

Inclusionary Housing in California and New Jersey: A Comparative Analysis

Nico Calavita
San Diego State University

Kenneth Grimes
Wiltshire Community Council

Alan Mallach
City of Trenton, New Jersey

Abstract

Many people have argued that inclusionary housing (IH) is a desirable land use strategy to address lower-income housing needs and to further the geographic dispersal of the lower-income population. In an attempt to evaluate the effectiveness of IH, this article examines the experiences of New Jersey and California, two states where IH has been applied frequently over an extended period.

While the concept of regional “fair share” is central to both states’ experiences, the origins of the programs, their applications, and their evolutions are quite dissimilar. IH originated in New Jersey from the famous *Mount Laurel* cases and in California from housing affordability crises and a legislatively mandated housing element. The experiences of both states indicate that IH can and should be part of an overall affordable housing strategy but that it is unlikely to become the core of such a strategy.

Keywords: Housing; Affordability; Legislation

Introduction

Increasing scholarly attention is being focused on the role that residential segregation plays in creating an urban underclass and in intensifying the income gap between the upper and lower strata in American society. There is widespread agreement that the disappearance of manufacturing jobs in the cities, coupled with the isolation of people in the inner city from the job market and the higher living standards of the suburbs, creates conditions of “hypersegregation,” hopelessness, and despair (Dolbeare 1989; Goldsmith and Blakely 1992; Massey and Denton 1993). To counter this trend, the U.S. Department of Housing and Urban Development (HUD) has implemented various residential

mobility programs, such as the Moving to Opportunity for Fair Housing demonstration, that help low-income families move to healthier communities (Cisneros 1995; Goering et al. 1995; HUD 1996). Similarly, a number of state-level initiatives have sought to address this concern. In addition to those in New Jersey and California, discussed in detail in this article, it is worth noting the pioneering Massachusetts Zoning Appeal Law, popularly known as the “anti-snob zoning” law, which provided affirmative remedies for developers seeking to build affordable housing in communities that had failed to produce their “fair share” of such housing, and the requirement established within state planning laws in Oregon and Florida that municipalities adopt affordable housing plans.

While affordable housing plans may offer a variety of means for fostering suburban integration, many of these have depended largely on the availability of public sector subsidies, including the HUD residential mobility programs; this dependence raises serious questions about their future effectiveness or utility. In a climate in which public sector subsidies are limited and market-based solutions are actively sought, a different approach to fostering residential integration, known as inclusionary housing (IH), is emerging.

Inclusionary housing is the term most frequently used to describe a wide variety of techniques that link construction of low- and moderate-income housing to construction of housing for the marketplace, generally by including lower-income units in an otherwise market-driven development. The principal objective of IH is not only to increase the supply of affordable housing, but to do so in a manner that fosters greater economic and racial residential integration. As such, it is arguably more effective than many alternative strategies: The construction of federally subsidized housing projects under the former Section 236 or Section 8 programs in the suburbs, while fostering integration at the macroscale, can be legitimately criticized for creating miniature, and often isolated, low-income enclaves within suburbia.

Although IH offers a strategy for creating affordable housing independent of the unpredictable availability and uncertain future of public sector subsidy, it does contain its own uncertainties. As a strategy that is simultaneously market driven and subject to the vagaries of local and state political conditions, it is susceptible to pressure from both directions. While it can be an appealing political strategy, particularly in a strong market environment, for those seeking to achieve lower-income housing goals without substantial public investment, that appeal may

not be permanent; as will be discussed below, where market declines increase developer resistance to IH, political support can be fleeting in the absence of a strong countervailing constituency for affordable housing.

As with other examples of planning or development terminology, the term *inclusionary housing* is used in a variety of ways and a variety of contexts. Housing linkage, for example—a strategy under which the developers of commercial properties are required to contribute to housing trust funds or to participate in the development of off-site affordable housing—is often characterized as a form of IH but will not be addressed here. Similarly, although IH has applications in some urban areas—particularly in the form of “80:20” rental projects financed through tax-exempt bonds, which have been widely used in New York City, parts of Massachusetts, and elsewhere—this article focuses on its application in developing suburban areas, where IH provides otherwise unavailable housing opportunities in such communities for lower-income households. By fostering economic and racial integration in the suburbs, IH gives lower-income households access to better jobs and educational opportunities, thus helping to break the cycle of poverty in which many inner-city residents, particularly minorities, are trapped (Cisneros 1995; Downs 1973; Franklin, Falk, and Levin 1974; Gans 1961; Massey and Denton 1993; Orfield 1985; Rosenbaum 1993).

Although it is only in New Jersey and California that IH has become a significant element in the provision of affordable housing on a statewide level, IH is not unique to those states. Indeed, some of the first IH initiatives in the United States arose in Virginia and Maryland. A promising effort initiated in the late 1960s by Fairfax County, Virginia, was nipped in the bud by a 1973 decision by the state supreme court, *Board of Supervisors of Fairfax County et al. v. DeGross Enterprises, Inc.* (214 VA 235, 198 SE 2d 600), which invalidated the county’s IH ordinance. In Maryland, however, Montgomery County, through its Moderately Priced Dwelling Unit program, has maintained what is arguably the largest IH program of any single local government jurisdiction, resulting in the production of some 10,000 affordable housing units over a period of nearly 25 years. Scattered examples of IH can be found elsewhere, including Massachusetts, particularly in the affluent suburbs of Boston. Although the 1991 *Britton v. Chester* decision of the New Hampshire Supreme Court (Rockingham No. 89-372) explicitly validated IH as a remedy for the exclusionary zoning practices of New Hampshire towns, little housing has yet to come from that judicial mandate.

In the final analysis, however, only in New Jersey and California has the experience with IH been both diverse and long-lasting. It is essential, then, to analyze the experience of these two states to understand the origins, evolution, degree of success, and prospects for the future of IH. By so doing, it may be possible to understand why other states have engaged in IH less frequently, if at all, and which conditions might lead to wider participation. The origin, context, and evolution of IH in New Jersey and in California are quite dissimilar, but different political and social dynamics have led to remarkably analogous outcomes.

IH in New Jersey—although relatively recent, having its impetus in the landmark 1983 *Mount Laurel II* decision—has generated considerable visibility and controversy. As a court-inspired outcome, the New Jersey experience has forced largely unwilling localities—and a less-than-enthusiastic state—to tackle social and racial integration and has raised complex questions about the role of the judiciary in promoting social change (Anglin 1994; Rosenberg 1991). Since 1985, the New Jersey Council on Affordable Housing, acting under the legislative impetus generated by the *Mount Laurel* decision, has imposed detailed state regulations governing the scope, character, and salient features of inclusionary development. While IH is not explicitly required under New Jersey law, the existence of the “builder’s remedy” in *Mount Laurel* and the cost and difficulty of alternative means of achieving fair-share goals have led to circumstances under which IH is at the heart of nearly every suburban fair-share plan.

Although California has a state statute establishing a procedure for setting municipal fair-share goals, enacted in 1980—and other state laws enacted beginning in 1975 furthering affordable housing in general and inclusionary development in particular—it lacks a legislative or judicial mandate equivalent to that of New Jersey. California localities must have a housing element certified by the Department of Housing and Community Development (HCD), but broad discretion is given to the unit of local government preparing the housing element. The ultimate decision to enact IH programs in California is left to each jurisdiction, as are the specific features of those IH programs enacted, creating a decentralized, ad hoc, and incremental system that is reflected in the diversity and complexity of its programs.

Origins of IH in California and New Jersey

California

The impetus for the growth of IH programs in California has been the housing affordability crisis, which has been a pervasive presence in the state's major metropolitan areas since the 1970s, linked with the increase in growth control and other land use and planning regulations. Until the 1970s, housing costs in California were close to the national average; after the recession of the early 1970s, they skyrocketed (Katz and Rosen 1980). By 1992, the average price of resale housing in California was approximately 190 percent of the U.S. level, and new housing was 155 percent of the national average. Between 1970 and 1993, gross rent levels increased 436 percent, and home prices increased 723 percent. During the same period, the state's median household income increased 316 percent (California HCD 1993).¹

This rapid increase in housing costs in California is attributable partly to heavy in-migration in the 1970s and 1980s and partly to the inability of the housing industry to keep up with demand (Levy 1991). Another element in the increasing cost of California housing is the widespread use of development impact fees (DIFs) charged to new developments to help meet the need for public facilities. DIFs are unusually high in California, partly because of the adoption of Proposition 13 in 1978, which limited property tax revenues, and partly because of a state body of case law on exactions that offers far more scope to local governments than is typically found elsewhere. While the national average for all such fees collected in 1990 was \$6,413, developers estimate that in some California cities the fees for a new home exceed \$20,000 (Fulton 1991). While the full amount is not necessarily passed on to consumers, high fees usually result in higher housing costs.

Growth controls have had a similar effect (Dowall 1984; Schwartz, Hansen, and Green 1984; Schwartz and Johnston 1981; Tucker 1991). Concerns about a declining quality of life caused by rapid growth led to the first generation of growth-control measures implemented in the 1970s, limiting the rate of development in several bedroom communities clustered around the San Francisco Bay (Brower, Godschalk, and Porter 1989;

¹ It should be mentioned that during the 1990s, housing costs in California have decreased considerably. For example, prices for existing single-family homes decreased 5.6 percent in California while they increased 16.4 percent in the country as a whole.

California Office of Planning and Research 1980; Reilly 1973). Residential building caps were established to limit the annual number of residential building permits. Given the strong demand for housing in those areas, it was feared that restricting housing development would lead to higher housing costs and constrain the supply of low- and moderate-income housing (Lillydahl and Singell 1987).

Public policies favoring affordable housing, however, may be able to mitigate this impact. Some of the inclusionary programs analyzed in this study were included as part of growth-limitation packages to provide low- and moderate-income housing. As a way to avoid legal challenges to their programs, California cities like Petaluma and Davis established a system that awarded points to proposed projects that included affordable units, effectively giving those projects priority in the allocation of building permits; thus, the first IH programs in California were instituted.

The two programs that have produced the largest number of IH units were initiated in Irvine and in Orange County in the 1970s. The programs were enacted in response to growth-related problems and resulting lawsuits that challenged the imbalance between job growth and the provision of housing, especially housing affordable to most of the new workers. A 1975 Irvine lawsuit questioned the adequacy of the environmental impact report concerning how the rezoning of 2,058 acres to industrial and commercial development would affect low- and moderate-income housing needs. This legal challenge led to a settlement that required the Irvine Company, owner of almost 90 percent of the developable land in Irvine, to produce 700 units of low- and moderate-income housing, with the city providing cost offsets and financing off-site infrastructure, thus inaugurating a “cost-offset” approach to IH. More important for our purposes, the legal challenge further highlighted the ongoing need for affordable housing and led to the establishment of a voluntary inclusionary program.

In 1979, Orange County had adopted, in concept, an IH program at the same time it was facing a lawsuit challenging the county’s housing element for not being in compliance with state housing law. The lawsuit, together with a requirement of the Air Resources Board in Orange County mandating the provision of affordable housing in the vicinity of new jobs, led to the establishment of a mandatory inclusionary program in 1979.

New Jersey

Although the landmark 1975 *Mount Laurel* decision (*Southern Burlington NAACP et al. v. Township of Mount Laurel*, 67 NJ 151) focused on the practices of one suburban township, its origins lie in the history of blatantly exclusionary practices characteristic of suburban New Jersey (Haar 1996; Kirp, Dwyer, and Rosenthal 1995). With that decision, the court found that zoning, a state police power delegated to local government to promote the general welfare, was being used to exclude low- and moderate-income households in violation of the New Jersey constitution; the court declared that developing municipalities had the legal obligation to provide their fair share of low- and moderate-income housing opportunities. While it was a powerful condemnation of exclusionary zoning practices and a ringing social policy statement, this decision offered no specific guidance on how to overcome exclusionary practices. Indeed, rejecting the trial court order that required Mount Laurel Township to take specified affirmative steps toward meeting the needs of its lower-income citizens, the Supreme Court concluded that the township “should first have full opportunity to itself act without judicial supervision” and added, “We trust it will do so in the spirit we have suggested” (*Mount Laurel* [1975], 67 NJ 192). Not only did the township fail to do so, but over the next few years, subsequent court rulings significantly undermined the powerful doctrine enunciated in *Mount Laurel*.

At the same time, however, other decisions were laying the groundwork for more constructive remedies to the problems identified by *Mount Laurel*, including inclusionary zoning, a process that eventually led to the *Mount Laurel II* decision in January 1983 (*Southern Burlington County NAACP et al. v. Township of Mount Laurel*, 92 NJ 158, 456 A.2d 390). *Mount Laurel II* stunned observers as much by the vehemence of its language as by the substance of its findings and conclusions. While breaking no new doctrinal ground, the 1983 decision sought to cut through the many barriers to effective relief that had been raised since the 1975 ruling and to establish a procedure through which, in the court’s words, “the opportunity for low- and moderate-income housing . . . will be as realistic as judicial remedies can make it” (92 NJ 214).

Among the most significant elements of the 1983 decision was the holding that “affirmative governmental devices . . . including lower-income density bonuses and mandatory set-asides” (92 NJ 217) were required if the opportunity for lower-income housing was to be a realistic one. That language was coupled with a

doctrine known as the “builder’s remedy,” under which lower courts were henceforth instructed to grant zoning relief, and even building permits, to a builder or landowner who, acting in good faith, “vindicates the constitutional obligation in Mount Laurel-type litigation . . . provided that the proposed project includes an appropriate portion of low- and moderate-income housing” (92 NJ 218).

The court’s timing was uncanny. The return of economic growth with the end of the 1980–82 recession, coupled with the decline in interest rates from the double digits of the late 1970s, unleashed a wave of pent-up housing demand. Developers, eager to move forward after many lean years, quickly sought to take advantage of the opportunity. After some initial hesitation prompted by uncertainty over including lower-income units in their projects—a radical departure from the conventional wisdom of real estate development—developers laid siege to the courtrooms of the three judges the Supreme Court had assigned to hear *Mount Laurel* matters and to search for the opportunities promised by *Mount Laurel II*.

By the fall of 1984, 90 suits had been brought by developers seeking builders’ remedies and offering to produce IH. By June 1985, the number had risen to 140 suits against some 70 municipalities, including almost every large suburban township in northern or central New Jersey. In each case, the plaintiff made clear that it was willing, in return for the opportunity to build, to dedicate at least 20 percent of the resulting housing units to low- and moderate-income occupancy pursuant to the strict standards established by the court. Moderate-income units were to be affordable to households earning between 50 and 80 percent of the area median income, and low-income units to households earning under 50 percent. Moreover, at least half of the units provided in each community, if not necessarily in each IH development, were required to be affordable to households earning under 50 percent of the area median income. (In California, instead, low income corresponds to the “moderate” category, and very low income corresponds to the “low” category of New Jersey’s standards.)

IH, although not entirely unheard of, was rare in New Jersey before the 1983 *Mount Laurel II* decision. Few municipalities had enacted such ordinances, and in those few, little or no housing had resulted. Indeed, IH in New Jersey can be seen as almost a pure artifact of the court’s ruling and of the subsequent enactment of the New Jersey Fair Housing Act by the legislature in 1985. This is in marked contrast to California, where a

combination of public and private pressures—but no formal legal mandate—had created a wide variety of IH programs and initiatives starting during the 1970s.

Legal framework

California

California General Plan Law requires that all localities adopt a general plan containing various mandatory and optional elements and that the municipality's zoning and subdivision ordinances be consistent with the general plan. Certain 1975 amendments to the general plan statute required that a housing element be included in the general plan, a five-year plan that "shall make adequate provision for the existing and projected needs of all segments of the community" and identify potential housing sites "for all income levels" (§65583 of Government Code). A 1980 amendment provided that each locality create policies and programs to enable it to meet its "fair share" of regional lower-income household needs. Both the regional need and the local share of that need are identified by the regional council of governments for the locality. In those limited, and largely rural, parts of California in which no regional council exists, the allocation is made by HCD.

While HCD has review powers and identifies housing elements that do not meet state law, it lacks the power to mandate changes. Certain incentives, however, do exist. Eligibility for state-administered federal housing programs (such as HOME) are linked with housing element compliance and provide an incentive to have a certified housing element, especially for smaller localities that receive federal funds through the state. Another incentive for preparing housing elements is the threat of litigation. Under California General Plan Law, it is possible to litigate and stop the issuance of building permits until an approved housing element is produced. A court can also grant a builder's remedy similar to that in New Jersey, although such actions are rare. Actual and threatened litigation—on the part of the California attorney general in the late 1970s and, more recently, on the part of housing advocates or builders—has prompted a number of local governments to obtain state certification (Lane 1991).

Nevertheless, even when a locality's housing element meets state requirements, there are no mechanisms to ensure that its provisions are implemented. The teeth in the statute are largely

procedural, rather than substantive. The Housing Element Law does not require local governments to *build* affordable housing. The result has been a “paper chase” that “focuses on the question of whether the housing element complies with state law, rather than the question of whether enough housing is being constructed” (Fulton 1991). Among the 527 cities and counties in the state required to adopt housing elements, the compliance rate at the end of 1992 was only 19 percent. Starting in 1993, HCD redoubled its efforts, raising the compliance level to 58 percent by December 31, 1995 (California HCD 1996).² It is questionable, however, whether this increase represents a corresponding increase in housing opportunities or is instead little more than the creation of paper documents with little significance for implementation.

In the absence of a clear state mandate or an overriding governing structure defining such programs, and in the absence of strong fiscal incentives and a single compelling court decision, inclusionary programs in California are adopted locally and subject to the vagaries of changing local political and economic conditions.

New Jersey

While many of the suits filed by developers against suburban municipalities between 1983 and 1985 in the wake of *Mount Laurel II* led to negotiated settlements or voluntary compliance, the process triggered a determined effort by local government to seek redress from the state legislature and resulted in the New Jersey Fair Housing Act of 1985 (*New Jersey Statutes Annotated* 52:27D-301 et seq.). Under the act, the executive branch assumed responsibility for administration of the *Mount Laurel* doctrine. An administrative agency, the Council on Affordable Housing (COAH), was established with the responsibility of determining the fair-share obligations of all municipalities in the state and of creating a process of certification for municipalities that developed fair-share plans acceptable to COAH.

The certification process established by the act, although voluntary rather than mandatory, carried with it a substantial incentive for local government by granting municipalities certified by COAH protection from exclusionary zoning suits for six

² There are also 104 localities (20 percent) that have adopted housing elements that are out of compliance. Twenty-six city and county draft elements are in compliance with state law. When these are adopted, about 61 percent of localities will be in compliance with state housing element law.

years. The municipal fair-share plan was embodied in the housing element of its master plan. Similar to the mandates of the California Housing Element Law, the fair-share plan must contain a determination of present and future fair-share obligations and must specify land most appropriate for construction of affordable housing. In contrast to the California provisions that target only new units, the fair-share plan also mandates an inventory of “existing stock most suitable for conversion or rehabilitation into low-income housing.” Furthermore, in contrast to California, in New Jersey it is the state itself, through COAH, that establishes each municipality’s fair-share obligation. Before certifying a municipal plan, COAH must review the substance of the plan and determine that it does indeed provide a realistic opportunity for the construction or rehabilitation of the fair-share goal.

Since starting work in 1986, in addition to defining municipal fair-share obligations, COAH has adopted a massive body of regulations governing nearly every element or program (including IH) through which a New Jersey locality might seek to comply with the *Mount Laurel* mandate. While the fair-share allocation process is, within limits, tailored to individual municipal characteristics, the one-size-fits-all character of many of the implementing regulations is arguably unresponsive to the substantial differences between jurisdictions in economic, environmental, social, and political conditions. It nonetheless offers a measure of predictability to those municipalities seeking to address their legal obligations.

Evolution of IH programs in California

The California statute governing housing elements was further strengthened in 1980 by language mandating that a locality’s housing needs for all income levels “shall include the locality’s share of the regional housing need” (Burton 1981). This language was interpreted by HCD under the Brown administration as an “obligation imposed by housing element law to zone affirmatively for regional housing needs” (Burton 1981). HCD prepared a “Model Inclusionary Housing Ordinance,” which was energetically promoted by staff as a tool that local jurisdictions could use to bring their housing element into compliance with state law (California HCD, Legal Department 1978; Mallach 1984). HCD advocacy of IH was so strong that the California Association of Realtors (1991) accused HCD staff of implying that local housing elements might not be approved unless they contained an inclusionary program.

In 1983, with the arrival of the politically conservative Deukmejian administration, HCD gradually moderated its stance, reducing the ability of local policy makers and housing advocates to use state law as leverage to foster inclusionary programs. The HCD strategy from 1980 to 1983 required inclusion of affordable housing in new development but provided no cost offsets or incentives to developers other than the 25 percent density bonus mandated by the state Density Bonus Law of 1979 for any IH development that contained 25 percent or more affordable housing units. The strategy did, however, allow developers to meet program requirements through the payment of in-lieu fees, land dedications, and off-site compliance.

About 30 IH programs were developed during the late 1970s and early 1980s, and their area of application began to spread beyond the San Francisco Bay area and Orange County. While HCD played an important role in their enactment, it must be recognized that they were also a reflection of “the burgeoning housing crisis” and “a widely held conviction that housing affordability was a major problem affecting a substantial part of the area population and that the inclusionary approach was a rational way in which to address the problem” (Mallach 1984, 200). Inclusionary programs proliferated in California so rapidly at the beginning of the 1980s that a New Jersey attorney noted that “New Jersey adopted inclusionary housing but California implemented it” (Burton 1981).

As Mallach (1984) points out, there was substantial diversity among IH programs enacted at this time. For example, there were significant variations in the target populations, the percentage of lower-income units required, and the ability of developers to pay in-lieu fees or use other alternative forms of compliance. Despite this diversity, however, the great majority of these programs had two essential characteristics in common: their mandatory nature and the absence of any provision for cost offsets.

During the 1980s, HCD reduced its advocacy of IH. By the 1990s, HCD’s hands-off stance toward IH had turned into outright hostility. At present, it is HCD’s position that without offsets and flexibility, “inclusionary zoning becomes a constraint or an exaction on new development” (Coyle 1991).³ Thus, HCD “recommends against the adoption by local governments of inclusionary housing ordinances or policies which shift the

³ Timothy L. Coyle was the director of HCD until 1995. The department’s position has remained the same with the new director.

burden of subsidizing low-income affordability from government to private builders” (Coyle 1994). Recent HCD reviews of housing elements with inclusionary programs view IH as in itself a “governmental constraint” and require that their impact on housing development in general be measured: “While we cannot endorse this approach to facilitate lower-income housing production, if the City has implemented a program that acts as a governmental constraint, the City must analyze the effect that the action has on housing development” (Badenhausen 1995).

This position represents a sharp reversal of HCD’s strong advocacy of IH programs during the late 1970s and early 1980s and reflects the dramatic political differences between the Brown and Wilson administrations and today’s widespread antiregulatory and probusiness stance. Such a stance can be seen as arising from the recession that assailed California during the last years of the 1980s and into the early and mid-1990s. The recession increased the power of the development industry, and “overregulation” was cast as the major cause of high housing costs (Advisory Commission on Regulatory Barriers to Affordable Housing 1991). In the expansive market of the 1980s, developers were able to pass on cost increases—from whatever source—to the consumer, taking advantage of the dramatic price appreciation noted earlier. When the recession hit California, however, real estate values quickly plummeted. Developers who had paid prerecession prices for the land were faced with absorbing a large portion of the cost increases that might be generated by IH. This contributed to the increasing opposition of the real estate development community to such redistributive impositions.

The strategic choice for local governments under these political circumstances was to develop inclusionary programs that were less objectionable to the building industry—that is, programs that provided cost offsets. Through cost offsets, developers receive financial assistance and regulatory relief in an attempt to counter the costs incurred in providing inclusionary units. Regulatory relief may include density increases, impact fee waivers or deferral, fast-track permit approval, reduced parking requirements, relaxed design restrictions (such as reduced street widths and setbacks), or other regulatory concessions. In addition, favorable financing may be made available through state housing bonds, Community Development Block Grants, below-market-rate construction loans, tax-exempt mortgage financing, and land write-downs.

Developers argue that regulatory relief alone does not compensate them adequately for inclusionary requirements, and they

typically seek additional financial assistance (Johnston et al. 1990; Rivinius 1991). Despite developer resistance, studies have demonstrated that it is possible to fill the affordability gap—the difference between what it costs to provide housing and what lower-income households can afford—through local government measures to reduce production costs (Brown and Harrington 1991; San Diego Housing Commission 1992).

Offering such measures does not, however, guarantee the development industry's support. The ability to hold out cost-offsetting measures, especially reductions in development standards, as a reward for providing affordable housing is as much a political as an economic matter. In a community with a politically powerful development industry, particularly during a recessionary period, this tradeoff may be unacceptable to the development industry, which may seek to block such IH programs and, on occasion, to obtain regulatory relief without inclusionary obligations. This was the case in Stockton, Sacramento County, and, most egregiously, in San Diego (Calavita and Grimes 1994; Judd and Rosen 1992; Newman 1993).⁴

Although an objective analysis may show that the financial assistance and regulatory relief being offered is equal to or greater than the cost of the inclusionary requirement, developer opposition should not be considered completely irrational. Much of the financial assistance comes with complex procedural or regulatory strings, which are a particular problem to smaller developers. Furthermore, all calculations of cost offsets are based on assumptions, a crucial one of which is the projection of the price at which the market-rate units can be sold. The stronger the market, the more comfortable the developer is likely to be in moving forward on the basis of such projections.

All current California IH programs offer offsets, the most common being the density bonus mandated by the 1979 statute. Eighteen of the 35 programs established during the 1990s provide both financial incentives and reduction or flexibility in development standards. Many of the IH programs that were updated in the 1990s also were changed to provide more

⁴ In San Diego, the value of the offsets was determined by an IH task force. The task force spent nine months analyzing, critiquing, and cross-examining a consultant's data and eventually agreed (with industry representatives included in the agreement) to a balanced package of offsets and housing affordability requirements. The consultant believed that the offset savings warranted even stricter affordability requirements. Nevertheless, the building industry eventually repudiated such a conciliatory approach and withdrew its support, effectively killing the proposal (Calavita and Grimes 1994).

flexibility and cost offsets. For example, in Santa Barbara County, “significant changes in the State and local economy have driven the County to seek programs which offer practical incentives ensuring the economic feasibility of affordable housing projects” (Santa Barbara County 1993).

The picture that emerges from this analysis of the evolution of IH in California is that of a system marked by change and flexibility, as localities respond to shifts in the economy and the state’s policy-making environment. Ultimately, it is at the local level that the unique characteristics of an IH program take shape, which explains the wide variation in the distribution and characteristics of inclusionary programs in California.

Most of the data presented here are based on the results of a mail survey conducted by the California Coalition for Rural Housing Project (CCRHP) in 1994.

While they are found throughout the state, inclusionary programs in California are primarily clustered in jurisdictions around San Francisco and in Southern California coastal counties (Los Angeles, Orange, and San Diego), areas characterized by rampant growth and high housing costs.

The 1994 CCRHP survey found that 64 jurisdictions had adopted IH programs that had produced a total of 22,572 units, with 2,439 units approved or in the pipeline. Most programs (66 percent) are mandatory. These programs have produced the greatest number of low-income and very low income units.

The minimum project size subject to IH requirements varies from 1 to 100 units, the typical minimum project size is 10 units, and a majority of the programs require 10 to 15 percent of new residential development projects to be affordable. Small projects are widely exempted because they do not enjoy the economies of scale that facilitate the compliance of larger projects. Furthermore, small projects are more likely to be located in older communities, where concentrations of lower-income households already exist and where it would be inconsistent with the dispersal objectives of IH to add to the stock of low-income housing. Sixty-one percent of the programs permit the developer to pay a fee in lieu of providing affordable housing, and a total of \$21,398,644 had been collected by 17 jurisdictions over the life of their programs. In-lieu fees range from as little as \$600 per unit in Pleasanton to \$36,000 per unit in Oceanside, reflecting the market value to the developer of being relieved of an inclusionary requirement. Some programs allow the developer to make an

in-lieu donation of land, normally equivalent to the acreage that would have been used to meet the requirement. In some localities, such as Encinitas and Oceanside, in-lieu fees are used to support local rent subsidy programs. Other uses of in-lieu fees include homelessness assistance, transitional housing or special-needs housing, acquisition and rehabilitation, new construction, and land acquisition.

Nearly all programs provide for both low-income (between 50 percent and 80 percent of median income) and moderate-income (between 80 percent and 120 percent of median income) households.⁵ Just over half (53 percent) of the programs also require that some units be set aside for very low income households (50 percent of median or less, corresponding to the “low” definition in New Jersey) usually earning less than \$22,600 per year. Only five programs, or 8 percent of the total, mandate that housing be provided exclusively for moderate-income families. Notably, this represents a shift from an earlier survey conducted in 1983, which found that 6 of 31 programs then surveyed (19 percent) limited their benefits to moderate-income families (Mallach 1984), suggesting a modest trend toward reaching lower-income households through IH programs.

The term of affordability for IH units varies from 10 years to perpetuity; for most programs, affordability restrictions remain in effect for at least 30 years. Permanent affordability for multi-family housing is required in 24 percent of the jurisdictions and for single-family housing in 17 percent.

The CCRHP singled out 14 jurisdictions—10 cities and 4 counties—that have produced the greatest number of IH units. The cities are Irvine, Livermore, Sunnyvale, Roseville, Pleasanton, Petaluma, Santa Monica, Chula Vista, Davis, and San Leandro; the counties are Orange, Santa Barbara, Santa Cruz, and Monterey. These jurisdictions share a number of features but differ in some respects. For example, all offer a wide variety of incentives, which range from density bonuses and flexible standards to fast-track processing and reduced requirements. All have in-lieu policies, but the circumstances under which they can be used vary from place to place. Most, but not all, require that the inclusionary units be evenly distributed throughout the market-rate units but do not require that they be comparable to them.

⁵ In 1993, HUD estimated median income in California to be \$45,200 per year for a family of four in a metropolitan area.

In the absence of affordability standards such as those set by *Mount Laurel II*, the emphasis in California has been on moderate-income buyers, those earning between 80 and 120 percent of area median income. There are both political and economic reasons for the lack of emphasis on very low income households, those earning under 50 percent of area median income. In the absence of any other organized pressure, local decision makers usually favor homeownership programs for middle-income groups over rental housing for lower-income groups. This preference is reinforced by developers' own preferences, as well as the higher cost of producing a unit for a very low income, rather than a low- or moderate-income, household.

It must be stressed that IH, from a political standpoint, is either a response to outside (i.e., state) pressure or the product of concerns indigenous to the generally affluent suburbs in which it is being used. Meeting the needs of the moderate-income population—which typically includes large numbers of municipal employees, schoolteachers, police officers, and the like—as well as the struggling children of older suburbanites is clearly a higher political priority than addressing the needs of the very low income population, which typically represents a small and poorly organized part of the suburban political system. Pressure from grassroots or community groups to make IH programs more responsive to the needs of lower-income groups is rare. It is notable that the opposite has been the case with housing trust funds, which have often been established as a result of community pressure and typically do provide housing for very low income groups (Brooks 1989, 1994; Calavita and Grimes 1992; Connerly 1989, 1993).

Overall, the results of the survey indicate considerable variation in standards and applications, reflecting the highly political nature of any public policy response to the affordable housing shortage, as well as the differences between local political dynamics and the ingenuity of local housing officials in successfully negotiating obstacles to the creation of affordable housing opportunities.

Evolution of IH programs in New Jersey

In contrast to California, where inclusionary housing programs had become widespread by the late 1970s, IH was rare in New Jersey before the 1983 *Mount Laurel II* decision. In fact, at least some of the IH ordinances adopted by New Jersey suburban

townships in the 1970s were so laden with burdensome provisions that the areas were rendered all but unbuildable. For all practical purposes, IH in New Jersey is the product of the Supreme Court’s decision in *Mount Laurel II* to place it at center stage as a virtually obligatory element of municipal compliance with the court’s fair-share doctrine.

Construction on the first inclusionary units to emerge from *Mount Laurel II* began in 1984 in the affluent exurban township of Bedminster, little more than a year after the landmark decision. The first of 260 low- and moderate-income families to live in the Hills, a planned development of 1,284 town houses and condominium flats, moved in early in 1985. By 1994, 694 units of affordable housing had been completed in that one township alone. A survey completed early in 1988 of the 54 fastest-growing New Jersey municipalities, which contained perhaps 90 percent of all *Mount Laurel* units built or approved up to that point, found nearly 12,000 low- and moderate-income units in inclusionary developments in the development pipeline (Lamar, Mallach, and Payne 1989). The status of these units was as shown in table 1.

Table 1. Status of Units in 54 Fastest-Growing New Jersey Municipalities, 1988

Status	Units
Completed	2,101
Under construction	2,123
Received planning board approval	2,981
Pending before planning board	4,512
Total	11,717

Within the municipalities surveyed, another 5,000 low- and moderate-income units, for which no plans had yet been submitted to municipal planning boards, were included in municipal master plans and land use ordinances. These units made up more than 80 percent of the lower-income housing being produced in response to the *Mount Laurel* mandate and the subsequent implementation of the New Jersey Fair Housing Act. An informal survey conducted in 1992 by COAH found that by that point nearly 7,000 low- and moderate-income units in inclusionary developments had been completed and occupied

(conversation with Douglas Opalski, then executive director of COAH, 1992). Although it is difficult to be precise, between 1985 and 1991, roughly 15 percent of all housing units built in New Jersey—as either affordable or marketplace units—were in inclusionary developments.⁶

As an engine for the production of housing units, the *Mount Laurel II* doctrine during this period was overwhelmingly successful. However, New Jersey's inclusionary development during the 1980s raises some serious social policy issues. The developer-driven process that had emerged sought, as a rule, to respond only to the most easily addressed segments of lower-income housing need. Although low-income households were defined as those earning 50 percent or less of area median income and, as noted, at least half the units were required to be affordable within this range, low-income units were rarely priced to be affordable to those earning below 40 percent of median and were often limited to households earning between 45 and 50 percent. Households earning less than 40 percent of area median—more than three-fourths of low-income households—were effectively placed beyond the reach of *Mount Laurel* housing. Still, the percentage of households in this income category that obtained affordable housing through IH was substantially greater in New Jersey than in California, where, as discussed above, nearly half the IH programs excluded this group from consideration entirely, and many others offered only a token number of units for this segment of the population.

As in California, those in greatest need were further excluded by the preference of most developers to sell, rather than rent, their lower-income units. The 1988 survey found that 87 percent of the units in the inclusionary development pipeline were offered for sale rather than rent (Lamar, Mallach, and Payne 1989). While understandable, that preference led to a drastic reduction in the pool of realistic candidates for the units being offered. Only the most fortunate low-income households could come up with the down payments and closing costs, and satisfy the stringent credit

⁶ During the period in question, inclusionary developments were generally developed with set-asides ranging from 10 to 20 percent, with the majority at or approaching 20 percent. If one assumes an average set-aside of 17.5 percent, the 7,000 lower-income units made up part of developments with a total of 40,000 units, the balance being marketplace units. Between 1985 and 1991, a total of 265,396 building permits were issued in New Jersey. It should be noted that the percentage in the growing north central suburban counties—including Mercer, Middlesex, Morris, and Somerset Counties—was probably much higher, because relatively little development taking place in urban areas or in the southern New Jersey suburbs was inclusionary development.

standards, to become home buyers. Often, as many as 10 income-qualified applicants would be eliminated for each one who was actually able to purchase a unit (Lamar, Mallach, and Payne 1989). Not surprisingly, this process favored applicants from middle-class families—with parents or other relatives who could assist them financially—over applicants from low-income or inner-city backgrounds.

There is some evidence, however, that the situation began to change in the late 1980s as developers discovered that by building rental housing to meet their low-income obligation they could use the federal low-income housing tax credit as a significant cost offset. The provision of rental housing—although at the price of an overall reduction in affordable housing production—was furthered by a COAH policy that gave municipalities “bonus credits” against their fair-share obligation for production of affordable rental units. This suggests that incentives, *within the framework of a mandatory program*, can redirect a developer’s approach to inclusionary development. There is no evidence of a suburban market-driven developer taking advantage of the low-income tax credit to build affordable rental housing in the absence of an underlying inclusionary requirement.

Developers’ efforts to target a lower-income population in a way that would be less costly to them and perceived as less threatening to their marketplace buyers found a counterpart in local government efforts to achieve their *Mount Laurel* obligations at the lowest political or social cost. Local officials often preferred inclusionary developments to other alternatives because they could make the developer take responsibility for the outcome. Some municipalities, realizing how many units they might have to accommodate to achieve their fair-share obligations through IH, turned to direct provision of lower-income housing, as opposed to developer-sponsored IH production; even after more than a decade of experience, however, such municipalities remained relatively rare exceptions. Whatever the circumstances, officials took great interest in the selection of buyers for the units and often sought to ensure that local residents received preference over others for the handful of units available, a practice prohibited by the New Jersey Supreme Court in 1994. Even without formal resident preferences, however, the effect of informal communications in the nearly total absence of affirmative marketing efforts dictates that the great majority of the households that have been the beneficiaries of inclusionary development in suburban New Jersey have been suburbanites themselves (Lamar, Mallach, and Payne 1989).

The great majority of households that have moved into *Mount Laurel* housing legitimately belong in those units; abuses have been few. Many buyers have been blue-collar workers, needy young couples, and divorced mothers with small children, many of whom had been doubling up with their more affluent suburban parents. However, if the underlying social goals of the *Mount Laurel* decision are held to be reducing urban-suburban disparities and fostering racial and economic integration within metropolitan regions, IH has not substantially succeeded. Although data on the racial composition of *Mount Laurel* projects are sparse, available information suggests that few projects have substantial minority—particularly African-American—populations and that the minority population is nominal or even nonexistent in many (Lamar, Mallach, and Payne 1989). Indeed, a recent study (Wish and Eisdorfer 1996), which analyzed a sample of suburban IH developments occupied between 1988 and 1996, found that 88 percent of the occupants had previously been suburbanites and only 12 percent had previously resided in an urban municipality. Further, of that minuscule pool of urban-suburban migrants, less than a quarter were African American, a share of IH beneficiaries significantly below their share of urban housing need.

The New Jersey real estate boom of the 1980s vanished as quickly as it had appeared. More than 50,000 building permits were issued in New Jersey in 1987. The total dropped to 40,000 in 1988, 30,000 in 1989, and 18,000 in 1990—the lowest figure since consistent record keeping began in 1962, and most probably since the late 1940s. Although a modest recovery began in 1992, that recovery led to little more than 27,000 permits a year being issued in 1993 and 1994, totals only marginally better than those obtained at the depth of the 1980–82 recession (21,000 to 22,000). Real estate prices, which had risen steadily at nearly 20 percent per year between 1983 and 1988, declined precipitously. Although prices had largely stabilized by 1993, a return of the real estate market to anything approaching the climate of the 1980s seemed inconceivable.

To the extent that development was taking place, its character had significantly changed. More cautious developers, kept under tighter control by equally cautious lenders, were building smaller developments that could be completed quickly and that required far less initial investment in land and infrastructure. This caution reflected a fundamental underlying change in the housing market.

In retrospect, it was clear that developers in the 1980s had overbuilt for their target market, the middle- and upper-middle-income first-time home buyer. By the 1990s, that market had begun to shrink, with the remaining demand largely accommodated by the overhang of unsold units from the 1980s, coupled with the growing resale market in those same developments. By 1993, however, the peak cohorts of the baby boom were in their 40s. Owners of homes purchased in the 1970s and 1980s, often in the middle of their child-raising years, they were a potential market for developers, but one smaller than, and very different from, that which had driven the 1980s boom. Despite the exhortations of planners and environmentalists—who had argued since the early 1970s for a return to more compact housing types and settlement patterns—these buyers were, if anything, even more committed to the suburban single-family house than the buyers of the previous decade.

The shifting market gave rise to a phenomenon unprecedented in the history of land use regulation. Beginning around 1990, developers holding parcels previously approved for town house or condominium developments at densities between 6 and 10 units per acre returned to the townships that had approved them seeking a reduction in the permitted density, generally to 4 units per acre or less, so that they could construct single-family subdivisions in place of their previously approved developments. Because nearly all the prior approvals contained inclusionary requirements, developers generally sought relief from those requirements, in the form of an outright waiver, the ability to substitute a cash payment for the lower-income units, or at least a significant reduction in the magnitude of the inclusionary requirement.

A reflection of developers' eagerness to relieve themselves of the obligation to incorporate lower-income units into their downsized developments was the frequency with which they were willing to make significant cash contributions to the municipality, for use for regional contribution agreements (RCAs) or other activities, in lieu of producing the units. RCAs were a controversial but widely used strategy authorized by the Fair Housing Act under which one municipality, generally suburban, would make a cash contribution to another, generally urban; in return, the recipient municipality would construct affordable units to be credited to the donor's fair-share obligation. Under COAH regulations, the minimum per-unit contribution for an RCA was \$20,000, arguably greater, in many cases, than the actual capital subsidy cost of providing the unit in the development.

The readiness of developers to make cash payments of \$20,000, and sometimes more, per unit in order to be relieved of the obligation to build lower-income units prompts some observations on the financial burdens of IH, as well as the slippery but recurrent issue of cost incidence—that is, who pays for the affordable housing units?

The single most important variable, arguably, in determining the financial burden of IH to a developer is the affordability threshold established by the local program. In this respect, the California and New Jersey experiences differ significantly. For example, given current mortgage interest rates and the 1 percent property tax rate mandated throughout California by Proposition 13, a unit affordable to a typical household in the range between 80 and 120 percent of area median income is likely to sell for a price between \$125,000 and \$150,000. A capable developer, given development densities and standards that permit efficient development, can build such a unit not only without losing money, but while making a respectable profit. If one can characterize the “typical” California IH program as one that requires 10 to 15 percent of the units to be affordable, with those equally divided between moderate- and low-income units (as those terms are defined in California), one can readily see that with the cost offsets discussed earlier, most developers are unlikely to lose money by building under the typical California IH program.

Clearly, however, those developers will make less money than if they were able to build the same number of units, under the same development standards, without the obligation to build affordable units. Therein lies the point where the economic and political issues converge: To the extent that government makes the provision of affordable housing a requirement for development opportunities and regulatory relief, developers will follow. To the extent that developers believe that they can obtain those opportunities without that stipulation, their rational self-interest demands that they will try to do so.

By contrast, a New Jersey developer seeking to build units for the low-income household earning under 50 percent of median may have to sell that unit for \$50,000 to \$60,000, a price likely to be substantially below the true cost, even without profit, to produce that unit. In the typical New Jersey IH program, 20 percent of the units must be affordable, of which half must be affordable to households earning under 50 percent of median and half to those earning between 50 and 80 percent. Indeed, COAH has adopted a rule mandating that the average level of affordability be no higher than 57.5 percent of the area median income.

Under such conditions, where it can often be shown that the developer will lose money on each affordable unit, the question of cost incidence becomes not only relevant, but significant. While one of the authors has written on this issue in detail elsewhere (Mallach 1984), it is worth brief discussion. The issue was seen as largely unproblematic in New Jersey during the boom of the 1980s. Developers, who were paying more and more for suitable land parcels, were treating the IH costs as a simple cost of doing business, easily offset by the rapidly rising profit margins available in the overheated housing market. In that climate, developers could simultaneously offer market buyers competitive prices, make attractive profits, and pay premium prices for land. Clearly, that was an anomalous situation. In the climate of the 1990s, such costs must bear much closer scrutiny. In some cases, this is reflected in lower land prices, as costs are displaced back to the seller. In others, particularly in elite communities, IH costs are incorporated into the premium paid by market buyers to purchase homes in those communities. Finally, in many cases, the inability to displace those costs either forward or backward may render a developer unwilling or unable to move forward with IH development, a factor reflected in the sharp decline of IH in New Jersey between the 1980s and the 1990s.

Although developers had become relatively comfortable with inclusionary zoning during the 1980s, it was widely seen as inseparable from the large-scale planned-unit, town house, and condominium developments that represented so much of the development activity of that period. In the wake of *Mount Laurel II*, the initial resistance to IH from the development industry was defused by that industry's discovery that lower-income housing could be successfully integrated into the town house and condominium developments that they were seeking to build at that time. With the shift in the marketplace away from large-scale planned development toward smaller developments made up of detached single-family houses, the resistance of the development community to the inclusion of low- and moderate-income units predictably reappeared.

There are plausible, if not easily measurable, reasons that inclusionary provisions are perceived as less appropriate in single-family subdivisions than in multifamily developments. It is far easier to situate low- and moderate-income units unobtrusively in a multifamily development, where the range of design and site-planning options available to the developer is far greater. In a multifamily development, the size of the individual unit does not dictate the size of the building in which it is located; therefore, a wide variety of individual unit sizes and

configurations are possible within a visually homogeneous framework. Whether one seeks to intersperse the affordable units among the market units or to create separate clusters of lower-income units (both strategies have been pursued successfully in inclusionary developments), such integration occurs far more naturally in large-scale multifamily developments than in single-family subdivisions. Furthermore, developers anticipated greater market resistance from buyers of single-family detached houses, buyers more oriented to a long-term commitment to a home and a neighborhood, than from renters or condominium buyers (typical of the 1980s inclusionary developments), who are more likely to see their investments as shorter term. A developer's assumption that the buyers of single-family homes will be less tolerant of anything that may be perceived as threatening to the social and economic stability of their investment is not unreasonable.

The last point, of course, is speculative. What is less speculative is that over the same period the legal climate changed in ways that were significant in their implications for developer behavior. Although the changes were not fully apparent until the early 1990s, having been masked by the development boom that lasted through the late 1980s, their roots were visible far earlier. The post-*Mount Laurel II* scene, in which developers and their attorneys were seen as turning voraciously on vulnerable municipalities, triggered a powerful backlash across suburban New Jersey. In 1985, with the New Jersey Supreme Court under attack and talk of constitutional amendments in the air, the state legislature enacted the New Jersey Fair Housing Act, moving responsibility for carrying out the *Mount Laurel* mandate from the courts to a new administrative body, the New Jersey COAH. In a subsequent decision that came to be known as *Mount Laurel III (Hills et al. v. Township of Bernard* [1986], 103 NJ 1), the Supreme Court upheld, with almost indecent haste, the constitutionality of this new statute, including a controversial provision that transferred all pending court cases to the jurisdiction of the new agency.

It was clear that the builder's remedy (along with the host of large-scale inclusionary developments that it spawned) was at the heart of the backlash, although ironically it appeared that the issue was more the sheer number of units being authorized than the lower-income units per se. From the start of COAH's work in 1986, therefore, its focus has been on easing the path of suburban municipalities toward compliance with the *Mount Laurel* mandate by making adjustments, on a case-by-case basis, to the magnitude of individual municipal fair-share obligations

and by offering municipalities alternatives to the builder's remedy—that is, ways other than inclusionary development through which they could achieve their fair-share goals.⁷

Although *Mount Laurel II* remains the law of the land, in practice its reach has become narrower. In 1983, the Supreme Court had assigned three special judges to hear all *Mount Laurel* cases, in part because of the inconsistent and often contradictory decisions of trial judges following *Mount Laurel I*; however, those judges were reassigned to other duties soon after enactment of the Fair Housing Act. Henceforth, the few *Mount Laurel* cases that escaped COAH's purview were handled as civil matters under each separate county's jurisdiction. While a determined developer, confronting a particularly recalcitrant township, might still have been able to use the courts or COAH to compel the rezoning of a parcel for a planned inclusionary development, the circumstances under which that was legally feasible, and was likely to lead to a timely and positive outcome, were becoming more and more rare.

The likelihood that more than a handful of developers, however, would even have an interest in pursuing such matters in the 1990s was remote. As discussed earlier, the single-family developments that were now most appealing to the marketplace were rarely perceived as compatible with inclusionary housing provisions. Because such developments were generally more acceptable to local officials to begin with, they were less likely to need the intervention of the courts than the large-scale planned developments that characterized the 1980s. Moreover, though developers in the 1980s (thanks to *Mount Laurel II*) may have seen inclusionary development as the wedge by which to gain local approval, developers in the 1990s now saw the increasingly antiregulatory political climate as an opportunity to challenge "excessive" regulation. To the mainstream of the development

⁷ There are, of course, a wide variety of alternatives. State and federal subsidies, although limited, are available to fund projects entirely made up of lower-income units in suburban communities. The most significant such resource in New Jersey is the Balanced Housing Program, a trust fund program funded by a surcharge on the real estate transfer tax, enacted in tandem with the Fair Housing Act in 1985. In a handful of cases, municipalities have provided capital subsidies through various means. State law permits municipalities to levy affordable housing fees on developers of noninclusionary (including nonresidential) projects, fees that are deposited in a housing trust fund, to be used within or outside the municipality. With certain limitations, COAH permits rehabilitation of substandard housing, creation of accessory apartments, and creation of group homes to be used to meet a municipality's fair share. Finally, the Fair Housing Act permits RCAs, as described above.

community in 1997, *Mount Laurel* was far less of a driving force than it had been 10 years before.

Conclusions

There is nothing unprecedented about a regulatory system that requires certain actions from a developer as a condition of approval. Developers are often required to build streets, sidewalks, curbs, and sewer and water lines; in more aggressive jurisdictions, they must also build—or contribute to the cost of building—schools, parks, and police stations. The fundamental legal test is whether the requirement fulfills a legitimate public purpose, and there is little question that providing housing for the nation's lower-income households, particularly in otherwise exclusionary suburban communities, meets this standard. The primary task is to identify the circumstances that are likely to lead a municipality to impose such requirements. Creating an IH program is especially difficult because, for such an approach to emerge and address housing needs beyond those stemming from—and acknowledged by—the municipality itself, the program needs to confront a tightly woven web of class and racial prejudices and insular local controls. In all likelihood, the enactment of an effective IH program cannot be expected without the intervention of either a higher level of government or the courts.

In both California and New Jersey—the two states in which IH has produced significant and measurable results—this kind of intervention was a central element. In New Jersey, IH was achieved through the imposition by the courts of fair-share obligations on local jurisdictions; and in California, through a legislatively mandated housing element and fair-share doctrine. Central to both states is the proposition that each locality should meet its fair share of the region's affordable housing need. This goal is made explicit in the requirement that all jurisdictions prepare a housing element that meets the standards established by the state. Without this governing principle underlying municipal action, it is hard to imagine that IH programs will be more than sporadic and isolated exceptions born of unusual and unique circumstances.

The similarities between the two systems do not stop with the concept of fair share. As noted, a housing element figures prominently in the housing strategies of both states, with not dissimilar standards and requirements. Also, both states seek to lower the burden on the developer through what we have defined as a cost-offset approach that originated in the 1970s in Orange County and Irvine in California. Such a feature has been part of

the New Jersey experience: The language of *Mount Laurel II* all but requires municipalities to offer cost offsets to the extent available.

Furthermore, the courts play a crucial role in both states. While the role of the courts in New Jersey is well known, their role in California is less well understood. Given the general plan consistency requirements of state law, a municipality that fails to adopt a housing element that meets state requirements can be subject to a court order severely limiting its development approval powers and, potentially, to a builders' remedy similar to New Jersey's. While litigation has been rare and seldom engages the substance of the housing element as distinct from the procedural requirement, research by Calavita and Grimes (1996) has shown that the fear of litigation is an effective tool. It has been shown to lead to the certification of housing elements in general and—given that many localities realistically conclude that IH is the only way to produce a significant number of low-income units—to IH programs as well, particularly in growing cities with large amounts of developable land.

IH emerged at different times in the two states. It arose during the late 1970s and early 1980s in California with the advent of a Democratic administration at the time of a burgeoning housing crisis, and in the mid-1980s in New Jersey on the heels of *Mount Laurel II*. Economic trends and antiregulatory pressures resulted in diminished support for IH in both states in the 1990s. While the California HCD is still actively pursuing the certification of housing elements, it is discouraging programs like IH, which are seen as inconsistent with its market-oriented philosophy. This stance on the part of HCD is likely to lead to more cost-offset programs, but not necessarily to the downfall of IH in California, given the absence of plausible alternatives. The variety of programs in California demonstrates the ability of IH to adapt to changing circumstances, and its long history—a quarter century in some cases—suggests that it is a permanent feature of the California regulatory landscape.

While a sizable number of IH units have been built in both states, it should be stressed that affordability standards are much stricter in New Jersey, where half the affordable units must be affordable to households making less than 50 percent of median income. In California, programs with such a standard are rare, and emphasis has been placed on households close to 80 percent of median income and on units for sale. Thus, the neediest families rarely benefit from IH in California. This is also true—although to a lesser extent—in New Jersey. In New

Jersey, a state with a far more pronounced socioeconomic split between city and suburb, the evidence indicates that the beneficiaries of IH have largely been suburbanites. That tendency has been exacerbated by the widespread and increasing use of RCAs by suburban jurisdictions willing to pay—or to have developers pay on their behalf—to be relieved of their fair-share obligations.

If IH in New Jersey were analyzed in isolation, it would be easy to view it as the result of a combination of favorable circumstances unlikely to be repeated again and, as a result, no more than a phenomenon of a particular moment. In an analysis of the New Jersey inclusionary experience, Anglin (1994) argues that “given the slim results in the New Jersey case,” it would be tempting to conclude that “the court cannot be a force in causing social change.” We would disagree strongly with that conclusion. IH in New Jersey must be seen in the context of a judicial movement for change operating in a highly resistant political and social climate. Notwithstanding recent trends, *Mount Laurel II* has led to significant results; furthermore, the courts have been successful in forcing other branches of government to act. *Mount Laurel II* set in motion a process, mechanisms, and an awareness that would not otherwise exist. As one New Jersey planner has put it, “it’s working, not as fast or as well as was hoped, but it has succeeded in focusing attention on low—and moderate—income housing needs” (Harvey Moskowitz, quoted in Lovejoy 1992).

As discussed earlier, the significant changes in the New Jersey economic climate have forced a reappraisal of IH as the heart of a statewide affordable housing strategy. Indeed, that reappraisal suggests that the New Jersey system may be evolving toward that of California, where the enactment and continued survival of IH reflect political compromises between different parties and adjustments to changing political and economic circumstances. The California model will likely survive precisely because of compromises regarding affordability, a preference for homeownership over rental housing, and the provision of increased cost offsets and flexibility to developers participating in the program. It is not unlikely that over the coming years, greater flexibility and local variation will emerge within the New Jersey environment, which is currently driven by a regulatory scheme that is too centralized and not adequately sensitive to changing conditions and realities.

IH is an important tool for meeting lower-income housing needs, but it is not a sufficient strategy for fully addressing those needs. During its heyday, some New Jersey observers were

tempted to believe that IH was the answer not only to the state's severe housing needs but also to its deep-rooted problems of social and economic segregation. Those expectations were unrealistic. As could be predicted, once IH fell under the jurisdiction of the legislative branch of government, it came to reflect more the political and economic realities of the state than the reforming zeal of the courts. Its scope and effectiveness, perhaps never as great as initially believed, inevitably diminished.

Despite, or perhaps because of, the experience of the past decade, we still believe that the argument that IH is "the best, perhaps even the only, currently available means by which residential integration can be actively fostered" and housing affordable to a less affluent population can be provided (Mallach 1984, 45) remains valid. The failure of the New Jersey experience, to date, to foster meaningful geographic and racial integration is not a failure inherent in IH, but a reflection of a lack of political will to address the issue and of the sheer intractability of the problem. Few alternatives are available; even the handful of *Gautreaux* experiments currently under way are likely to dwindle in the coming years, as the supply of new Section 8 certificates and vouchers disappears under federal budgetary pressures.

Although the California and New Jersey experiences indicate that IH can play a meaningful role over an extended period, those experiences also demonstrate its limitations. Any truly serious effort to address the needs of lower-income populations must call upon a more comprehensive range of tools and remedies, which must address the most severe housing needs in the places in which they are most heavily concentrated, America's urban centers. While IH may not be the central theme of such an affordable housing strategy, it should and must remain a significant part of such a strategy.

Authors

Nico Calavita is Professor of Urban Planning at San Diego State University. Kenneth Grimes is Director of the Wiltshire Community Council in Wiltshire, United Kingdom. Alan Mallach is Director of the Department of Housing and Urban Development for the City of Trenton, New Jersey.

References

- Advisory Commission on Regulatory Barriers to Affordable Housing. 1991. *"Not in My Backyard": Removing Barriers to Affordable Housing*. Report to President Bush and Secretary Kemp. Washington, DC: U.S. Department of Housing and Urban Development.
- Anglin, Roland. 1994. Searching for Justice: Court-Inspired Housing Policy as a Mechanism for Social and Economic Mobility. *Urban Affairs Quarterly* 29(3):432–53.
- Badenhausen, Carolyn. 1995. Reviews of the Cities of Sausalito, Escalon, Carpinteria, Yucca Valley, American Canyon, Gilroy, and Marin County Proposed or Adopted Housing Elements. Sacramento, CA: Department of Housing and Community Development.
- Brooks, Mary. 1989. *A Guide to Developing a Housing Trust Fund*. Washington, DC: Center for Community Change.
- Brooks, Mary. 1994. Housing Trust Funds. In *The Affordable City: Toward a Third Sector Housing Policy*, ed. John Davis. Philadelphia: Temple University Press.
- Brower, David J., David R. Godschalk, and Douglas R. Porter, eds. 1989. *Understanding Growth Management: Critical Issues and a Research Agenda*. Washington, DC: Urban Land Institute.
- Brown, Marc, and Ann Harrington. 1991. The Case for Inclusionary Zoning. *Land Use Forum* 1(1):23–24.
- Burton, Carolyn. 1981. California Legislation Prohibits Exclusionary Zoning, Mandates Fair Share: Inclusionary Housing Programs Are Likely Response. *San Fernando Valley Law Review* 9(19):19–46.
- Calavita, Nico, and Kenneth Grimes. 1992. The Establishment of the San Diego Housing Trust Fund: Lessons for Theory and Practice. *Journal of Planning Education and Research* 11(3):170–84.
- Calavita, Nico, and Kenneth Grimes. 1994. Inclusionary Housing in a Conservative City: Equity Planning Strategies and Political Realities. Paper presented at the 36th Annual Meeting of the Association of Collegiate Schools of Planning, November, Phoenix, AZ.
- Calavita, Nico, and Kenneth Grimes. 1996. Inclusionary Housing in California. Paper presented at the Urban Affairs Association 26th Annual Meeting, March 14–16, New York.
- California Association of Realtors. 1991. *Background Paper: Inclusionary Housing in the 1990s*. Washington, DC: Local Government Relations Division.
- California Coalition for Rural Housing Project. 1994. *Creating Affordable Communities: Inclusionary Housing Programs in California*. Sacramento, CA.
- California Department of Housing and Community Development. 1993. *California Comprehensive Housing Affordability Strategy, 1994–1998*. Sacramento, CA: State of California.

California Department of Housing and Community Development. 1996. *Status of Housing Elements in California: 1995 Report to the Legislature*. Sacramento, CA: State of California.

California Department of Housing and Community Development, Legal Department. 1978. *Model Inclusionary Zoning Ordinance*. Sacramento, CA: State of California.

California Office of Planning and Research. 1980. *California Planners' Book of Lists*. Sacramento, CA: State of California.

Cisneros, Henry. 1995. *Regionalism: The New Geography of Opportunity*. Washington, DC: U.S. Department of Housing and Urban Development.

Connerly, Charles. 1989. *A Guide to Housing Trust Funds*. Washington, DC: Neighborhood Reinvestment Corporation.

Connerly, Charles. 1993. A Survey and Assessment of Housing Trust Funds in the United States. *Journal of the American Planning Association* 59(3):306–19.

Coyle, Timothy. 1991. Inclusionary Zoning: Is It Helping or Hurting Housing? *Land Use Forum* 1(1):27–28.

Coyle, Timothy. 1994. Barriers to Affordable Housing. Memo for Housing Task Force Members. Department of Housing and Community Development. Sacramento, CA. November 2.

Dolbeare, Cushing. 1989. *Out of Reach: Why Everyday People Can't Find Affordable Housing*. Washington, DC: Low Income Housing Information Service.

Dowall, David E. 1984. *The Suburban Squeeze: Land Conversion and Regulation in the San Francisco Bay Area*. Berkeley, CA: University of California Press.

Downs, Anthony. 1973. *Opening Up the Suburbs: An Urban Strategy for America*. New Haven, CT: Yale University Press.

Franklin, Herbert M., David Falk, and Arthur J. Levin. 1974. *In-Zoning: A Guide for Policy-Makers on Inclusionary Land Use Programs*. Washington, DC: Potomac Institute.

Fulton, William. 1991. *Guide to California Planning*. Point Arena, CA: Solano.

Gans, Herbert. 1961. The Balanced Community. *Journal of the American Institute of Planners* 27(2):176–84.

Goering, John, Abdollah Haghghi, Helene Stebbins, and Michael Siewert. 1995. *Promoting Housing Choice in HUD's Rental Assistance Programs: Report to Congress*. Washington, DC: U.S. Department of Housing and Urban Development, Office of Policy Development and Research.

Goldsmith, William W., and Edward J. Blakely. 1992. *Separate Societies*. Philadelphia: Temple University Press.

Haar, Charles M. 1996. *Suburbs under Siege: Race, Space, and Audacious Judges*. Princeton, NJ: Princeton University Press.

- Johnston, Robert A., Seymour I. Schwartz, Geoffrey A. Wandesforde-Smith, and Michael Caplan. 1990. Selling Zoning: Do Density Bonus Incentives for Moderate Cost Housing Work? *Land Use Law & Zoning Digest* 42(8):3–9.
- Judd, Richard A., and David Paul Rosen. 1992. Inclusionary Housing in California: Creating Affordability Without Public Subsidy. *ABA Journal of Affordable Housing & Community Development Law* 1(2):4–7.
- Katz, Lawrence, and Kenneth Rosen. 1980. *The Effects of Land Use Controls on Housing Prices*. Berkeley, CA: University of California, Center for Real Estate and Urban Economics.
- Kirp, David L., John P. Dwyer, and Larry A. Rosenthal. 1995. *Our Town: Race, Housing, and the Soul of Suburbia*. New Brunswick, NJ: Rutgers University Press.
- Lamar, Martha, Alan Mallach, and John Payne. 1989. Mount Laurel at Work: Affordable Housing in New Jersey. *Rutgers Law Review* 41(4):1199–277.
- Lane, Krist. 1991. Planning for Affordable Housing: What Do the 90s Hold? *Land Use Forum* 1(1):9–11.
- Levy, John. 1991. *Contemporary Urban Planning*. Englewood Cliffs, NJ: Prentice Hall.
- Lillydahl, Jane, and Larry Singell. 1987. The Effects of Growth Management on the Housing Market. *Journal of Urban Affairs* 9(1):63–78.
- Lovejoy, Ellen. 1992. Mount Laurel Scorecard: New Jersey's Fair Share Housing Program May Not Be So Fair after All. *Planning* 58(5):10–14.
- Mallach, Alan. 1984. *Inclusionary Housing Programs: Policies and Practices*. New Brunswick, NJ: Rutgers University, Center for Urban Policy Research.
- Massey, Douglas, and Nancy Denton. 1993. *American Apartheid: Segregation and the Making of the Underclass*. Cambridge, MA: Harvard University Press.
- Newman, Morris. 1993. California Sweet-Talks Its Way into Affordable Housing. *Planning* 59(2):16–20.
- Orfield, Gary. 1985. Ghettoization and Its Alternatives. In *The New Urban Reality*, ed. Paul E. Peterson. Washington, DC: Brookings Institution.
- Reilly, William K., ed. 1973. *The Use of Land: A Citizen's Policy Guide to Urban Growth*. New York: Crowell.
- Rivinius, Robert. 1991. The Case against Inclusionary Zoning. *Land Use Forum* 1(1):25–26.
- Rosenbaum, James. 1993. Closing the Gap: Does Racial Integration Improve the Employment and Education of Low-Income Blacks? In *Affordable Housing and Public Policy*, ed. Lawrence Joseph. Chicago: University of Illinois Press.
- Rosenberg, Gerald N. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press.

San Diego Housing Commission. 1992. *Inclusionary Housing Analysis: Balancing Affordability and Regulatory Reform*. Report to the Deputy City Manager. San Diego, CA.

Santa Barbara County. 1993. Planning Commission Staff Report: Staff Analysis and Recommendation on the 1993 Draft Housing Element, Housing Element Implementation Guidelines, Ordinance Amendments, Resolutions, and CEQA Documents. July 28.

Schwartz, Seymour I., David E. Hansen, and Richard Green. 1984. The Effect of Growth Control on the Production of Moderate-Priced Housing. *Land Economics* 60(1):110–14.

Schwartz, Seymour I., and Robert A. Johnston (with Dallas Burtraw). 1981. *Local Government Initiatives for Affordable Housing: An Evaluation of Inclusionary Housing Programs in California*. Davis, CA: University of California, Institute of Governmental Affairs and Institute of Ecology.

Tucker, William. 1991. *Zoning, Rent Control, and Affordability*. Washington, DC: Cato Institute.

U.S. Department of Housing and Urban Development. 1996. *Expanding Housing Choices for HUD-Assisted Families*. Washington, DC.

Wish, Naomi Bailin, and Stephen Eisdorfer. 1996. *The Impact of the Mt. Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*. South Orange, NJ: Seton Hall University, Center for Public Service.