housing production in Palo Alto. The predominant cost of the program is borne by the developer, who is compensated by the bonus density. There are slight costs to the environment and to the community in terms of a larger structure, increased population, and pollution, but balanced against these drawbacks is the prospect of providing adequate housing for all citizens.

2. *Housing Developments Under the Program*

In the two and one-half years since the adoption of the Palo Alto program, only two developments providing bmp units have been approved and completed. No program for granting density bonuses on a comprehensive scale has been provided.¹⁶⁹

167. STAFF REPORT OF PALO ALTO, CAL., PLANNING COMMISSION 3 (Sept. 26, 1974).

168. See note 58 and accompanying text *supra*; Appendix B *infra*.

169. The city's planning office continues to emphasize that there is no direct relation between a density bonus and the provision of bmp units. A density bonus is considered if the developer proposes it and if the project would otherwise comply with the

One approved development, the San Alma project, contains a total of thirty-four units, eight of which are priced below market. No bonus density was involved in this project. Due to the architecture of the project, the bmp units were not dispersed throughout the development. A one bedroom bmp condominium was priced at \$23,000, and a two bedroom bmp townhouse was priced at \$29,500. The market priced dwellings were large, three bedroom, single family units that sold for \$65,000.¹⁷⁰ The developers of Channing Place, the second project approved and finished, requested a rezoning from a single-family zone to a planned unit community zone. The rezoning increased the density for the local area by between two and three hundred percent. This development contained a total of twenty-four units, two of which were two bedroom bmp dwellings. Unlike the market priced units, which sold for \$65,000, the \$30,000 bmp units were not equipped with such luxuries as micro-wave ovens, full length mirrors, and carpeting.¹⁷¹

The principal defect in this selective site rezoning is that there is no legal assurance that the developer submitting the rezoning application will proceed with the development proposal in the manner approved in the negotiations. Once the rezoning is granted, the developer can utilize the project site for any use that conforms to the higher density limits. For example, a developer requested and was granted a planned unit community development permit, with a density increase, conditioned upon his providing 14 to 140 bmp condominiums. The developer built 14 and leased 7 of the required bmp units to the city housing authority, but he refused to lease the additional 7 bmp units to the city. He sold them instead at market price, claiming that he could not afford to comply with his earlier agreement. The city discussed the matter with him but could not legally require him to lease the remaining units at below market.¹⁷²

Although the Palo Alto ordinance resulted in at least two developers providing bmp units, recent evidence indicates that the city's hopes for voluntary compliance were disappointed. The ordinance affects only developments of twenty units or more, and as predicted in the planning commission study, all development applications to the city within recent months have proposed only nineteen or fewer units. By

city's housing policies. Telephone interview with Cherie Charles, Planning Department, Palo Alto, Cal. (Aug. 24, 1975).

170. *Id.*

171. *Id.*

172. Telephone interview with Cherie Charles, Planning Department, Palo Alto, Cal. (Sept. 30, 1975).

omitting just one unit the developers have avoided compliance with the legislative intent of the ordinance.

E. Voluntary Inclusionary Ordinances With Density Bonus Compensation

1. *Arlington County, Virginia*

Arlington County, Virginia, is located across the Potomac River from Washington, D.C. Between 1955 and 1973 the proportion of land in residential use increased slightly, with land used for single-family homes decreasing and land used for apartments substantially increasing; vacant land in the county decreased from 2,158 acres to 660 acres. The total number of dwelling units in the area increased between 1960 and 1970, while average household size decreased. Arlington's population increase during that period, however, was significantly less than the twenty-four percent increase for the previous decade.¹⁷³

Residential construction patterns currently have an urban trend toward high-density, multi-unit structures containing one or two bedroom units. This trend reflects the movement from the suburban dominance of young parents with children to the urban mix of young and older adults. If present Arlington population trends continue, the county will have a stable or decreasing population with fewer school age children, fewer married couples, and smaller families. A large percentage of this population will live in rented housing.¹⁷⁴

In February of 1973 the Arlington County Board adopted a resolution announcing an intent to preserve and expand Arlington's present substantial supply of privately owned and operated moderate income housing without the use of public housing programs that have proven ineffective in other communities.¹⁷⁵ The board stated the goal that all new developments of fifty or more units would provide approximately

173. DEPARTMENT OF ENVIRONMENTAL AFFAIRS, ARLINGTON TRENDS, ARLINGTON COUNTY, VA. 3 (1974).

174. In 1970 the county had the highest per capita income in the Washington, D.C., area (\$5,483). *Id.* at 8. But the six census tracts with large black or foreign-born populations have median incomes substantially lower than the county median. These tracts also have high female labor participation rates. *Id.* at 8. The elderly population in the county grew by 42.2%, while the number of old-age assistance recipients increased by 51.4% between 1960 and 1972. Demographic trends suggest that the number of old-age assistance cases will continue to grow at a substantial rate. *Id.* at 19.

175. Arlington County, Va., Resolution on Developer Provision for Moderate-Income Housing (Feb. 21, 1973).

ten percent of the residential units for moderate cost housing. Developers may comply with this policy either by taking part in various government programs or by constructing similar housing for moderate income families using the "Arlington Standard" for moderate income and for rentals, as defined by the county board's July 8, 1972, housing resolution. As an alternative, they may make payments into a special tax relief or rent supplement fund, with the level of payment per moderate cost unit to be established by the county board.

In developing its proposed price schedules, the county attempted to offset the loss assumed by the developer on the moderate income units with a ten percent bonus density and an additional height allowance of one to six stories for the proposed projects. The "Arlington Standard" of rent restrictions is approximately fifty percent of the difference between the federal rental limits and the average market price.¹⁷⁶ The moderate cost units are made available for a minimum of ten years and priced according to an approved schedule, which is periodically revised by the county board. To date there have been developer commitments for 244 units, consisting of 76 on-site units, 13 off-site units, cash in lieu of 26 units at \$6,000 per unit, and 109 units whose provision is required but whose form is not yet fixed.¹⁷⁷

The housing services chief believes the program has failed to meet its objectives for two reasons.¹⁷⁸ First, a lack of new development space means new developments are usually high rises or small townhouses. It is therefore difficult to design the bmp units into the overall project, and the socio-economic lifestyles do not mix well in such a restricted environment. Second, the bmp requirements are not

176. Arlington Standard Income Limits For Housing			
Family Size	Maximum Annual Income Arlington Standard	Maximum Annual Income Federal Standard	
1	\$ 6,600	\$ 5,968	
2	\$ 8,000	\$ 6,679	
3	\$ 9,750	\$ 7,705	
4	\$10,050	\$ 8,732	
5	\$11,800	\$ 9,474	
6	\$12,100	\$10,216	

Arlington Standard for Garden-Type Apartments			
Unit Size	Federal	Avg. Market Rental	Arlington Standard
efficiency	\$118	\$135	\$125
1 BR	\$127	\$175	\$150
2 BR	\$153	\$192	\$175
3 BR	\$175	\$222	\$200

177. Letter from Thomas C. Parker, Department of Environmental Affairs, Arlington County, Va. (Sept. 30, 1975).

178. Telephone interview with Ed Brandt, Housing Services Chief, Arlington County, Va. (Dec. 30, 1975).

clearly mandated by law. Thus there is no clear legal framework for negotiation between the staff and the developers.¹⁷⁹

2. *New Castle County, Delaware*

Located in the northeast area of Delaware, New Castle County's central position between Philadelphia and Washington, D.C., has resulted in constant growth. In 1971, New Castle County adopted its first planned unit development (PUD) legislation.¹⁸⁰ The original intent of this enactment was to meet the need for improved housing by encouraging innovation, efficiency, flexibility, and variety in the design and construction of developments and by encouraging the construction of publicly and privately subsidized housing units. This was to be accomplished through a variety of residential facilities offering a range of housing types, site plan layouts, and rental and purchase prices. Additionally, the county sought to establish sound administrative standards and procedures to facilitate the achievement of such purposes.

Specifically, the ordinance establishes an overall density of seven units per acre but permits an increase if publicly or privately subsidized housing is provided. One additional unsubsidized unit is granted for each subsidized unit, up to a maximum of nine units per acre. No economic studies were conducted to determine whether this optional scheme would in fact facilitate the development of lower priced housing units; nor was there any evidence that the bonus density incentives would actually induce developers to utilize this provision.¹⁸¹

Since the inception of the bonus density provision for subsidized housing in 1970, the county has zoned and approved eighteen planned unit developments comprising 2,170 acres of land with a total of 15,625 dwelling units. None of these projects utilized the density bonus and no low or moderate priced units were provided. The absence of bmp housing is attributed primarily to uncertainty over the economic profitability of the density bonus and to the county's reluctance to encourage its voluntary use by developers. Given a choice between dedicating moderate cost units or dedicating open space to the county,

179. *Id.* The entire process of negotiating a bmp unit requirement and granting a density bonus is conducted according to suggested county guidelines. The county board exerts pressure to negotiate by inquiring at building permit hearings about the degree to which the proposed project would comply with the suggested guidelines.

180. NEW CASTLE COUNTY, DEL., ZONING CODE art. XIV, §§ 23-78 to -81 (1974).

181. Letter from Jane Brodziak, Executive Assistant, Office of the County Executive, New Castle County, Del. (Oct. 28, 1975).

all developers chose to dedicate open space to acquire higher densities for their projects. The county has concluded that "there is simply no real incentive for a developer to exercise the options under the [low to moderate income] density bonus."¹⁸²

Amendments to the PUD ordinance have attempted to remedy the bmp shortage. In 1975 the PUD Review Committee recommended the removal of the bonus density provision because "it has never been used by a developer, and in all probability will not be used."¹⁸³ The committee recommended that in the future a process of voluntary negotiation be used to encourage the provision of housing for low and moderate income families and also recommended elimination of the twenty-five acre minimum size requirement for a PUD. A minority report concluded that all developers in New Castle should include a percentage of low or moderately priced housing in their projects and that language should be drafted to mandate participation of developers. The minority cited the following reasons for continuing the twenty-five acre minimum size: (1) the requirement is necessary to achieve the purpose of providing a variety of housing types; (2) it has not deterred the submission and approval of numerous PUD developments; (3) elimination of the requirement might encourage the rezoning of small parcels to the PUD classification, producing a higher density than would presently be permitted; and (4) elimination of the requirement might lead to a loss of flexibility and variety in the design of future developments.

3. *Lewisboro, Westchester County, New York*

The Town of Lewisboro is in the midst of an area projected to grow rapidly over the next ten to twenty years. The northeastern Westchester County area, in which Lewisboro is located, is one of the most attractive suburban regions in the country. Its natural physical beauty, its lakes, and its nearness to the New York metropolitan center has made this region desirable to many thousands of people. New housing construction is barely keeping pace with the growth of the population, and little is being done to replace existing sub-standard units. The serious shortage of adequate housing in the area is expected to become more severe. It is estimated by the County Planning Department that about ten percent of the total housing stock, or thirty thousand

182. *Id.*

183. RECOMMENDATIONS OF THE NEW CASTLE COUNTY PLANNED UNIT DEVELOPMENT REVIEW COMMITTEE 8 (1975).

units, are sub-standard, and that the total will grow by at least a thousand units with each passing year.¹⁸⁴ In northeastern Westchester County, no apartment units are being built to meet the demands of families with incomes of less than \$15,000 per year; and no single-family houses are being constructed that can be purchased by families with incomes of less than \$25,000 per year.¹⁸⁵ Consequently, less than five percent of the region's population can afford such homes.¹⁸⁶

Lewisboro's semi-rural character will rapidly disappear if present trends continue, resulting in development of virtually all of Lewisboro's land area by the year 2000. Ninety-eight percent of Lewisboro (17,800 acres) is now zoned for single-family residential development. There is no multi-family zone and only 0.1 percent of the town (21 acres) is zoned for two-family development. Single-family houses at densities greater than one dwelling unit per acre are permitted in approximately five percent of Lewisboro.¹⁸⁷

The Lewisboro Town Development Plan recommended that future housing be provided across a range of cost, type, character, and density. In order to provide housing opportunities for older people, young married couples, and employees of the town, the school district, and business serving the town's residents, the development of limited numbers of townhouses, garden apartments, and moderately priced single-family units should be permitted in appropriate areas. Specifically, the plan stated that moderately priced housing could be provided through designed residential developments, which would allow varying types of housing at densities slightly exceeding those normally granted. Approval of these densities would depend partially upon the developer's commitment of a percentage of the total units to sell or rent at prices affordable by middle income wage earners who are now being priced out of the housing market.¹⁸⁸

The Town Board of Lewisboro in July, 1974, adopted a revised zoning ordinance that incorporated many of the housing recommendations of the Town Development Plan, particularly the policy of expanding housing opportunities.¹⁸⁹ The main planning tool to provide

184. LEWISBORO, N.Y., TOWN DEVELOPMENT PLAN 9-10 (1973).

185. *Id.*

186. *Id.*

187. *Id.* at 23. The Regional Plan Association indicates an alarming increase in tensions resulting from forced separation of housing for different racial and economic groups and from the severe shortage of moderate cost housing. *Id.* at 12.

188. *Id.* at 47.

189. LEWISBORO, N.Y., ZONING ORDINANCES § 323.1 (1974).

more moderate cost housing is the design residential development, which requires the developer to provide the supporting public facilities usually financed by a city. As an incentive for moderate cost housing, the town allows a ten percent density increase, provided that such additional units are available for sale, resale, or continuing rental to "middle income households" as defined in the ordinance. Middle income persons applying for housing are selected on the basis of respective priorities given to municipal employees, school district employees, other persons employed in the town, residents of the town, relatives of residents of the town, other residents of the county, other persons employed in the county, and all others. Within each category priority is given to families displaced by governmental action, then families of which the head or spouse is sixty-two years or older, and families of which the head is handicapped.¹⁹⁰

No developer has yet elected the density bonus option. The generally sluggish housing market and the lack of an effective public water or sewer system have been major factors in the reluctance of developers to begin new projects.¹⁹¹

F. Summary of the Community Survey

All communities in the survey reported an increased demand for housing. Within urban areas such as Los Angeles and Berkeley, California, and Arlington County, Virginia, this demand is caused especially by elderly people, nonwhite families, and young adults, either single or married, without children. With vacant land at a premium, construction now tends toward high density, high rise structures. The population increases in suburban communities such as Palo Alto, California, Lewisboro, New York, and Montgomery County, Maryland, appear to be due to young families with children and middle and higher income workers attracted by new job opportunities. Prices for single-family dwellings in these areas have skyrocketed, and there is an acute demand for moderately priced multi-unit structures.

The communities have responded to the perceived housing shortage with a variety of inclusionary housing programs. The major difference between these programs is whether developers are required to provide moderate cost housing under mandatory regulations or are encouraged to do so as part of a voluntary housing program. The manda-

190. *Id.*

191. Letter from Esther M. Lewis, Secretary, Planning Board, Lewisboro, N.Y. (Oct. 10, 1975).

tory ordinances appear to have been more successful in providing moderate cost housing located throughout the town or county. Those ordinances that relied on federal subsidies had difficulty requiring actual rental or sale of units at below market price. Los Angeles, California, and Lakewood, Colorado, reported that while developers have agreed to provide the required units, actual implementation has been postponed until the federal government can arrange for funding. The ability of the federal government to fund such programs on the necessary scale is speculative if not impossible. Continued use of federal programs also forces developers to deal with HUD administrative regulations that are often confusing, expensive, and slow.

The alternative approach has been for the community to reduce land costs or otherwise increase project revenues by granting a density bonus. The Stanford study indicated that a variety of density bonuses combined with a requirement of bmp housing would give the developer a profit on his investment. In actual practice the Montgomery County, Maryland, density bonus ordinance appears to encourage construction and to be profitable for the developer. The county allows a density bonus of fifteen to twenty percent, in addition to a number of variances from building code requirements, in order to provide special units that have less living space and fewer luxuries than market priced units. Finally, the use of clustering techniques and construction of the bmp units in large numbers helps decrease the cost of construction. The county has established sale and rental price limits that are \$4,000 to \$5,000 higher than the maximum levels permitted by federal housing guidelines. Arlington County and Fairfax County, Virginia, have also set their own guidelines for defining income levels for eligible families and sale or rental prices for the required dwellings. This practice enables each locality to research its own particular housing demands and to set specific income levels that respond to its resident's housing needs. Many communities reported that the federal guidelines were set too low to help many area residents that were still in need of financial assistance.

A mandatory bmp standard also facilitated the negotiation process between planning staffs and developers. Los Angeles reported that developers were now recognizing the need for lower income housing and agreeing to provide bmp units within market priced projects. The burden of arranging subsidies, however, is on the city, and the developer is excused from compliance in the absence of funding. Developers in Fairfax County, Virginia, prevailed when the courts declared an earlier ordinance invalid. Planners in Boulder, Colorado, and Montgomery County, Maryland, report that local developers have ac-

cepted the bmp requirement and are providing such units in their new developments.

The voluntary ordinances are not as successful in providing bmp units as the mandatory programs. Developers are reluctant to cooperate with voluntary programs because of uncertainty about the profitability of the density bonus. Many do not understand how the bonus operates to reduce land costs and to increase the amount of profit realized on the investment. Lack of mandatory provisions often results in a breakdown in the negotiation process. As a result, most of the voluntary density bonus systems have appeared unsuccessful even when the incentive is a relatively generous density bonus.

Conclusion

The housing shortage confronts an increasingly large percentage of American families. Although costs of land, labor, and materials, in addition to administrative and legal expenses, continuously inflate the price of housing for everyone, recent studies indicate that low and moderate income families are most seriously affected by the rising costs.

Federal and state housing programs in the form of subsidies and actual construction have not solved the problem of deteriorating housing conditions. Yet the private construction industry cannot produce dwellings at a reduced cost without some form of public financial assistance. In response, many land use planners now embrace the use of local zoning to encourage the private construction of housing priced below market. Communities traditionally have utilized their zoning powers to exclude undesirable uses of land and to protect the homogeneity of residential areas. While the United States Supreme Court recently held that a city has no affirmative duty to zone for the inclusion of racial minorities absent a record of purposeful discrimination,¹⁹² several state legislatures and courts have required that municipalities provide for the housing needs of all socio-economic groups within the region.¹⁹³

There appears to be an uncertain trend toward the use of the housing density bonus programs to provide low and moderate income housing. A survey of ten community housing programs utilizing different bmp provisions indicates mixed results. Programs seeking only voluntary compliance with bmp provisions and granting no

192. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 45 U.S.L.W. 4073 (U.S. Jan. 11, 1977).

193. See notes 34-35 *supra*.

density bonus to the developer appear to yield the poorest results in low cost housing. Programs encouraging voluntary compliance by granting a density bonus, however, seem to generate some construction of necessary housing. Programs imposing mandatory compliance with bmp requirements have achieved the best results, particularly when combined with a density bonus to allow the developer to recoup his expenses and to avoid allegations of taking for public use without just compensation. The housing density bonus appears to be a reasonable land use technique available to communities that seek to increase the supply of moderately priced dwellings.

APPENDIX A

NAME	ENTITY	TYPE OF IN-CLUSIONARY PROGRAM	AUTHORITY	BMP UNITS	COMPEN-SATION	LEGALITY
Lakewood, Colorado	City	Mandatory 10%-15% bmp; no bonus	Planning Commission Policy	262 units not built.	Building Permit	
Boulder, Colorado	City	Mandatory 15% bmp; no bonus	City Resolution	211 units built; 365 not built.	Building Permit	
Los Angeles, California	Charter City	Mandatory 15% bmp; no bonus	City Resolution	400 units not built; all others not funded.	Sec. 8 Federal Funds	City Attorney's opinion is that scheme is unconstitutional.
Berkeley, California	Charter City	Mandatory 25% bmp; no bonus	City Zoning Ordinance	0	Building Permit	
Montgomery County, Maryland	County	Mandatory 15% bmp; 15%-20% bonus	County Zoning Ordinance	1627 units; 212 built.	Building Permit; Density Bonus; Variances	County Attorney believes unconstitutional.
Fairfax County, Virginia	County	Mandatory 15% bmp; 15% bonus	County Zoning Ordinance	0	Density Bonus	<i>DeGroff</i> case struck down first scheme.
Palo Alto, California	City	Voluntary 15% bmp	City Council Resolution	10 units built.	Indirect Density Bonus; Variances	
Arlington, Virginia	County	Voluntary 15% bmp; 10% bonus	Planning Commission Guidelines	89 units not built; cash, 26 units @ \$6,000 each; 109 units, form not fixed.	Density Bonus	
New Castle, Delaware	County	Voluntary; bonus	PUD Zoning Ordinance	0	Density Bonus	
Lewisboro, New York	City	Voluntary; bonus	Zoning Ordinance	0	Density Bonus	

APPENDIX B

STANFORD STUDY ON DENSITY BONUS PROGRAMS

The Stanford Study calculated the cost of constructing bonus units in addition to twenty conventional units in a housing project. The expenses for and income from the bonus units are assumed to be the same as for the original twenty-unit project, with a few important exceptions: (1) The costs of construction of the bonus units are only the appropriate *variable* unit costs. For example, when an additional floor is added to a project, this does not appreciably affect the costs of the excavation work, and such excavation is treated as a fixed cost; (2) The gross rents were adjusted as indicated by the policy under consideration. Rents may decrease even if expenses do not because expenses are not related to rental prices. All other costs were derived by prorating those of the basic twenty-unit model project.

The assumption is made that the developer would expand in a vertical direction, that is, would build a taller building with the bonus units. This is assumed for several reasons: (1) the authors believe that a variance on site coverage requirements is less desirable for environmental and aesthetic reasons; and (2) from a cost/income approach, the most desirable type of expansion is upward. This serves to increase the amount of profit realized from the bonus units because the developer need purchase no additional land.

When determining construction costs for the bonus units, a fixed cost savings percentage of fifteen percent was used. This was adjusted down both to include any small effects that additional construction might have on these costs and to give a conservative estimate of the increased economy to be realized. The actual additional construction cost is calculated as follows:

Base Cost for Original 20 Project Units	Percent Variable Cost	Total Variable Costs
\$371,000	× .85	= \$315,000

After calculation of the total variable costs, the study then determined the cost of an individual bonus unit:

Total Variable Costs	No. of Units	Unit Cost
\$315,000	÷ 20	= \$15,750

The study therefore determined that the cost of a bonus unit was \$15,750 compared to \$15,941 to \$16,317 for each original project unit.

Interpretation of Stanford Project Model Results

For an analysis of the developer-related economic impact of low and moderate cost housing construction, a basic twenty-unit market priced project with no bonus was evaluated by computer to see if it could yield a reasonable rate of return. The results indicated a rate of return for the basic model of 10.2 percent after taxes. Then, various mixes of bmp unit requirements with or without a density bonus were evaluated to compare the rate of return from such projects with the same basic model project. The data reveals that *all* projects under the density bonus yield a rate of return above that of the basic twenty-unit project that did not include any bonus units. The key factor was that the bonus units cost less to construct than the original twenty project units.

**SUMMARY OF STANFORD STUDY COMPUTER ANALYSIS
OF HOUSING DENSITY BONUS**

Total Units	PERCENT LOW TO MODERATE Based Density (required)	Bonus Units (optional)	Total Low to Moderate Cost Units	Percentage Rate of Return (Profit)
BASIC MARKET PROJECT				
20 units	none	none	0	10.16%
NO DENSITY BONUS				
20 units	10%	none	2	9.3%
20 units	20%	none	4	8.5%
20% DENSITY BONUS				
24 units	none	50%	2	10.3%
24 units	none	100%	4	10.2%
24 units	20%	none	4	10.2%
24 units	10%	50%	4	10.2%
40% DENSITY BONUS				
28 units	none	50%	4	12.4%
28 units	none	100%	8	10.9%
28 units	40%	none	8	10.9%
28 units	10%	50%	6	11.7%
28 units	20%	50%	8	10.9%