

This is a collection of reports on Inclusionary zoning by
Chicago's nationally revered public interest law firm
Business and Professional People in the Public Interest



BUSINESS AND PROFESSIONAL PEOPLE
FOR THE PUBLIC INTEREST

Affordable Housing Toolkit for Communities in the Chicago Region

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Introduction

This booklet provides a basic primer on several local tools that could be used by a community in its efforts to preserve and promote affordable housing. Each tool is chosen based on its ability to address local needs and the tool's proven success in other communities. In the following pages, one will find a brief outline of each tool and case studies that illustrate how that tool has been successfully used around the country. Implementation of any of these tools will require additional research and analysis. However, this booklet provides an introduction to policies that could serve as models for a local community as it determines how best to address its affordable housing needs.

I. Affordable Housing Trust Fund

Housing trust funds are distinct funds established by legislation, ordinance or resolution to receive public revenues, which can only be spent on affordable housing. Administered by the local agency or department that handles federal housing programs, a housing trust fund generates a consistent stream of funds that can be used in a variety of ways to serve a variety of affordable housing initiatives. In addition, trust funds can effectively harness and leverage additional resources for affordable housing programs. By reviewing the policies used in Cambridge, Massachusetts, Chicago, Illinois, San Diego, California, and Santa Fe, New Mexico, one gets a sense of how a community could use a trust fund program to meet its own needs.

II. Flexible Zoning Tools

Stringent zoning policies can make the development of affordable housing infeasible. Zoning codes can be an obstacle when they do not allow for multi-family developments, mixed-use developments or affordable unit set-asides. Sometimes rehab codes at the local level are arbitrary and cost-prohibitive. Municipalities that intend to create more affordable housing can often benefit from adopting more adaptable or flexible zoning codes.

A. Inclusionary Zoning

Inclusionary zoning requires that a percentage of units in residential developments (new construction, substantial rehabilitation, and condo conversions) be made available for low- and moderate-income households. An inclusionary zoning program can take many forms. The policy can be mandatory or voluntary; the affordable housing units can be built within the development or at a different location; the developers can be required to build the affordable housing units directly or in some circumstances, may be allowed to contribute to a housing trust fund or to donate land in lieu of building affordable units. The developers receive benefits or incentives to help offset the cost of the affordable units. These incentives or benefits can include: density bonuses, an expedited permit process, the waiver of certain fees, relaxed design standards, tax breaks or direct subsidies. Because inclusionary zoning links the creation of affordable units to the creation of market rate housing, it is most effective in areas that are experiencing significant growth and development or gentrification. Case studies from Davis, California, Montgomery County, Maryland and Newton, Massachusetts, highlight the use of this tool around the country.

B. Flexible Rehab Codes

Flexible rehab codes allow municipalities the flexibility to determine when buildings must meet new construction standards based on the nature of the work to be done (and its effect on safety) instead of the cost of the work. Municipalities should standardize the process through clear, “cookbook-like” steps and not make rehab too cost prohibitive.

C. Other Zoning Tools

Other tools might include allowing accessory dwelling units, such as coach houses, in a single-family zoned area. Also, a municipality can increase the amount of land zoned for multi-family development, or allow for mixed-use zoning districts.

III. Community Land Trust

A community land trust can be created to acquire and hold land to provide affordable access to land and housing within the community. A community land trust, typically a non-profit organization, receives land as gifts or uses public or private funds to acquire land. Quite often, a community may use revenues from its trust fund to acquire land for a community land trust. The policies used in Burlington, Vermont, Albuquerque, New Mexico, and Durham, North Carolina demonstrate how homeownership can be made possible through a community land trust for extremely low- to moderate-income households.

IV. New Local Revenue Sources

To address affordable housing needs, additional resources are always crucial. This toolkit suggests three useful tools to help produce public funds at the local level: a commercial linkage fee, a real estate transfer tax, and a tear down fee and tax. All or some of these revenue sources could be dedicated to an affordable housing trust fund.

A. Commercial Linkage Fee

This fee can apply to new commercial, retail and/or industrial development, under the rationale that this new development creates a need for affordable housing. The funds generated from this fee are usually directed into a housing trust fund and used to support affordable housing initiatives. The fee is based on a rate per square foot.

B. Real Estate Transfer Tax

This is a tax based on the sales price of property and is paid every time a property is sold. The real estate transfer tax provides a steady stream of income without relying on annual budget processes. The real estate transfer tax could be dedicated to an affordable housing trust fund.

C. Tear Down Fee and Tax

The permit fee and demolition tax apply to the tear down or removal of a residential structure. The demolition tax per unit is based on the type of residence. Such a mechanism could generate revenue needed to accomplish affordable housing initiatives in a community. The City of Highland Park recently implemented a tear down fee and tax to help provide a revenue stream for its local housing trust fund. The permit fee is set at \$500 and the

demolition tax is \$10,000 for a single-family residence. Residents of a multi-family unit pay either \$10,000 or they pay \$3,000 per unit – whichever is higher.

V. Employer-Assisted Housing

With the guidance provided by the Regional Employer-Assisted Collaboration for Housing (REACH), employers within a community could provide grants or down payment assistance to help residents obtain affordable housing near their place of work. Due to the high costs of employee turnover and training, employers and employees can both benefit from this program.

VI. Vacant, Abandoned and Substandard Property Rehab & Sale Programs

Many cities have created programs that acquire vacant, abandoned and substandard property in order to rehabilitate that property and produce affordable housing. This tool could be an effective method for providing affordable housing to low- and moderate-income homebuyers while simultaneously improving the quality of life of affected neighborhoods. A local government could operate this program in collaboration with a community land trust and with funds from a housing trust fund.

VIII. Existing Regional Programs

The following two regional programs are examples of affordable housing initiatives that utilize Housing Choice Vouchers to provide diverse housing opportunities.¹

A. Regional Housing Initiative

In an effort to create mixed-income housing development, the Regional Housing Initiative (RHI), serves as an additional source of public resources for affordable housing. RHI turns local-housing authorities' unused Housing Choice Vouchers into new apartments. This program provides a subsidy to developers with proposals to create affordable housing opportunities that promote diversity and sound planning within the community.

B. Housing Choice Voucher Homeownership

Administered by CHAC Inc., this program allows families to use Housing Choice Vouchers to purchase homes. CHAC makes a monthly housing assistance payment (HAP) to help the owner pay the mortgage and housing utility expenses. The monthly HAP amount is the difference between the payment standard for mortgage and utilities for the home and 30 percent of the family's monthly adjusted income. The program provides broad homeownership opportunities to people who might otherwise not be able to afford the cost of a home.

These policy tools provide a number of potential ways for municipalities to address their housing needs. Only the local community can answer which of these tools are most appropriate. However, all of these tools, acting alone or in concert, stand as proven and viable ways for preserving and promoting affordable housing.

¹ The Housing Choice Voucher Program is a national rental assistance program, funded by the U.S. Department of Housing and Urban Development (HUD). The program assists low- and moderate-income families in renting housing in the private market by paying a portion of the family's rent each month.

I. Affordable Housing Trust Fund

What is an Affordable Housing Trust Fund?

Housing trust funds are distinct funds established by legislation, ordinance or resolution to receive public or private revenues, which can only be spent on housing.

What will it do?

Housing trust funds provide a flexible, secure and sensible way to fund needed housing.

How does the program work?

Most housing trust funds are administered by the agency or department that typically handles federal housing programs, such as HOME and the federal Community Development Block Grant program (CDBG).

What income levels will they serve?

Housing trust funds are established to provide the financial resources needed to address the housing needs of low-income (below 80% Area Median Income - AMI) and very low-income (below 50% of the AMI) households. Some extend this mission to moderate-income (80-120% of the AMI); others focus more specifically on the needs of the homeless or other special groups.

What needs to be done to establish a Housing Trust Fund?

Steps to Set Up Administration of the Housing Trust Fund

1. Determine where the trust fund should be housed.
2. Outline this administrative body's key responsibilities.
3. Determine how to pay for administration.
4. Establish a board or commission to oversee the fund's operations.

Steps to Set Up a Housing Trust Fund's Programs

1. What target population will the fund support (e.g. below 80% of the AMI)?
2. Who will be eligible to receive funds (e.g. for profit developers developing affordable housing)?
3. What kinds of projects or programs should the fund support (e.g. rehab and creation of affordable housing units)?
4. How should the funds be awarded (e.g. based on criteria established by the trustees and staff)?
5. What funding criteria should be incorporated in the application process (e.g. long-term affordability, priority of projects, etc.)?
6. Determine a local revenue source.

II. Flexible Zoning Tools

Many barriers to affordable housing are a result of strict, cost-prohibitive zoning policies that make affordable development impossible. Municipalities can use their zoning powers to make affordable housing a reality for families and individuals.

A. Inclusionary Zoning

What is Inclusionary Zoning?

Many cities and municipalities around the country have started to see how rapidly rising real estate values can push out or keep out the working families and individuals that make communities diverse and robust: school teachers, police officers, and fire fighters, to name a few. In response, many cities and municipalities now use their zoning powers to promote the development of affordable housing within the private market. These localities' zoning codes require or provide incentives for developers to set aside a certain percentage of units in a residential development (new construction, substantial rehab, and/or condo conversions) as affordable to low- and moderate-income households. The production of affordable housing is thus tied to the demand for, and production of, housing in general. The program can be either a mandatory requirement for developers to create a certain number of units, or a voluntary goal with built-in incentives to encourage developers to include affordable units in their developments. Programs usually apply citywide to all residential developments of a certain size.

What will Inclusionary Zoning Do?

An inclusionary zoning program will:

- increase the supply of affordable housing in municipalities;
- disperse the affordable units throughout the community;
- allow low- and moderate-income families to live in homes indistinguishable from, and adjacent to, market-rate housing;
- allow low- and moderate-income families to live in communities with better access to employment and educational opportunities; and
- encourage racial and economic integration of our communities.

Who Will Inclusionary Zoning Benefit?

- Businesses who find it easier to hire and retain employees who are able to live within a reasonable commuting distance.
- Senior citizens who have the choice to remain in the communities where they have raised their children.
- Families who have the option of staying in the communities where they grew up.
- Younger parents and single parent families who can find homes in communities with good schools, parks and services.

How does Inclusionary Zoning work?

(1) Set-Aside Requirement

A set-aside is the percentage of units within a development that a developer is required to price as affordable. Around the country, set-asides range from 5 to 35%.

| | |
|--------------------------------------|-----------------------------|
| EXAMPLES : Boulder, Colorado: | Mandatory set-aside of 20%. |
| Irvine, California: | Voluntary set-aside of 15% |
| Boston, Massachusetts: | Mandatory set-aside of 10% |

(2) Developer Incentives

Municipalities provide developers with certain benefits to compensate the developer for pricing some units below market rates. These can be used in either **voluntary or mandatory programs**. These incentives include:

Density bonuses: the developer is allowed to construct additional market rate units beyond what is permitted under the current zoning ordinance.

- **EXAMPLE:** A 10% density bonus allows a developer for a 50-unit development to develop five extra units, which helps to offset the cost of producing affordable units. Montgomery County, Maryland provides up to a 22% density bonus.

Expedited permit process: The city provides the developer with a streamlined permit process if the development contains a certain percentage of affordable housing.

- **EXAMPLE:** The developer receives his approvals within three months instead of seven months. Sacramento, California offers an expedited permit process.

Relaxed design standards : Municipalities relax or reduce requirements such as minimum lot sizes, set-back requirements, landscaping requirements or parking spaces to ease the costs to the developer.

- **EXAMPLE:** A city's parking regulation could be reduced from a 1 to 1 requirement to a ½ spot for 1 unit requirement. The Davis, California ordinance allows the minimum lot size requirement to be reduced based upon the development's feasibility.

Waivers of certain municipal fees: The costs of impact and permit fees are waived for the developer.

- **EXAMPLE:** Montgomery County, Maryland waives the water and sewer charges and the impact fees for affordable developments.

(3) Income Targeting

Most municipalities base the price of the affordable units upon a percentage of the area median income. For example, a municipality may decide units must be affordable to families with an income below 80 percent of the area median income (AMI).

EXAMPLES:

| | |
|-------------------------|---|
| Sacramento, California: | Half of the affordable units must be affordable to families with incomes at or below 80% of the AMI . |
| Denver, Colorado: | For-sale units must be affordable to families at 80% of the AMI . Rental developments can voluntarily set aside affordable units for families at 65% of the AMI , less a utility allowance. |
| Newton, Massachusetts: | Units must be affordable to families at or below 50% of the AMI . |

(4) Period of Affordability

Each municipality can decide how long the affordable units must be required to stay affordable—five years, 20 years, even for perpetuity. Certain legal mechanisms, such as deed restrictions and covenants, can be used to guarantee that the units stay affordable for that time period.

| | | |
|------------------|-----------------------|---|
| EXAMPLES: | Boulder, Colorado: | Permanent period of affordability |
| | Fairfax County, VA: | 15-year period of affordability for sale housing and 20-year period of affordability for rental housing |
| | Santa Fe, New Mexico: | 30-year period of affordability |
| | Irvine, California: | 30-40-year period of affordability, case-by-case |

In the interest of keeping units affordable for an extended period of time, many municipalities apply resale restrictions to the affordable units, such as:

- Deed restrictions
- Covenants that run with the land
- Contractual agreements
- Land trust agreements

The local municipality will often reserve the right to buy some percent of the affordable units produced through the housing commission, local housing authority, or a designated not-for-profit entity in order to preserve long-term affordability. For example, in Montgomery County, Maryland, the Public Housing Authority may purchase 33 percent of the affordable units, and qualified not-for-profits may purchase 7 percent of the affordable units.

B. Flexible Rehab Codes

Often times, rehab work is not economical or predictable. Arbitrary decisions with regard to building codes and rehab policies make the development of affordable housing difficult. Municipalities can ease some of these rehab barriers by:

- 1) Determining when buildings must meet new construction standards based on the nature of the work to be done (and its effect on safety) instead of the cost of the work, and
- 2) Standardizing the process through clear, “cookbook-like” steps to ensure predictable, fair requirements for all rehab.

Historically, many building codes included “cost-triggers” and rigid “change of occupancy” rules that required rehab jobs to meet standards for new construction, thereby driving up the cost of such projects. The National Building Code (NBC), the Standard Building Code (SBC), and the Uniform Building Code (UBC) (the three major model codes) all seriously modified or eliminated these provisions in the late 1970s and 1980s.

However, some jurisdictions retained these provisions, and local building officials have been known to revert to some version of them when enforcing local or state codes. Both historically and today, even without these provisions, model building codes tend to lack clarity and predictability for rehab work, thereby creating disincentives for rehab.

Local jurisdictions can look to a number of sources for guidance in designing a more affordable housing-friendly rehab code. In 1995, HUD developed the Nationally Applicable Recommended Rehabilitation Provisions (NARRP). In addition, New Jersey’s rehab code, passed in 1998, has been hailed as a national model because of the increased rehab that it stimulated after its passage. Local jurisdictions can also look to the new 2003 building codes from the International Code Council (ICC) and the National Fire Prevention Association (NFPA), which both contain rehab codes within them that draw upon the best portions of the New Jersey and Maryland rehab codes, and the NARRP.

C. Other Zoning Tools

Municipalities can employ other flexible zoning tools to allow for the creation of affordable developments. The tools below open communities to affordable housing and give municipalities control over how to best use their zoning and planning powers.

For example:

- Zoning codes can allow accessory dwelling units, such as coach houses, in single-family zoned areas.
- A municipality can increase the amount of land zoned for multi-family development.
- A municipality can allow for and promote mixed-use zoning districts.

III. Community Land Trust

What is a Community Land Trust?

A community land trust (CLT) is a private non-profit corporation created to acquire and hold land for the benefit of a community and provide secure affordable access to land and housing for community residents.

What will it do?

Community land trusts help communities to:

- Gain control over local land use and reduce absentee ownership.
- Provide affordable housing for lower-income residents in the community.
- Promote resident ownership and control of housing.
- Keep housing affordable for future residents.
- Capture the value of public investment for long-term community benefit.
- Build a strong base for community action.

How does the program work?

The large majority of CLTs, including those that are city-initiated, are incorporated as private, not-for-profit entities, and operate independently of municipal government. CLTs are usually organized as “membership corporations,” with boards of directors elected by the members. Usually the CLT board includes three kinds of directors: those representing resident members, those representing members who are not CLT residents, and those representing the broader community interest. Typically, CLTs acquire property as gifts or in the open market, often with the help of funding from public or private sources. CLTs then hold this property and require that the development upon that land be operated and preserved as affordable for-sale or rental housing.

The CLT model, as defined by federal statute, has eight distinct features:

1. Dual Ownership (CLT owns the land; another entity owns the housing on the land)
2. Leased Land
3. Perpetual Affordability
4. Perpetual Responsibility
5. Community Control
6. Balanced Governance
7. Expansionist Acquisition
8. Flexible Development

What income levels will they serve?

CLTs can serve extremely low-income (below 30% of the AMI) to moderate-income (80-120% of the AMI) households.

What needs to be done to establish a Community Land Trust?

The following are the key decisions and tasks for creating a new CLT:

1. Define “community.” (Scope of the CLT).
2. Create the corporate structure.
3. Create the governance structure.
4. Preserve affordability.
5. Promote “responsible” use.
6. Choose roles and activities.
7. Target the benefits.
8. Build the base.
9. Educate public sector.
10. Educate private sector.²

² Institute for Community Economics.

IV. Local Revenue Sources

A. Commercial Linkage Fee

What is a Commercial Linkage Fee?

Linkage strategies “link” new economic development to the construction and maintenance of affordable housing. In most cases, a fee is assessed to a new commercial property to support affordable housing initiatives. This program works to correct the job-housing imbalance that is created when there are not enough housing opportunities for workers to live in the vicinity of their jobs. A local government could also structure this fee as a tax.

Why use Linkage Strategies?

Linkage fees are a successful way to raise substantial funds to be used towards affordable housing construction and maintenance. Additionally, these strategies generate affordable housing opportunities in areas that would normally be faced with increased property taxes from the new commercial development in the area.

How do Linkage Strategies Work?

A linkage strategy is established by local legislation and administered by city staff. The revenue generated is directed into a housing trust fund. Once the fee or tax is in place, the program will generate substantial funds without any further need for action. In most cases, the linkage fees are charged per square foot of the new development and may vary depending on the use of the land. To determine the fee, one must decide how many new affordable units are needed and then determine the difference in cost between developing the affordable units and developing the market rate units. The fee payment can be required in order for the developer to receive a permit or can be paid out over a certain number of years. Oftentimes, there is a proximity requirement incorporated into the linkage program to ensure that the affordable housing is built in the area affected by the commercial development. To protect small businesses, there is a minimum square footage required before the fee is enforced.

B. Real Estate Transfer Tax

What are real estate transfer taxes?

Real estate transfer taxes (RETT) are state, county, and/or municipal sales taxes that are used to generate revenue for either a general fund or for specific uses, such as affordable housing development. The tax is usually based on sales price and is paid every time the property is sold. The seller and the buyer typically negotiate at the closing who will pay the tax or what portion of the tax price they will jointly pay.

Why use real estate transfer taxes?

Real estate transfer taxes provide a predictable stream of income to a housing trust fund without depending on annual budget processes. For example, Florida predicted \$1.67 billion in revenue from its transfer tax in 2002-2003. Approximately 14.8% of the revenue, or \$249 million, will be devoted to state and local housing trust funds. RETTs are successful because they accumulate revenue from new businesses, homeowners and landlords and use that revenue to preserve qualities of the neighborhood that made it attractive for these newcomers.

How do real estate transfer taxes work?

The taxes, enacted at the state, county or municipal level, become part of closing costs, usually adding a nominal amount to the associated fees. Oftentimes, municipalities already have RETTs in place, but they may need to be increased or redirected for specific use. There are several variables to consider before enacting a RETT system:

- 1. What properties are covered by the real estate transfer tax?** Residential properties are typically covered, but vacant land, industrial, commercial and retail properties could also be considered.
- 2. What is the tax rate?** The RETT is usually applied as a percent of the sales price or as a set dollar amount per \$1,000 of value of a sold property.
- 3. What are the exemption standards?** A RETT is only applied to the amount of the purchase price above a certain threshold, such as \$75,000.
- 4. What is the intended use of the revenue?** RETTs are a common way to fund housing trust funds. According to the Fannie Mae Foundation, 12 of the 37 state-level housing trust funds are funded by RETTs.³

³ <http://www.policylink.org>.

C. Demolition Permit Fee and Demolition Tax

What is a Demolition Permit Fee and Demolition Tax?

The demolition permit fee and tax applies to the removal and/or destruction of at least 50% of a structure or building by the owner. The demolition permit fee is applied to all demolition permits issued by the city, and the demolition tax is applied to the demolition of residential structures based on the type of residence. Effective May 29, 2002, the City of Highland Park adopted a demolition permit fee and a demolition tax to generate revenues that are placed in the housing trust fund for use in the provision of affordable housing in the city.

What will it do?

The permit fee and tax will help generate revenues that can be used to produce and preserve affordable housing. The activities of the Highland Park Housing Trust Fund are designed to:

- Promote, preserve, and construct long-term affordable housing.
- Provide housing-related services to low- and moderate-income households.
- Support not-for-profit organizations that are actively engaged in addressing the affordable housing needs of low- and moderate-income households in the City.

How does the program work?

The program in Highland Park has imposed both a demolition permit fee and a demolition tax to fund their housing trust fund.

Fee for Demolition or Removal Permit (for Residential Structures)

The City of Highland Park Building Division imposes the fee when the permit is issued. The fee for a permit to demolish or remove a structure is \$500.

Demolition Tax

Upon the issuance of a demolition permit by the City of Highland Park Building Division, a demolition tax payment in the following amount is due:

Single-Family Residence: \$10,000
Multiple Family Residential Building: \$10,000 or \$3,000 per unit, whichever is higher

What income levels will the proceeds from the fee and tax serve?

The Highland Park Housing Trust Fund helps address the housing needs of low-income (earning less than \$54,400 for a family of four, 80% of the AMI or less) and moderate-income (earning less than \$90,480 for a family of four, 100% of the AMI) households who live or work in Highland Park, including but not limited to:

- Persons employed in the City but financially unable to live in the City
- Seniors on fixed incomes
- Single-parent families
- Young households
- Persons with disabilities who require affordable and accessible housing⁴

⁴ Jerry L. Sargent, AIA, Building Division Manager. "Memorandum to All Applicants for Highland Park Demolition Permits." May 29, 2002. Available online at: <http://www.cityhpil.com/govern/comm/housing.html>.

V. Employer-Assisted Housing (EAH)

What is Employer-Assisted Housing?

Employer-assisted housing (EAH) refers to a variety of programs employers use to help employees find and finance housing closer to their workplace. It can take the form of education or counseling about homebuying and financing, direct financial help with closing costs and mortgage payments, rental assistance, individual development accounts, real estate investment, or some combination of these.

What will it do?

Everyone gains when employees live close to their workplace. Employees can devote more time to their work, families and communities. Employers reduce turnover costs and increase their appeal to new employees. Communities benefit from the local investment and stability of their housing stock, while shorter commutes reduce stress on the region's transportation infrastructure and environment.

How does the program work?

Recognizing that many employers are not equipped to take on new responsibilities related to housing and real estate, eight non-profit housing organizations from around the region have come together with the Metropolitan Planning Council to form the Regional Employer-Assisted Collaboration for Housing (REACH). These housing groups administer EAH initiatives on behalf of employers and provide credit counseling and homebuyer education to their employees.

What role can the government play?

Local, regional and state governments can play important roles by offering EAH to their own workforces and promoting programs to local businesses. The State of Illinois encourages private investment in workforce housing by offering matching funds and tax credits to participating employers. The Illinois Housing Development Authority (IHDA) matches dollar-for-dollar an employer's contribution to a worker's down payment or closing costs. The Illinois Affordable Housing Tax Credit provides \$.50 in tax credits for each \$1 invested in EAH. By offering EAH to its own employees, government positions itself as a model for local businesses.

What income levels does this serve?

The services are provided for employees in various companies based on criteria established in the company's EAH program. Qualifications exist concerning the number of years of employment an employee must have previously worked in order to receive this assistance.

What needs to be done to establish an Employer-Assisted Housing Program?

1. MPC and REACH partners help determine the economics of an EAH program for any organization.
2. MPC and REACH partners provide a housing needs survey to help determine whether employees currently own or rent, how they get to work and if they would be interested in moving closer to their jobs. The survey has to be customized to meet the particular needs of the employer.
3. MPC and REACH partners work with an employer to design and implement an EAH initiative.
4. Local government or business associations can invite employers to attend presentations or individual meetings. These can be arranged by MPC and REACH partners.
5. Governments can provide financial incentives to employers to invest in EAH by helping to cover program counseling costs or targeting existing housing programs to employees of local companies.⁵

⁵ Direct Excerpts from “Right at Home: Local Support for Employer-Assisted Housing” By Samantha DeKoven, MPC. April 2003.

VI. Vacant, Abandoned, or Substandard Property Rehab and Sale Programs

What is it?

Many municipalities have carried out programs to target acquisition of vacant properties in the municipality for rehabilitation and reuse, generally for subsequent sale to low- and moderate-income homebuyers.

What will it do?

If the municipality can address the issues outlined below, such a program can be an effective tool both for providing affordable housing and for improving the quality of life of affected neighborhoods. Examples of such programs include:

| | |
|-----------------------------|--|
| St. Paul, Minnesota: | Houses to Homes Program |
| Minneapolis, Minnesota: | Home Ownership Works (HOW) |
| Charleston, South Carolina: | Charleston Housing Trust |
| Oakland, California: | Vacant Housing Acquisition and Rehabilitation Program (V-HARP) |
| Detroit, Michigan: | Revitalife Program |
| Chicago, Illinois: | Preserving Communities Together (PCT) Program |

Many more such programs exist around the country. Programs vary in important ways, both with respect to the acquisition and the rehab aspects of the program.

How does the program work?

Programs are generally organized into two steps:

1) Acquisition:

Some programs, such as the Detroit program, are limited to those properties that the local government (in this particular case, state government) obtains through tax foreclosure or tax reversion, effectively without cost. Other programs, such as those in Minneapolis and Charleston, involve the municipality actively acquiring properties from their owners through other legal tools. In a city like Detroit, the number of properties that come into governmental hands through tax reversion is so large that arguably there is no need to use other tools to acquire properties. In cities with stronger markets, however, the city must have other tools to use – particularly eminent domain – to acquire properties. While most cities acquire first and then look for entities to rehabilitate the properties, Chicago's program is based on responding to requests for acquisition by interested parties.

2) Rehabilitation:

Some programs, such as the Detroit program, simply make the properties available at a nominal cost to non-profit organizations seeking to rehabilitate the properties for reuse. Most of the others provide at least some gap funding, either to fill the gap between the rehab cost and the market value (which is often less than the rehab cost), or between the rehab cost and the price that a lower income homebuyer can afford. Oakland provides up

to \$100,000 in gap financing per affordable unit. St. Paul provides up to \$40,000 per single-family house and \$65,000 to convert multifamily units into single-family homes.

As a rule, the municipality does not rehabilitate the houses itself, but passes the property through to a nonprofit or other entity to rehabilitate the property under municipal supervision.

Key issues that must be addressed for a successful program:

- **Acquisition tools.** Does the municipality have the legal powers to gain control of vacant properties in a timely fashion? This may include an effective tax foreclosure or tax reversion system, the ability to use eminent domain to take vacant or nuisance properties, or sufficient resources to acquire land and hold it, for example, in a Community Land Trust.
- **Acquisition resources.** Does the municipality have a source of funds to acquire properties? This is particularly important if the municipality cannot rely on tax foreclosure as its sole or primary source of properties. The source of funds can be the municipal capital budget, outside (state or federal) funds, a housing trust fund, etc.
- **Disposition tools.** Does the municipality have the legal flexibility to convey the properties to the most suitable entity at a flexible price that will ensure the most appropriate outcome? Some states place severe constraints on the legal ability of a municipality to dispose of publicly owned property on a negotiated basis. This question would need to be answered under Illinois Law.
- **Rehabilitation.** Does a rehabilitation ‘infrastructure’ exist in the community? In other words, is there a pool of interested nonprofit developers, contractors, etc. capable of rehabilitating at reasonable cost the number and type of properties that the municipality plans to acquire?
- **Market.** Is there a market for the properties once rehabilitated at a reasonable price?
- **Rehabilitation funds.** Does the city have a source of funds to use to provide rehabilitation gap subsidies? If the goal of the program is to benefit low-income homebuyers, this is likely to be necessary because the cost of rehabilitating vacant houses, particularly if they have been vacant for any length of time, is likely to exceed the affordable sales price.
- **Supervision.** Does the municipality have (or can it obtain) the staff and/or consultants needed to manage the program? An acquisition and rehabilitation program is labor-intensive, with respect to both the acquisition and rehabilitation elements of the program. The rehabilitation side includes selection of developers, review of specs and cost estimates, monitoring of construction, and monitoring of sale to ensure that the rehabilitated homes are sold in a fair manner to qualified buyers.

Two Outstanding Legal Questions in Illinois:

- 1) Under Illinois Law, can a municipality use the power of eminent domain for the purpose of rehabilitating a vacant building or property in order to produce affordable housing?
- 2) Under Illinois Law, does a municipality have the legal flexibility to dispose of publicly owned property on a negotiated basis?⁶

⁶ Alan Mallach, Expert on Housing, Planning and Zoning Issues.

VII. Existing Regional Programs

The following two regional programs utilize Housing Choice Vouchers (HCVs) to accomplish affordable housing initiatives. The Regional Housing Initiative (RHI) pools unused HCVs and provides these vouchers as incentives for developers to create mixed-income affordable housing developments. The Housing Choice Voucher Homeownership program allows families to purchase homes with HCVs. While these programs are run at the regional level, municipalities can tap into these existing resources or use these models to suggest similar programs in their own regions.

A. Regional Housing Initiative (RHI)

What is the Regional Housing Initiative?

The Illinois Housing Development Authority (IHDA) and the Metropolitan Planning Council (MPC) are working with three regional housing authorities (City of Chicago, Cook County, and Lake County) to attach a new pool of housing subsidies to tax credits. These five partners form the Regional Housing Initiative (RHI).

What is the goal of RHI?

The goal of RHI is to spur mixed-income housing development. It accomplishes this by providing an incentive to developers to address two key findings of MPC's Regional Rental Market Analysis that have been confirmed by 2000 census findings:

- (1) Northeastern Illinois is experiencing a shortage of quality mixed-income rental housing that is located near jobs and transit locations, and
- (2) There is a scarcity of housing affordable to households earning less than \$20,000 per year.

How does RHI work?

The Regional Housing Initiative turns local housing authorities' unused Housing Choice Vouchers into new apartments. RHI pools vouchers from the Chicago, Cook County and Lake County housing authorities as financing incentives to developers whose proposals apply sound planning principals to create diverse communities in the sponsoring counties.

Who does RHI involve?

1. Developers of Multi-family Housing: The RHI provides subsidies to developers who agree to rent a percentage of units to very low-income households within a broader mixed-income community, with supportive housing that offers opportunities. Selected RHI proposals score additional points under the Illinois Housing Development Authority tax credit competition.
2. Mayors, Municipal Officials or other Cook or Lake County Officials: The RHI helps to develop safe, quality affordable housing that is consistent with the community's values and needs.
3. People Concerned About the State of Housing in the Region: RHI helps meet the need for rental housing affordable to low-income households, especially in areas of high job growth.

What has RHI accomplished?

RHI hit the ground running in the last round in December 2002, providing for the development of 25 new units of affordable housing. Subsidies in this pilot phase will fund a total of 328 apartments within mixed-income communities.⁷

B. Housing Choice Voucher Homeownership

What is the Chicago Housing Choice Voucher Program?

This program provides families with the opportunity to purchase a decent, safe and sanitary housing unit with their Housing Choice Voucher (HCV). The homeownership voucher is limited to the purchase of a single-family home, condominium or cooperative, or to a lease-to-purchase agreement for a single-family home, condominium or cooperative. CHAC, Inc., a private company contracted by the Chicago Housing Authority, administers the program. CHAC makes a monthly housing assistance payment to help the eligible family pay the mortgage and housing utility expenses. The monthly Housing Assistance Payment (HAP) is the difference between the payment standard for mortgage and utilities based on the number of bedrooms in the home and 30 percent of the family's monthly adjusted income.

What will this program do?

The goal of this program is to assist low- and moderate-income families in purchasing housing in the private market by paying a portion of the family's mortgage payment. The program allows families to utilize a broad range of housing options—options that they might not otherwise be able to afford.

How does the program work?

Participants in this program must complete an extensive step-by-step process.

1. Family must enroll in CHAC's Family Self-Sufficiency Program/FSS and attend a Homeownership Orientation program.
2. Family must complete a "Choose to Own" (CTO) application and authorize the release of their credit report.
3. Family must attend one-on-one appointment with the CTO Coordinator.
4. Once they receive the certificate of eligibility and the Housing Choice Voucher, they are referred to the Housing Counseling Agency (with whom they must set up an appointment) and receive CHAC's Home Buyer's Packet.
5. Family must complete the HomeBuyer Education Program (8-10 hours and Community Economic Development Law Project (CEDLP) video).
6. Once they receive their mortgage pre-qualification from the Counseling Agency, the family must meet with a pro-bono attorney and a pay \$50.00 processing fee to CEDLP.

⁷ Information compiled from Robin Snyderman, MPC's Housing Director, www.metroplanning.org.

7. The family must identify a lender, fill-out an application, and forward the pre-approval letter from the lender with terms to the CTO Coordinator.
8. Once the family receives approval from the CTO Coordinator and approval on their 1st and 2nd mortgages, the family can start shopping for a home.
9. Once the family finds a home, they have to execute the residential purchase agreement, which is subject to HQS Inspection, and forward the contract and request for HQS inspection on to the CTO Coordinator.
10. Once they receive their HQS Inspection report, they must forward that on to the CTO Coordinator. If the unit fails the HQS Inspection, the family must search for a new home. (Failure of inspection means need for repairs greater than \$1,500).
11. After forwarding the Contract on to the lender and receiving the final loan commitment, the sale is closed.
12. At the time of closing, the family must sign the Home Buyer Obligation, set up the electronic withdrawal for their mortgage payment, and make the debit payment to the first lender.
13. The terms of the program require that the family attend quarterly counseling sessions and workshops, receive annual post-purchasing counseling in their home and have an annual certification conducted.⁸

What has the HCV Homeownership Program accomplished?

After only one year in operation in Chicago, the program has helped 16 people to purchase homes. Fifty additional people are now certified for the program.

However, Local Housing Authorities must initiate this program. In the Chicago region, only the Chicago Housing Authority (CHA) has created such a program. However, if created by other housing authorities and implemented, it could be a valuable resource for local communities.

⁸ <http://www.chacinc.com>; “Choose to Own”—Housing Choice Voucher Homeownership Program: Program Guide prepared by Prim Lawrence Group on behalf of CHAC, last revised July 2002. (Provided by Rich Hendricks, Staff Attorney, CEDLP).

CASE STUDIES

Housing Trust Fund Case Studies *Cambridge, Massachusetts*

Purpose: To help create affordable homeownership and rental units and preserve existing affordable homes and rental units.

Beneficiaries: Households with incomes that do not exceed 80% of the AMI.

Oversight: A nine-member board appointed by the City Manager for three-year terms, representing different sectors of the community concerned with housing policy (e.g., representatives of existing City boards and agencies, non-profit housing organizations, the community.) The Board approves distributions from the trust (functioning, in effect, as a loan committee), advises and assists the City in establishing comprehensive housing policies, and helps establish new programs to meet affordable housing needs.

Administration: City Manager is Managing Trustee. The Director of the Housing and Community Development Department staffs the trust. (The department administers a number of housing programs).

501(c)3: No

Programs: Funds a Rehab Loan Program and a Condo Buyers Initiative. Trust Declaration allows funds to be used for creating new affordable units, assistance with multi-family rehabilitation of distressed properties (with multi-family housing owned by non-profit entities which ensure maximum long-term affordability receiving priority funding consideration), acquisition and rehab of potential limited equity housing cooperatives and preservation of existing affordable units. Support may be provided in the form of loans or grants.

Among the criteria established by the trustees and staff for awarding funds are: long-term affordability, priority for projects with maximum number of low-income units, use of trust fund monies to leverage other funds, no negative impacts on surrounding neighborhoods and no displacement of existing tenants.

Revenue: Dedicated revenue from a commercial linkage fee has provided uneven funding. In the wake of the elimination of rent control, the City committed a \$2 million annual appropriation for a period of 10 years. Also receives funding from private sources (including a recent \$6 million grant from Harvard).

Housing Trust Fund Case Studies *Chicago, Illinois*

Purpose: To financially assist in meeting the permanent housing needs of low-income persons by funding projects that promote stability and long-term affordability.

Beneficiaries: The ordinance establishing the trust specifies as beneficiaries persons whose income is at or below 50% of the AMI. The trust's mission statement defines the beneficiaries as "Chicago's poorest residents," whose incomes are at or below 30% of the AMI. Included, among others, are the disabled, the elderly, the homeless, single room occupancy residents, and low-income families.

Oversight: A 15-person Board of Directors, appointed by the Mayor with the advice and consent of the City Council, for two-year terms. Directors are drawn equally from representatives of (1) low-income housing residents of Chicago and community-based organizations, (2) business and philanthropic organizations, and (3) at large, including community leaders, public officials, and religious leaders. The Board is responsible for developing guidelines and procedures for processing applications for funding.

Administration: The Department of Housing administers the HTF. Dedicated staff consists of 1.75 persons. Staff responsibilities include administration of the three staple programs of the trust. Other City departments are also involved in making the trust run, (e.g. finance, law, and comptroller's office).

501(c)3: Yes

Programs: The enabling ordinance gives the trust broad powers in terms of activities that can be funded, as well as eligible applicants. In practice, the HTF is used almost exclusively in rental assistance programs (overseen by the HTF) that meet the needs of very low-income residents through grants to building owners and developers who agree to reduce rents to accommodate tenants earning no more than 30% of the AMI. It also operates a supportive housing program that provides rental assistance and a comprehensive package of supportive services to help formerly homeless individuals and persons with disabilities move from shelters and transitional housing to permanent housing.

Revenue: All funds derived from the Presidential Towers Project were dedicated to funding the trust. Now the City allocates more than \$6 million annually from its corporate trust (subject to the yearly budgeting process). The trust also receives HUD and HOME funds.

Housing Trust Fund Case Studies *San Diego, California*

Purpose: To serve as a permanent and ongoing resource to meet, in part, the housing needs of the City's very low-, low-, and median-income households. The ordinance identifies the following purposes: to meet a portion of the need for housing affordable to households with lower incomes; leverage non-City capital funds with trust fund monies; foster mixed-income projects and support the dispersal of affordable housing projects throughout the City; preserve affordable housing; and encourage private sector activities that advance these goals.

Beneficiaries: Very low-, low-, and median-income households. Low-income includes households which earn less than 80% of the median and either pay more than 30% of their gross income for housing costs, live in overcrowded conditions, live in substandard housing units, are homeless, or have special housing needs such as the elderly, developmentally disabled, mentally ill, physically disabled, single parent households and large families.

Oversight: The Housing Commission oversees the HTF. Funds from the HTF are treated as any other revenue source (e.g. along with HOME and CDBG funds that are administered by the Commission). After staff reviews an application for eligibility, it is referred to the Commission's Loan Committee, which in turn makes a recommendation to the Housing Commission.

Administration: Housing Commission staff administers the fund but the trust fund is not separately staffed. (By itself, the trust fund does not require a lot of staff time). Up to 8% of the trust fund's annual budget is used to fund overhead expenses.

501(c)3: No

Programs: Fund allocation targets: At least 10% to transitional housing; at least 60% to housing for very low-income households (at or below 50% of the AMI); a maximum of 20% for housing for low-income households (incomes between 50% and 80% of the AMI); and a maximum of 10% to median income first-time homebuyers.

Fund Uses: The ordinance allows funds to be used for production, acquisition, rehabilitation and preservation. The ordinance also allows funding for supportive services under certain conditions and requires a capacity-building program for nonprofit housing organizations. Each year, the Housing Commission adopts a three-year Program Plan that identifies the types of programs and administrative support that can be funded, including rental housing development programs, home ownership programs, rehabilitation programs, transitional housing operations, special purpose housing development, and non-profit capacity building. There are specific requirements, priorities, and preferences for each type of program activity. The Program Plan must be approved by the City Council. The Commission awards funds either through a Request for Proposal (RFP) or a Notice of Fund Availability Process (NOFA).

Revenue: Dedicated revenue from commercial linkage fee and hotel tax. Currently represents about \$4 million annually.

Housing Trust Fund Case Studies *Santa Fe, New Mexico*

Purpose: The Santa Fe City Council approved the HTF as a mechanism for funding the development of affordable housing.

Beneficiaries: Households with incomes up to 80% of the AMI, with a preference for programs assisting households with incomes below 60% of the median. Higher priority is given to projects that serve households with lower incomes.

Oversight: The City Council approved generalized policies and procedures for the HTF and the basic structure of the Santa Fe Roundtable that serves as the oversight body. The Roundtable, a coalition of nonprofit housing agencies and local government representatives, determines the priorities for the fund in accordance with the Strategic Housing Plan for Santa Fe (updated every 3 years) and approves allocations. Approvals are based on the recommendations of its elected Allocation Committee, which consists of Roundtable participants who do not receive monies from the HTF: a representative of the city, the Enterprise Foundation, and a nonprofit agency.

Administration: Because state anti-donation laws restrict the use of funds administered by the City, the Roundtable administers the HTF. The Santa Fe Community Housing Trust, a nonprofit housing development organization, acts as the fiscal agent for the HTF pursuant to a contract with the City.

501(c)3: Neither the HTF or the Roundtable is a 501(c)3, but the Santa Fe Community Housing Trust is.

Programs: Funds may be used for:

- The production of affordable housing by nonprofit developers, including new construction, land acquisition and development,
- Acquisition and/or development of existing housing,
- Revolving loan funds for home ownership, and
- Rehabilitation or partial rehabilitation.

Funds must be leveraged with other conventional or subsidy sources. Favorable consideration is given for projects that serve the lowest income group, large families, and have the longest term of affordability.

Revenue: The trust is funded with monies received from developers in fulfillment of obligations to provide affordable housing. Because of changes in local law, funds received from developers are declining and there is a need to identify a more productive, dedicated source of revenue. (The City is considering a real estate transfer tax, but it would have to be passed by the state). Generally, the Roundtable waits until there is \$80,000 in the HTF to issue an RFP.

Inclusionary Zoning Case Studies *Davis, California*

Political Landscape and Policy

Davis, California is a city of only 62,200 people. Its inclusionary housing program was implemented in 1990 and has been very successful.

Highlights of the Program

The Davis Ordinance applies to both for-sale and rental developments with five or more units. The set-aside requirements in Davis are some of the highest percentages in the country.⁹ Developers also have flexibility under the program; they can meet the set-aside requirement through a combination of on-site development, off-site development, fee in-lieu payments, and land dedication.

In rental developments with 20 or more units, 35% of the units must be set-aside as affordable. At least 25% of the market-rate units must be priced affordable for low-income households,¹⁰ and at least 10% of the market-rate units must be priced affordable for very-low income households.¹¹ In for-sale developments, 25% of the units must be set aside as affordable.

For rental developments, all affordable units must be constructed on-site. For-sale developments have a bit more flexibility. Also, fee in-lieu payments are allowed in Davis for developments that have under 30 units or if the developer can demonstrate a “unique hardship.” Davis gives developers a one-for-one density bonus in for-sale developments. For rental developments, developers receive a 15% density bonus.

In determining a price for an affordable for-sale or rental unit, Davis uses specific formulas. The sale price of an affordable for-sale unit is determined by a mortgage payment that would be 30% of the gross monthly income of an eligible family, less insurance and property taxes, adjusted for family size. While there is not an affordability control period for affordable for-sale units, the rental units are permanently affordable, creating a permanent supply of affordable rental housing.

Impact

Davis has created over 1500 units of affordable housing since the implementation of its Inclusionary Housing Program in 1990. A combination of Davis’ income-averaging scheme for the pricing of affordable units, plus the significant percentage of set-aside units required, has resulted in a significant percentage of affordable units priced for very-low income households, a phenomenon not seen in other municipalities. Over 70% of the multi-family affordable units created in Davis are affordable to very-low income households.¹²

⁹ California Coalition for Rural Housing Project, “Creating Affordable Communities: Inclusionary Housing Programs in California,” November 1994.

¹⁰ Davis defines low income as 50-80% of area median income.

¹¹ Davis defines very-low income as 50% of area median income or below.

¹² California Coalition for Rural Housing Project, “Creating Affordable Communities: Inclusionary Housing Programs in California,” November, 1994.

Inclusionary Zoning Case Studies *Newton, Massachusetts*

Political Landscape and Policy

Newton is an upper-income suburb of Boston with a population of about 83,000 people.¹³ Most of Newton has been built up and is of a single-family character. In fact, only 12.5% of the land in Newton is zoned as multi-family. However, at the same time, Newton is known for its liberal politics and began an informal inclusionary housing policy as early as the 1960's. This policy was formalized in an ordinance in 1977.¹⁴

Highlights of the Program

The Newton Ordinance applies to all residential new construction and rehab that requires a special permit. Under Newton's zoning ordinance, all developments with greater than two units require a special permit. The developer must set aside 25% of the units as affordable. Under this process, a developer can receive up to a 20% density bonus.

All the affordable units created under the program are rental units, regardless if the market rate units are rental or for-sale. The affordable units are leased through the Newton Housing Authority, who then leases the units to eligible households. If the Housing Authority does not have adequate funds to lease the units, the Board of Aldermen for the City of Newton may purchase the affordable units or ask the developer to pay a fee. The affordable units are required to be equal in size, quality and characteristics to the market rate units.

If a development is below 10 units, a developer can make a fee in-lieu payment. However, since the payment level is low and is not indexed to inflation, the fee is less burdensome than building the affordable units on-site. The result of this policy is many nine-units-and-under developments, and only \$600,000 in funds over the 26 years of the program.¹⁵

The period of affordability is 40 years, and discussions are currently underway to expand that period of affordability again. To date, 50 of the 225 units created have aged out of the system and have been sold on the open market.

The affordable units created under the program are priced for households making at or below 50% of the area median income, one of the lowest income-targeting guidelines in the country. Newton used the Section 8/Housing Choice Voucher rent guidelines to determine rents for eligible families.

Impact

To date, the Newton Ordinance is responsible for the creation of 225 affordable units.

¹³ U.S. Census Bureau, 2000 Census.

¹⁴ Engler, Robert. "An Inclusionary Housing Case Study: Newton, Massachusetts," *Inclusionary Zoning: Lessons Learned in Massachusetts*, NHC Affordable Housing Policy Review, vl. 2, Issue 1, January, 2002.

¹⁵ Engler, Robert. "An Inclusionary Housing Case Study: Newton, Massachusetts," *Inclusionary Zoning: Lessons Learned in Massachusetts*, NHC Affordable Housing Policy Review, vl. 2, Issue 1, January, 2002.

Inclusionary Zoning Case Studies *Montgomery County, Maryland*

Political Landscape and Policy

Montgomery County, with more than 800,000 residents, is the most populous county in Maryland.¹⁶ During the 1970's and 1980's, Montgomery County grew from a Washington, D.C. bedroom community to the region's second largest employment center. Now more than 60% of residents work and live in the County.

Highlights of the Program

Montgomery County's inclusionary housing program, implemented in 1974, applies to every new subdivision or high-rise with 50 or more housing units. At least 12.5% of the units in these developments must be set aside as affordable, but up to 15% can be set aside with a sliding-scale density bonus given as an incentive. The affordable units are targeted toward households making under 65% of area median income (AMI). The County's public housing authority, the Housing Opportunities Commission (HOC), has a right to purchase one-third of the affordable housing units.

Montgomery County has a sliding-scale density bonus connected to the set-aside in order to create an economic incentive for developers to construct more affordable units. For every tenth of a percentage point increase in set-aside by the developer, the density bonus increases by one percent, to a maximum density bonus of 22%. Also, in order to promote the integration of the affordable units in the market rate development, Montgomery County allows for a 10% compatibility allowance.

In "exceptional cases," a developer has three alternatives to constructing the affordable units on the site of the market rate development: (1) the developer can either build significantly more affordable units at one or more other sites in the same or an adjoining planning area; (2) convey land in the same or adjoining area that is suitable in size, location, and physical condition and that can contain significantly more affordable units than the market rate site; or (3) contribute to the Housing Initiative Fund an amount that will produce "significantly" more affordable units than would have been developed at the market rate site.

The period of affordability is ten years for for-sale units and 20 years for rental units. However, if the home is sold before the 10-year control period is over, it begins anew with the new owner.

The price of for-sale units must be affordable to households making 65% of the area median income, including closing costs and brokerage fees. For rental units, the resulting rent must be affordable to households making 65% of the AMI and must include the cost of parking, but excludes utilities when they are paid by the tenant. Prices for the affordable units are set every five years and are increased in the intervening years by the Consumer Price Index.

Impact

Montgomery County's ordinance – the first major inclusionary zoning program in the country – is responsible for creating integrated neighborhoods by racial and ethnic group, and by income. Over 11,500 affordable units have been developed since the program was implemented.

¹⁶ U.S. Census Bureau, 2000 Census.

Community Land Trust Case Studies *Burlington, Vermont*

One of the largest and most influential CLTs is located in Burlington, Vermont, a university town of about 40,000 on the shore of Lake Champlain. Since the early 1980s, economic growth and progressive public policies, combined with an attractive setting, have made Burlington an increasingly desirable, and increasingly expensive place to live. With active support from city government, BCLT was established in 1984 to produce and preserve affordable housing for local residents.

In sixteen years, BCLT's holdings have grown to nearly **500 units** of housing, including single-family homes, housing cooperatives, condominiums, and varied rental options. In the process, BCLT has had a major impact on conditions in a low-income neighborhood, while expanding housing opportunities for low-income people in that neighborhood, and in outlying suburban areas as well.

All of BCLT's housing is affordable not just for the first residents, but for all residents thereafter. BCLT Director Brenda Torpy says,

“We're old enough to have had a number of resales, and we've seen it really work. The second time around we don't need any additional government subsidy and we typically serve a lower income family. We're doing that at the same time that the seller is taking equity with them and has had all the tax benefits and all the security that homeownership offers.”

Community Land Trust Case Studies *Albuquerque, New Mexico*

Beginning in the 1980s, residents of Albuquerque's Sawmill neighborhood created a community organization to fight pollution from a nearby particleboard factory. At the same time, on the other side of the neighborhood, historic Old Town was becoming a leading tourist attraction, with galleries, trendy shops, restaurants and museums. The resulting gentrification pushed home prices upward, and the Sawmill residents started to worry about their families' futures in a neighborhood where some had lived for generations. To expand affordable housing opportunities in this situation, the community organization negotiated with the City to gain the right to develop 27 acres of vacant land once occupied by the old sawmill operation. The existing organization then created the Sawmill CLT to develop and hold the land.

On this site the CLT is now developing 99 housing units, including single-family homes, townhouses and senior apartments, together with a plaza, park, community center, and projected commercial space. To make sure that this development continues to serve lower income residents of the community, the land will be held permanently in trust by the CLT.

Community Land Trust Case Studies *Durham, North Carolina*

Durham Community Land Trustees was organized in 1987 by residents of Durham's West End neighborhood, a predominantly African American, low-income community adjacent to the campus of Duke University. DCLT's housing program was launched with technical assistance and project financing from the Institute for Community Economics' Revolving Loan Fund, which supports CLT projects around the country. As development has accelerated in recent years, financing has come from a growing number of sources, including the Federal Home Loan Bank, municipal bonds, and Duke University. Project subsidies and operating support have come from the City and the North Carolina Community Development Initiative.

By focusing its housing rehabilitation efforts on specific blocks, DCLT has had a significant impact on conditions in the neighborhood, helping to raise community morale and becoming an important vehicle for community organizing and advocacy efforts. Through its lease-purchase program, DCLT makes homeownership possible for families who could not otherwise own homes and keeps those homes affordable for future families.¹⁷

¹⁷ Institute for Community Economics.

Linkage Strategy Case Studies

| City/Year | Devlp. type | Rate (sq.ft.) | Exemption | Revenue | Features |
|-----------------------------|---|---|--|--|---|
| Boston (1987) | Office, Retail, Hotels, Institutions | \$8.62 (\$7.18 to housing \$1.44 to job training) | 100,000 sq. ft. | \$45 million | Extended payment period (7 yrs.) |
| Berkeley (1993) | Office, Retail | \$5.00 (\$4.00 to housing \$1.00 to childcare) | 7,500 sq. ft. | \$1.93 million for housing \$840,000 for childcare | Rate schedule is ceiling with option for reduction |
| | Other commercial & indust. | \$2.50 (\$2.00 to housing, \$.50 to childcare) | | | |
| Cambridge (1988) | Hotel, commercial, Retail, Institutions | \$3.28 | 2,500 sq. ft. (30,000 sq. ft. threshold) | \$75,000 w/ \$2.5 mil. in pipeline | Option to build afford. Units of "equivalent benefit" instead |
| San Francisco (1981) | Entertain. | \$13.95 | 25,000 sq. ft. | \$38 million | |
| | Hotel | \$11.21 | | | |
| | Office | \$14.96 | | | |
| | Research & Devlp. | \$9.97 | | | |
| | Retail | \$13.95 | | | |
| Seattle (1989) | commercial | \$20 s.f. for purchase of extra floor area ratio (FAR) or construct. Of afford. housing | | 166 housing units & \$5 million | Voluntary program |

Source: <http://www.policylink.org>.

Real Estate Transfer Taxes Case Studies

| City | Tax | Date enacted | How tax is used | \$ generated | Exemptions |
|----------------------------|---|--------------|---|--|---|
| Highland Park, IL | \$5 per \$1,000 of the property's selling price | 1988 | City's General Fund and then transferred annually to the Street Construction Fund | <u>FY04 Budget Estimate:</u> \$1,887,185 | Deeds relating to real property acquired by or from a gov't body, deeds with secure debt, deeds less than \$100, tax deeds, deeds with partition, deeds made by subsidiary corp. to its parent, etc. |
| Evanston, IL | \$5 per \$1,000 or any fraction thereof on the sale of real property | 1986 | City's General Fund | <u>2002:</u> \$3,000,000 | Deeds relating to real prop acq by or from a gov't body, deeds with secure debt, deeds w/ an actual consid less than \$50,000 and the seller qualifies for Sect. 8, deeds where actual consid is less than \$500, tax deeds, deeds made by subsidiary corp. to its parent, etc. |
| Chicago Heights, IL | \$4 per \$1,000 of the sale price of the property (round to nearest \$1,000) | 1992 | City's General Fund. | <u>2000-2001*:</u> \$176,326 <u>2001-2002*:</u> \$172,924 <u>2002-2003*:</u> \$239,354 | Exemptions are for people moving but staying within Chicago Heights and seniors. |
| Chicago, IL | \$3.25 per \$500 of the purchase price Cook County and the State of IL have transfer taxes, but these taxes are imposed on the seller of real prop. The tax is \$.25 and \$.50 per \$500 of the selling price, respectively. | Early 80s | General Fund | <u>2000:</u> \$101,000,000 <u>2001:</u> \$108,000,000 <u>2002:</u> not final but expected to be higher. Can fluctuate: a bad year = \$80,000,000 but generally increases year-to-year | Transfers of real estate btw subsidiary and parent company, transfers of prop. Located in City Enterprise Zones, transfer of prop from or to a gov't body, transfers made pursuant to a plan of reorgan. Under Chapt. 11 of the U.S. Bankruptcy code, transfers where purchaser has completed the state of IL H.O.M.E program |

* Based on Chicago Heights' Fiscal Year beginning May 1st and ending April 30th.

Sources:

<http://www.cityhpil.com/govern/dept/fiscal/rett.html>

<http://www.cityofevanston.org/Government/CityClerk/realestate-transfertax.html>

<http://www.chicagoheights.net/public/realestatetax.htm>

<http://www.ci.chi.il.us/Revenue/Tax/PropertyTransfer.html>

Employer-Assisted Housing Initiatives Case Studies¹⁸
System Sensor, St. Charles

This was the first regional employer to use the Regional Employer-Assisted Collaboration for Housing (REACH) model. In 1999, the Pittway Corporation committed to provide \$5,000 in down payment assistance to help up to 50 qualified employees over two years buy homes closer to work. Assuming the employee stays with the company for five years, the \$5,000 loan will be fully forgiven. If an employee leaves the company within that time, the unforgiven portion must be repaid. The home must be within a 15-mile radius of the place of work. Pittway contracted with the Joseph Corporation to provide counseling and homeownership education.

Highlights:

- 36 new homeowners as of June 2002.
- Participating employees’ median income was \$31,500. Their household median income was \$43,600.
- They averaged 7 years of employment with System Sensor.
- 24 were members of racial or ethnic minority groups.
- 27 were first-time homebuyers.
- System Sensor credits the program with saving over \$100,000 per year through reduced turnover costs.

System Sensor Cost-Benefit Analysis:

| | Year 1 | Year 2 |
|--|--------------------------------------|---------------------|
| Downpayment/ closing costs assistance | \$5,000*16 participants =\$80,000 | \$5,000*19=\$95,000 |
| Joseph Corporation Counseling program | \$20,000 | \$20,000 |
| MPC program design and evaluation | \$7,500 | \$7,500 |
| Savings due to reduced turnover, recruitment and training* | \$207,500 | \$247,500 |
| Net Savings to System Sensor | \$100,000 | \$125,000 |

*These data were compiled by reviewing turnover within the company; i.e. what it would have cost the company if an employee had left the company.

¹⁸ Excerpts from “Right at Home: Local Support for Employer-Assisted Housing” By Samantha DeKoven, MPC. April 2003.

Employer-Assisted Housing Initiatives Case Studies
Northwest Community Healthcare, Arlington Heights, Illinois

The new initiative was announced to employees in March 2002. The program is available to employees who have worked for the hospital at full or close to full-time for at least a year and earn less than \$70,500. The employee should also be a first-time homebuyer, and the home must be within a 10-mile radius of the hospital. The hospital offers \$5,000 forgiven at 20% per year over five years. If an employee leaves before completing the five-year commitment, the portion that has not been forgiven must be repaid to the hospital.

Highlights:

- As of December 2002, NCH had helped four employees buy homes.
- Hospital had benefited from media coverage and heightened exposure in the local community.

Employer-Assisted Housing Initiatives Case Studies
Bank One, Metropolitan Chicago, Illinois

Bank One provides \$2,500 grants to help with down payment and closing costs for eligible employees purchasing their first homes. The employee must have been employed with the bank for one year to participate, and the borrower's income must be less than 80% of the area's median income. There are no requirements on the distance between home and work. Bank One has committed \$500,000 toward this program. Bank One has partnered with MPC and all eight REACH partners to provide eligible employees with a total of \$5,000 in assistance. Bank One and REACH partners set a goal of assisting 25 new homebuyers during the first year of the program.

Highlights:

- Since the local launch in June 2002, more than a dozen Chicago-area employees have qualified for the program and six participants have successfully bought new homes. The discrepancy in the above numbers is due to the fact that Bank One qualifies employees before they purchase the home.

| | Chicago Region | Nationwide(Including Chicago) |
|--------------------------------|-----------------------|--------------------------------------|
| Total New Homeowners | 12 | 68 |
| Grant Amount | \$2,500 + taxes | \$2,500 + taxes |
| Average Mortgage Amount | \$107,683 | \$85,997 |

Source: Bank One.

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Regional Inclusionary Housing Initiative

Policy Tools Series

POLICY TOOL #1

DEVELOPING AN INCLUSIONARY ZONING ORDINANCE

Inclusionary housing programs can effectively create affordable housing in a variety of communities. The most common route to creating an inclusionary housing program is through a zoning ordinance that sets the specific requirements linking the development of new residential units with the creation of affordable housing units. This Policy Tool provides a brief overview of inclusionary housing and a detailed analysis of issues that need to be considered when developing an inclusionary zoning ordinance.

What is Inclusionary Housing? Inclusionary zoning requires residential developers to set aside a portion of the homes they build as affordable for low- and moderate-income families. In addition to increasing the supply of affordable housing, inclusionary zoning disperses affordable housing throughout the growth areas of a region. It enables low- and moderate- income families to live in homes indistinguishable from, and adjacent to, market-rate housing, and to live in communities with better access to employment and educational opportunities. Inclusionary zoning has been implemented in a variety of locales, ranging from older cities, such as Boston, to growing towns like Longmont, Colorado.

What are the benefits of Inclusionary Housing? Inclusionary housing programs help municipalities serve the needs of local employers, including business, schools, and the municipalities themselves:

- Businesses find it easier to hire and retain employees who are able to live within a reasonable commuting distance
- Municipal governments, school districts, fire and police departments benefit from employees living in the communities they serve because they are more invested in its future.

Inclusionary housing helps meet the needs of current and future residents:

- Senior citizens have the choice to remain in the communities where they have raised their children.
- Younger parents and single parent families can find homes in communities with good schools, parks and services.

Inclusionary housing is effective in a variety of housing market conditions:

- In gentrifying communities, the affordable units created through an inclusionary program can help offset the displacement of residents.
- In new and growing suburban communities, the inclusionary units can broadly disperse affordable housing needed by area jobholders and prevent exclusive communities.

ISSUES TO CONSIDER IN DEVELOPING AN INCLUSIONARY ZONING ORDINANCE

The development of an inclusionary zoning ordinance requires consideration of a range of variables. The local decision making process that tailors the ordinance to local conditions is critical. There is no perfect inclusionary zoning ordinance but rather a range of options that need to be viewed separately and then evaluated in terms of how they work together. The following report addresses each variable and options to be weighed in developing an effective ordinance. It should be used as a guidebook through these issues, not as a magic recipe.

#1 Findings

Many ordinances begin with findings about the need for affordable housing and planning study results. The section would summarize any planning process the community has undertaken, trends in housing stock, the need for and benefits of affordable housing, and the benefits anticipated by enactment of an inclusionary zoning ordinance. Findings sections are often lengthy. Below is language based on Sacramento's ordinance.

The City Council makes the following findings:

- It is a public purpose of the City to achieve a diverse and balanced community with housing available for households of all income levels. Economic diversity fosters social and environmental conditions that protect and enhance the social fabric of the City and are beneficial to the health, safety, and welfare of its residents.
- The City is experiencing an increasing shortage of housing affordable to low income households. New residential development does not provide housing opportunities for low income households due to the high cost of newly constructed housing in the City. As a result, low income families are *de facto* excluded from many neighborhoods, creating economic stratification detrimental to the public health, safety, and welfare. An increasing number of low income persons live in overcrowded or substandard housing and devote an overly large percentage of their income to pay for housing.
- The amount of land in the City available for residential development is limited by City General Plan policies and principles embodied in state law pertaining to general plans and annexation. Scarce remaining opportunities for affordable housing would be lost by the consumption of this remaining land for residential development without providing housing affordable to persons of all incomes.
- Therefore, to implement the City General Plan, to carry out the policies of state law, and to ensure the benefits of economic diversity to the residents of the City, it is essential that new residential development in the remaining new growth areas of the City contain housing opportunities to low income households, and that the City provide a regulatory and incentive framework which ensures development of an adequate supply and mix of new housing to meet the future housing needs of all income segments of the community.
(Sacramento)

#2 Statement of Purpose

Purpose Statements typically are broad policy directives. The first purpose statement below is based on language from Fairfax County, Virginia's ordinance, and the second statement is based on language from Boulder, Colorado.

This program is established to assist in the provision of affordable housing for persons of low and moderate income. The program is designed to promote a full range of housing choices and to require the construction and continued existence of dwelling units affordable to households whose income is 115% or less than the median income for the Chicago Standard Metropolitan Statistical Area. (Fairfax County)

The purposes of this chapter are to:

- (a) Implement the housing goals of the City Master Plan;
- (b) Promote the construction of housing that is affordable to the community's workforce;
- (c) Retain opportunities for people that work in the City to also live in the City;
- (d) Maintain a balanced community that provides housing for people of all income levels; and
- (e) Insure that housing options continue to be available for very low-income, low-income, and moderate-income residents, for special needs populations and for a significant proportion of those who both work and wish to live in the City. (Boulder)

#3 Definitions

The terms that follow are typical of those that are defined in inclusionary zoning ordinances:

| | | |
|--------------------------|--------------------|------------------------|
| Affordable Housing Price | Eligible Homebuyer | Median Income |
| Affordable Rent | Eligible Renter | Moderate Income |
| Affordable Dwelling Unit | Extreme Hardship | Permanently Affordable |
| Control Period | Housing Commission | Residential Project |
| Developer | Housing Trust Fund | Very Low Income |
| Development Agreement | Low Income | |
| Dwelling Unit | Market Unit | |

#4 Threshold Size

Some ordinances limit their application to developments exceeding a threshold size. The first example below is based on language from Boulder's ordinance. In one sentence, it sets a threshold size, a set-aside percentage, and a period of affordability. The second is based on Burlington, Vermont's ordinance, and is notable because it applies to rehabilitation projects and the threshold level is applicable to development on more than a single site. Either example could be abbreviated to simply state what size developments trigger application of a set aside requirement.

Any development on a site larger than 10 acres or containing 50 or more dwelling units shall include at least twenty percent of the total number of dwelling units within the development as permanent affordable units. (Boulder)

The following residential development projects shall be Covered Projects and shall be subject to the requirements of this Article: all development of residential property larger than 10 acres or containing 50 or more dwelling units taking place through the construction of new structures or through the substantial rehabilitation of existing structures. Covered Projects shall include all development of residential property in excess of 10 acres or containing 50 or more dwelling units in the City by the same responsible party in any calendar year. (Burlington)

#5 Set-Aside—Targeted

A critical decision in developing an inclusionary zoning ordinance is the percentage of housing units required to be set aside as affordable. Often the set aside requirements are linked to specific income eligibility targets. Two examples of affordable housing set-asides targeted to specific income tiers follow below. The first example is based on language from Sacramento's ordinance. The second example, based on provisions of Davis, California's ordinance applicable to rental housing, also targets affordable housing to different income tiers, but varies the target percentages based on the size of the project. (Davis's numbers and percentages are used for ease of understanding.)

In developments covered by this section, the inclusionary housing component shall consist of affordable units leased or sold as follows: x% to very low income families (earning no more than 50% of area median income); x% to low income (earning more than 50% of area median income but no more than 80% of area median income); and x% to moderate income families (earning more than 80% of area median income but no more than 115% of area median income). (Sacramento)

A developer of multifamily rental developments containing 50 or more units shall provide at least 25% of the units affordable to low income households (earning more than 50% of area median income but no more than 80% of area median income) and at least 10% percent of the units affordable to very low income households (earning no more than 50% of area median income). A developer of multifamily rental developments containing between five and nineteen units, inclusive, shall provide 15% percent of the units to low income households and 10% percent to very low income households. (Davis)

#6 Housing Commission Right to Purchase

Some ordinances give the municipality and not-for-profit entities a right to purchase a fixed percentage of affordable units when they are first offered for sale or rent, so that they can keep the units permanently affordable. The first example below is based on language from Montgomery County, Maryland's ordinance, and the second is based on Fairfax County, Virginia's ordinance. (The percentages identified are Montgomery County's and Fairfax County's, respectively.)

The Housing Commission and any other not-for-profit corporation designated by the Commission has the option to buy or lease, for its own programs or programs administered by it, up to 40% percent of all affordable units. The Commission may buy or lease up to 33%. Any other designated corporation may purchase or lease any affordable units in the first 33% that the Commission has not bought or leased, and the remainder of the 40%. Units purchased or leased under this option shall be assigned to very-low or low-income persons. The Commission shall establish standards for designating not-for-profit corporations which shall require the corporations to demonstrate their ability to operate and maintain affordable units satisfactorily on a long-term basis. (Montgomery County)

The Housing Commission shall have an exclusive right to purchase up to one-third of the for sale affordable dwelling units within a development for a 90 day period beginning on the date of receipt of written notification from the developer advising the Housing Commission that a particular affordable dwelling unit is or will be completed and ready for purchase. The

remaining two thirds of the for sale affordable units within a development and any units which the Housing Commission does not elect to purchase shall be offered for sale exclusively for a 90 day period to persons who meet the income criteria established by the Housing Commission. After the expiration of 60 days of the 90 day period referenced above, the affordable dwelling units not sold shall be offered for sale to nonprofit housing groups, as designated by the Housing Commission, subject to the established affordable dwelling unit prices. (Fairfax County)

#7 Design and Building Requirements

Most ordinances require that affordable units be visually compatible with market rate units in the same development. The language below illustrates how this preference is drafted into an ordinance. The first example is based on Burlington's ordinance, the second is based on Sacramento's, and the third is based on Fairfax County's.

Affordable inclusionary units may differ from the market units in a Covered Project with regard to interior amenities and gross floor area, provided that:

- (i) these differences, excluding differences related to size differentials, are not apparent in the general exterior appearance of the Project's units; and
- (ii) these differences do not include insulation, windows, heating systems, and other improvements related to the energy efficiency of the Project's units;
- (iii) the gross floor area of the affordable inclusionary units is not less than minimum requirements established by the City.

(Burlington)

Inclusionary Units shall be visually compatible with Market Rate Units. External Building materials and finishes shall be the same type and quality for Inclusionary Units as for Market Rate Units. Upon application by the developer to the City, the City may, to the maximum extent appropriate in light of project design elements as determined by the Planning Director, allow builders to finish out the interior of Inclusionary Units with less expensive finishes and appliances. (Sacramento)

The Housing Commission shall develop specifications for the prototype affordable housing products both for sale and rental, which shall be structured to make the units affordable to very low-, low-, and moderate-income households. All building plans for affordable dwelling units shall comply with such specifications. Any applicant or owner may voluntarily construct affordable dwelling units to a standard in excess of such specifications, but only 50 percent of the added cost for exterior architectural compatibility upgrades (such as brick facades, shutters, bay windows, etc.) and additional landscaping on the affordable dwelling unit shall be included within recoverable costs, up to a maximum of 2 percent of the sales price of the affordable dwelling unit, with the allowance for additional landscaping not to exceed one half of the above-noted 2 percent maximum. (Fairfax County)

#8 Timing of affordable unit construction

Most municipalities require affordable units to be built concurrently with market units to ensure integration of affordable and market units, and to prevent developers from abandoning projects prior to completing the affordable units. The first example below is from Burlington's ordinance, and the second is from Montgomery County's.

Inclusionary units shall be made available for occupancy on approximately the same schedule as a Covered Project's market units, except that certificates of occupancy for the last ten percent of the market units shall be withheld until certificates of occupancy have been issued for all of the inclusionary units. A schedule setting forth the phasing of the total number of units in a Covered Project, along with a schedule setting forth the phasing of the required inclusionary units, shall be established prior to the issuance of a building permit for any development subject to the provisions of this Article. (Burlington)

The affordable dwelling unit agreement must include the number, type, location, and plan for staging construction of all dwelling units and other such information as the Commission requires to determine the applicant's compliance with this Chapter. The affordable dwelling unit staging plan must be consistent with any applicable land use plan, subdivision, plan, or site plan. The staging plan included in the affordable dwelling unit agreement for all dwelling units must be sequenced so that:

- (1) no or few market rate dwelling units are built before any affordable units are built;
- (2) the pace of affordable unit production must reasonably coincide with the construction of market rate units; and
- (3) the last building built must not contain only affordable units.

(Montgomery County)

#9 Fee In Lieu Formula

Some municipalities permit developers to pay a fee in lieu of developing hard affordable units. While some municipalities permit payment as a right, others require developers to show that constructing hard units would constitute a unique hardship, or that a fee would produce a greater benefit.¹ Because the fee paid is typically linked to the cost of producing a hard unit, fee in lieu formulas are necessarily dependent upon the local housing market. The first example below is based on the Boston Executive Order, and the second is based on Boulder's ordinance. The third and fourth examples, based on Montgomery County's and Brookline, Massachusetts' ordinances, respectively, authorize

¹ The following are summaries of the requirements that developers must satisfy to qualify to pay a fee in lieu of development in some municipalities:

Montgomery County: Developers may pay a fee in lieu if they can show that a resident's housing expenses for a hard unit would exceed what a participant in the affordable housing program could pay. A developer must justify why fees for facilities and services should not reasonably be excluded or reduced for affordable unit occupants. A fee paid must be sufficient to produce more units or units that are more affordable to low and moderate income families. The County has allowed fees in lieu of development on only 11 occasions.

Boulder: Fees in lieu of half of the required affordable units is permitted as a right. Developers may only pay fees in lieu of a larger percentage of units if a developer can demonstrate that payment of a fee would accomplish more benefit to the City than construction on site.

Santa Fe: Developers may pay a fee in lieu of developing hard units if they show that as a direct consequence of the inclusionary zoning ordinance they (1) are deprived of all economically viable use of their property as a whole, or (2) would lose money on the development as a whole and can demonstrate to the Housing Opportunity Program administrator's satisfaction that the loss is an unavoidable consequence of the affordable housing requirement.

a fee in lieu of development and provide that procedures for implementing such a fee shall be determined by administrative regulations.

Subject to the approval of the head of the relevant City agency, developers may also propose to achieve these affordable housing obligations by making a dollar contribution to an affordable housing fund calculated by multiplying the total number of dwelling units in the proposed residential development by 0.15, and by multiplying the result by the Affordable Housing Cost Factor, currently standing at \$52,000. This Affordable Housing Cost Factor is defined as the average total public subsidy per new construction affordable housing unit permitted in the City for the previous calendar year, and will be adjusted annually on July 1 of each year in an amount commensurate with the cost of producing affordable housing. (Boston)

Whenever this chapter permits a cash-in-lieu contribution as an alternative to the provision of a single permanently affordable housing unit, the cash-in-lieu contribution shall be as follows:

- (a) For each unrestricted detached dwelling unit, the cash-in-lieu contribution shall be the lesser of \$13,200.00, or \$55.00 multiplied by twenty percent of the total floor area of the unrestricted unit.²
- (b) For each unrestricted attached dwelling unit, the cash-in-lieu contribution shall be the lesser of \$12,000.00, or \$50.00 multiplied by twenty percent of the total floor area of the unrestricted unit

The city manager is authorized to adjust the cash-in-lieu contribution on an annual basis to reflect changes in the median sale price for detached an attached housing, using information provided by County Assessor records for the City. (Boulder)

In exceptional cases, instead of building the required number of affordable dwelling units, a developer may offer to contribute to the Housing Initiative Fund an amount that will produce significantly more affordable dwelling units. The procedures for considering and implementing contribution offers must be established by executive regulation. To implement an offer, the developer must sign an agreement with the Director of the Department of Housing and Community Development not later than a time provided in the regulations. (Montgomery County)

At the option of the City, the requirements of this Section may be met through a cash payment to the City or its designee in an amount based on the guidelines adopted as per (f) below if the cash payment is found by the City, in its discretion, to be advantageous to the City in creating or preserving affordable housing. Cash contributions shall be used only for purposes of providing affordable housing for very low, low, and moderate income persons. . . .

(f) The Planning Commission, in consultation with the Housing Commission and after public notice and hearing, shall adopt guidelines to aid in the interpretation and determination of the requirements of this Section. (Brookline)

#10 Cost Offsets

As is contemplated in the language below, some municipalities allow developers to request waivers from development standards such as set-back requirements, parking and landscaping requirements, or building material requirements, which reduce the cost of constructing affordable units. These cost offsets allow a municipality to decrease the

² The 20% floor area calculation reflects Boulder's 20% set-aside. The fee is based on 20% of the floor area of a development rather than 20% of the number of units. To determine the amount of the fee, Boulder conducted a study to determine the gap between the allowable sales price of an affordable unit and the actual cost to construct a unit; the gap figure was then lowered to a politically feasible amount.

burden placed on developers of affordable housing, and minimize the possibility of a developer showing that inclusionary zoning causes an excessive loss such that it effects a taking. The offsets in the examples below are incorporated into the ordinances, but municipalities may implement cost offsets in a variety of ways. For example, Brookline does not include offsets in its set-aside ordinance, but provides for an offset—a floor area bonus—in a separate ordinance. Though I am not aware of a municipality which has done so, an ordinance could generally authorize cost offsets which would be detailed in administrative regulations.³ The first example below is based on the Santa Fe ordinance, and incorporates cost offsets mentioned in the Highland Park Affordable Housing Plan. The second is based on provisions in the Sacramento ordinance, and lists offsets from that ordinance to provide a sense of the range of offsets available.

Impact fees, building permit fees, and tap-on fees (or portions thereof) may be waived for affordable units, subject to agreement of the entities receiving revenues from such fees. Any developer of affordable units may submit a request for a waiver of other City development standards, and the City shall respond within thirty calendar days of its receipt. The City shall approve a waiver if each of the following requirements are met:

- (a) The proposed waiver will make the housing more affordable. The developer must show how real costs will be reduced and how the savings will be passed on affordable home buyers or renters.
- (b) The proposed waiver does not compromise health, safety or welfare as determined by the City.
- (c) Vehicular and pedestrian circulation, storm drainage and utilities are provided for adequately.

(Santa Fe)

Upon application as provided herein, (1) the City shall make available to a Residential Project Developer a program of waiver, reduction or deferral of development fees, administrative and financing fees for affordable units; (2) the City may modify for affordable units, to the extent feasible, in light of the uses, design, and infrastructure needs of the Development Project, standards relating to road widths, curbs and gutters, parking, lot coverage, and minimum lot sizes; and (3) the City may, to the maximum extent appropriate in light of project design elements, allow builders to finish out the interior of affordable units with less expensive finishes and appliances. The Planning Director may issue Special Permits for Inclusionary Projects, and shall develop further procedures for streamlining and priority processing which relieve affordable units of permit processing requirements to the maximum extent feasible consistent with the public health, safety, and welfare. The developer may apply to the City's Housing Trust Fund for assistance in the financing and development of the affordable units in a development. (Sacramento)

#11 Density Bonus

A number of municipalities grant a density bonus—permission to develop more units than zoning would otherwise allow. Like other cost offsets, density bonuses may decrease the likely success of a taking claim by mitigating the economic impact of developing affordable housing. Though some communities tout density bonuses as the most effective cost offsets, others that do not desire denser development avoid them

³ Such a provision could look much like the Montgomery County and Brookline provisions which authorize fees in lieu of development, but leave determination of a fee formula or amount to administrative regulations.

altogether. Some municipalities automatically award a density bonus to developers of affordable housing, while others permit smaller developments as of right without any set-aside, and set up larger developments with increased density as a desirable variance, to which an affordable housing set-aside is attached. The first example below, based on Cambridge, Massachusetts' density bonus, follows the former strategy, and permits developers to split the additional density between affordable and market rate units. The bonus is structured so that the developer's profit on additional market units directly offsets the loss on affordable units. The second example is based on Somerville, Massachusetts' ordinance, and follows the latter strategy. In Somerville, up to 7 units may be developed as of right, but development of 8 or more units requires a special permit and a concomitant obligation to set aside 12.5% of all units as affordable. Some argue that structuring a density bonus as a variance with an accompanying affordable housing set-aside may prevent the set-aside from being labeled an exaction—a land use decision conditioning approval of development on the dedication of property to public use. This is advantageous because exactions are more vulnerable to taking claims than zoning of general application.

To facilitate the objectives of this Section, modifications to the dimensional requirements in any zoning district shall be permitted as of right for an Inclusionary Project, as set forth below:

- (i) The Floor Area Ratio⁴ (FAR) normally permitted in the applicable zoning district for residential uses shall be increased by 40% percent, and at least 50% of the additional FAR should be allocated for the Affordable Units required by this Section. In a Mixed Use Development, the increased FAR permitted in this paragraph (i) may be applied to the entire lot; however, any gross floor area arising from such increased FAR shall be occupied by residential uses, exclusive of any hotel or motel use.
- (ii) The minimum lot area per dwelling unit normally required in the applicable zoning district shall be reduced by that amount necessary to permit up to 2 additional units on the lot for each 1 affordable unit required by this Section.⁵

(Cambridge)

The affordable housing requirements of this Article shall apply to all residential developments seeking special permits with site plan review to develop 8 or more dwelling units, whether new construction, substantial rehabilitation, or adaptive reuse. Developments shall not be segmented or phased in a manner to avoid compliance with these provisions. Developers providing more than 12.5% of the total units in the development as affordable units may apply for an additional density bonus under the terms of this Article. Bonuses may be awarded on the basis of a 2 to 1 ratio of market rate units to affordable housing units. For every additional unit provided beyond the 12.5% required, 2 additional market rate units may be authorized.

(Somerville)

⁴ Floor Area Ratio is the ratio of gross floor area (the sum, in square feet, of the gross horizontal areas of all floors of a building) to the total area of the lot.

⁵ Implementation of a density bonus under this section would work as follows: Assume a 50 unit development, and a 20% set-aside. Thus, 10 of the 50 units must be affordable. Paragraph (ii) of the density bonus above awards a bonus of two market units for every one affordable unit, so 20 units would be permitted. In addition, paragraph (i) would permit a 40% increase in the lot's FAR, which corresponds to the 40% increase in units over the original 50. If considered in reference to the base number of units, the developer essentially gets 10 additional market units to offset the 10 required affordable units.

#12 Marketing

Some ordinances and regulations provide extensive instructions for marketing to and certifying buyers and renters of affordable units. The first example below is based on Santa Fe's ordinance pertaining to for-sale units, and provides broad guidance with regard to marketing. The second example is based on Santa Fe detailed regulations which implement the ordinance.

A. Developers shall market affordable homes in accordance with the requirements set forth in the administrative procedures. There shall be an efficient matching of the incomes of prospective affordable unit buyers to specific affordable unit prices. There shall be a reasonable matching of the household sizes of prospective affordable unit buyers to the sizes and types of affordable units. Any marketing materials shall clearly state the policies of the affordable housing program with regard to the pricing of affordable units and buyer eligibility.

B. In marketing affordable units the City or seller shall give preference to individuals who are citizens of the City or are presently employed or under contract with an employer within the City.

C. The City or its agent shall maintain and make available lists of prospective affordable unit buyers who have passed preliminary prequalifications for financing. For affordable developments for which the city expects immediate effective demand to outstrip supply, the city or its agent, at the city's sole discretion, may establish and maintain an equitable process for allocating rights to purchase the homes. For developments other than those described above, the developer shall establish and maintain an equitable process of marketing homes, including waiting lists where demand exceeds supply.

D. Prior to executing a purchase contract for any affordable unit, the prospective affordable unit buyer shall be certified as meeting affordable housing program requirements by the City or its agent. The certification process shall be set forth in the administrative procedures. Developers and affordable unit buyers may execute only purchase agreements that are approved as to form by the City and include language provided by the City which shall require that an appropriate disclosure form be provided to and explained to the affordable unit buyer prior to execution of the contract. The disclosure form shall explain any deed restrictions, restrictive covenants and/or liens that are placed on the affordable unit to ensure long-term affordability. (Santa Fe ordinance)

Developers shall market affordable homes in accordance with the following requirements:

- (1) There should be an efficient matching of the incomes of prospective affordable home buyers to specific home prices, as follows:

Household income of a buyer should not exceed the price level of a home by more than five percent. For example, only households with incomes at or below 65 percent of median income should be allowed to buy a home made affordable to households at 60 percent of median income. Thus, lower priced homes will be reserved for lower-income households. Alteration of this requirement may be based only on the unavailability of a qualified buyer with the required level of income for a period of 30 days or more after the home was legally ready for occupancy (assuming good-faith marketing efforts by the developer to find a qualified buyer).

- (2) There should be reasonable matching of the household sizes of prospective affordable homebuyers to the sizes/types of affordable homes as follows:

3 BR, 1.5 BA ----- Minimum household size = 4

4 BR, 2 BA ----- Minimum household size = 5

The City shall not market or sell an affordable home to a household which is smaller than the household sizes indicated, unless the City approves in writing fewer persons based on the unavailability of a buyer of the proper household size for a period of 30 days or more after the home was legally ready for occupancy

(assuming good-faith marketing efforts by the developer to find a qualified buyer), or the demonstrated need of a household for a dwelling unit with more bedrooms than allowed in this section.

- (3) In marketing affordable homes the City or seller shall give preferences to individuals who are citizens of the City or are presently employed or under contract with an employer within the City.
- (4) Brochures, advertisements and other marketing materials shall clearly state the policies of the affordable housing program with regard to the pricing of affordable units and buyer eligibility.
- (5) The City or its agent may maintain lists of prospective affordable homebuyers who have passed preliminary pre-qualifications for financing. Such lists will be made available to developers for marketing purposes.
- (6) For developments for which the City expects immediate effective demand to outstrip supply, the City or its agent, at the City's sole discretion, may establish and maintain an equitable process for allocating rights to purchase the homes. For example, the City could require a lottery or use of a ranked waiting list.
- (7) Prior to executing a purchase contract for any affordable home, a prospective buyer must be certified by the City or its agent as meeting program requirements. The certification must have been made within 90 calendar days immediately prior to the full execution of the purchase contract. Developers may sign purchase contracts with non-certified prospective buyers, conditional upon certification within 10 working days, if the developer is reasonably certain that he prospective buyer can be certified.
- (8) Developers and buyers of affordable units may execute only purchase contracts that are approved for form by the City and include language provided by the City, which will require that an appropriate disclosure form be provided to and explained to the buyer prior to execution of the contract. The disclosure form will explain any deed restrictions, restrictive covenants, and/or liens that are placed on home to insure long-term affordability.

(Santa Fe regulations)

#13 Administration of Affordability Control

Original sales prices and rental rates for affordable units are typically regulated so that that a low- or moderate-income purchaser or renter need not spend more than 30% of his or her income on housing expenses. Most municipalities also impose price restrictions which keep units affordable when they pass to new occupants. The first three examples below deal with the resale pricing of for-sale affordable housing. The first example is from Highland Park's Central Avenue Senior Development, and the second is based on the Boulder and Montgomery County ordinances. The third example is based Santa Fe regulations, and provides only general guidance on the subject of resale pricing. The last example, based on language from the Sacramento and Santa Fe ordinances deals with maintaining affordability of rental units, and is less complicated.

The resale price shall be the lower of:

- (a) the then-fair market value of the unit as determined by an appraisal performed by an appraiser approved by the Housing Commission taking into account applicable use and occupancy restrictions which may be binding on the unit; and
- (b) the purchase price under the agreement by which the unit owner purchased the unit, increased by an amount equal to the lesser of (i) three percent (3%) for each year (or part thereof) after the closing date during which the unit owner resided in the unit and (ii)

inflation as measured by the Consumer Price Index (All Urban Consumers, All Cities average, residential real estate) for the period of time that the unit owner resided in the unit.

(Highland Park, IL)

The resale price of any permanently affordable housing unit shall not exceed the purchase price paid by the seller of that unit plus:

- (a) A percentage of the unit's original purchase price equal to the increase in the cost of living since the unit was purchased by the seller, as determined by the Consumer Price Index;
- (b) The fair market value of improvements made to the unit by the seller⁶;
- (c) Customary closing costs and costs of sale; and
- (d) Costs of a real estate commission paid by the seller if a licensed real estate agent is employed.

(Boulder/Montgomery County)

The City requires that developers impose resale controls which are designed to achieve the following purposes:

- (a) reducing the potential for windfall profits by an owner-occupant;
- (b) recapturing any such windfall profits for use in an approved housing trust fund;
- (c) providing incentives for owner-occupants to resell to lower-income households, which are most in need of affordable housing;
- (d) maintaining the affordability of affordable units to subsequent buyers to a reasonable extent, while considering the sellers' rights to reasonable returns on equity; and
- (e) preventing speculative profits on affordable units by renting them to another household.

(Santa Fe)

The owner of affordable rental units shall be responsible for certifying the income of eligible tenants to the Housing Commission at the time of initial rental and annually thereafter. Rental rates shall be in accordance with the formula set forth in the administrative procedures.⁷ This requirement shall be made applicable to successors in title, if any, by means of a deed restriction. (Santa Fe/Sacramento)

Municipalities typically maintain affordability through deed restrictions or covenants recorded against the property. These affordability controls often specify that a unit must be sold or rented to an income eligible buyer at an affordable price; others give the municipality a right of first refusal to purchase affordable units. For a discussion of the validity and permissible duration of such affordability controls, please see the attached memorandum from BPI intern, Rebecca Onie.

⁶ In evaluating whether to allow sellers to recoup the value of capital investments in their homes, municipalities weigh a desire to provide sellers with some of the benefits of ownership against a desire to keep the sale price of the unit affordable. Some ordinances, such as Montgomery County's, Fairfax County's, and Santa Fe's do not impose restrictions on the capital expenditures homeowners may recover upon the sale of their homes. In contrast, Davis, California, in its lone for-sale development with resale restrictions, does not allow homeowners to recoup capital investments. (Davis is rethinking this issue with regard to future developments.) Boulder requires homeowners to obtain city approval for capital improvements, and limits recovery of expenditures to approximately \$1000 for each year the homeowner has owned the property. (Boulder's 2001 Homeownership Capital Improvements Policy is attached.)

⁷ Both ordinances target rental rates at 30% of a family's income less an allowance for tenant-paid utilities.

#14 Other Issues for Consideration

Land Dedication

Another possibility that may interest some municipalities is allowing a developer, at the City's discretion, the option to satisfy some of his affordable housing obligation via dedication of land to the City's contemplated land trust. For example, under Boulder's ordinance developers may satisfy their affordable housing obligation either by:

- (1) conveying land to the City of equivalent value to the fee-in-lieu contribution that would otherwise be required, plus an additional fifty percent, to cover costs associated with holding, developing, improving, or conveying the land; or
- (2) conveying land to the City that is of equivalent value to land upon which the required affordable units would otherwise have been constructed. Such land must be zoned to allow construction of at least as many affordable units as would otherwise have been required.

Examples of Inclusionary Housing Program Characteristics

| | DEVELOPMENTS COVERED | THRESHOLD NUMBER OF UNITS | SET-ASIDE REQUIREMENT | INCOME TARGETING | DENSITY BONUS | OTHER DEVELOPER INCENTIVES | FEE IN-LIEU / OFF-SITE DEVELOPMENT | PERIOD OF AFFORDABILITY |
|-----------------------------|--|--|--|--|--|---|---|--|
| Boston, Massachusetts | New construction; Rehabilitation | >10 units, seeking zoning variance or using City financing | 10% of units | At least half of aff. units for <80% AMI; Remaining aff. units for 80-120% AMI, average of 100% AMI | None | Tax break for developer; Increased height or FAR allowance | May build off-site if 15% of all units affordable; In-lieu payment permitted | Maximum allowable by law |
| Boulder, Colorado | All developments | No threshold #, applicable to all residential development | 20% | Average of HUD's definition of low income | None | Waiver of development excise tax | Fee in-lieu for development 4 units or fewer; half of for-sale units may be built off-site; flexibility with rental | Permanent |
| Cambridge, Massachusetts | New construction; Conversions (not rehab) | >10 units or developments >10,000 sq. ft. | 15% of units (if >10 units); or 15% of sq. footage | Average of 65% AMI | 15% for market-rate units, 15% for aff. units (total 30%) | Increased FAR for aff. units; decreased minimum lot area requirements; no variances needed for aff. units | Fee in-lieu only if show "significant hardship"; Off-site only in "certain exceptional circumstances" | Permanent for for-sale units; 50 yrs for rental units |
| Davis, California | All types | > 5 units | 25% in for-sale developments; 25-35% in rental developments | For-sale: At least half of aff. units for 90% AMI; remaining aff. units for 100% AMI; Rental: approx. 1/3 of aff. units for <50% AMI; remaining for <80% AMI | One-for-one in for-sale developments; 15% in rental developments | Relaxed development standards | Fee in-lieu for developments with <30 units, or "unique hardship"; 40% of for-sale aff. units must be on-site; all of rental aff. units on-site | No control period for for-sale units; permanent affordability for rental units |
| Denver, Colorado | New construction; Substantial rehab | >30 for-sale units; voluntary for rental units | 10% of for-sale units | For-sale units: <80% AMI Rental units: 65% AMI | 10% | \$5,000-\$10,000 per aff. unit, up to 50% of the total units; parking reduction; expedited permit process | Fee in-lieu of 50% of the price per aff. unit not built; off-site allowed if build "more" aff. units than required | 15 years |
| Fairfax County, Virginia | New construction; Conversions | >50 units | Sliding-scale requirement, not less than 12.5% for single-family units; not less than 6.25% for multi-family units | <70% AMI | Up to 20% for single-family units; up to 10% for multi-family units | None | May request fee in-lieu based on design infeasibility | 15 years for for-sale units; 20 years for rental units |
| Irvine, California | All types | No threshold #, applicable to all residential development | Voluntary set-aside of 15% | Tri-tier of: 1/3 <50% AMI, 1/3 50-80% AMI, 1/3 80-120% AMI | 25% | Only through negotiation | Fee in-lieu and other off-site options permissible | 30-40 years, determined case-by-case |
| Longmont, Colorado | All development on annexed land; new for-sale developments | No threshold #, applicable to all residential development | 10% | For-sale units: <80% AMI; Rental units: <60% AMI | Negotiated density bonus up to 20% | Expedited review process; relaxed development standards; fee waivers | Set fee in-lieu payment to the Affordable Housing Fund; off-site construction on case-by-case basis | 10 years for for-sale units; 20 years for rental units |
| Montgomery County, Maryland | New construction | >50 units | 12.5 – 15% | <65% AMI | Up to 22% | Fee waivers; decreased min. lot area requirements; 10% compatibility allowance | Fee in-lieu in "exceptional cases"; off-site in contiguous areas if aff. hh's cannot pay expected costs | 10 years for for-sale units; 20 years for rental units |
| Newton, Massachusetts | New construction; Rehabilitation | Units requiring a special permit (i.e. >2 units) | 25% of units over the 2 units permitted by right, up to 20% of the total development | <50% AMI | Up to 20% | None | Fee in-lieu for developments with 2 – 9 units | 40 years |
| Sacramento, California | Development in "new growth areas" | >9 units | 15% | 2/3 of the aff. units at <50% AMI; 1/3 of aff. units 50 – 80% AMI | 25% | Expedited permit process; fee waivers; relaxed design guidelines; priority for subsidies | No fee in-lieu; can do off-site if insufficient land zoned for multi-family | 30 years |
| Santa Fe, New Mexico | All developments | No threshold # | 11 – 16% | Average of 65% AMI | For-sale units: Density bonus equals set-aside %; Rental units: at City's discretion | Fee waivers; variances to development standards | Not permitted, except in cases of "extreme hardship" | 30 years; 30 year period starts over with each new occupant |

1 If the developer has four or fewer units, the developer must either create one affordable unit on-site or off-site, dedicate land for one affordable unit, or pay a fee in-lieu. If the development has five or more units, the developer must set-aside 20% of the units as affordable.

2 If a for-sale development is greater than 3 stories, has an elevator, and has over 60% of its parking structured, then the affordable units are priced affordable for households earning 95% AMI or below.

3 If a rental development is greater than 3 stories, has an elevator, and has over 60% of its parking structured, then the affordable units are priced affordable for households earning 80% AMI or below.

Examples of Inclusionary Housing Program Characteristics

| | Year of Inception | Affordable Units Produced | Threshold Number of Units | Set-aside Requirement | Control Period | "In lieu of" payment/ Off-site Development | Density Bonus | Other Developer Incentives |
|------------------------------------|-------------------|--------------------------------------|--|--|--|--|---|---|
| Boston, Massachusetts | 2000 | 68 | Development exceeding 10 units | 10% of on-site units | “Maximum allowable by law” | May build off-site if 15% of all units affordable In lieu of payment permitted | None | Tax break for developer |
| Boulder, Colorado | 1999 ¹ | Approx. 50 of nearly 200 anticipated | No threshold #--applicable to all residential development | 20% low-income in for-sale and rental developments ² | Permanent affordability by deed restriction | Fee permitted for smaller developments; Half of for-sale units may be built off-site; Developers have flexibility with rental unit obligation ³ | None | Waiver of development excise taxes |
| Davis, California | 1990 | 1474 | Development exceeding 5 units | 25% in for-sale developments ⁴ 25-35% in rental developments ⁵ | Permanent affordability for rental units No control period for for-sale units | In lieu of payment permitted for developments under 30 units, or other demonstration of “unique hardship” | 25% | None |
| Fairfax County, Virginia | 1991 | 1723 | Development exceeding 50 units ⁶ | 12.5% in single family home developments 6.5% in multi-family developments | 15 years for for-sale housing 20 years for rental housing PHA may purchase 1/3 of all units to keep affordable | Not permitted | 20% for single family units 10% for multi-family units | None |
| Irvine, California | 1978 | Over 3400 | No threshold #--applicable to all residential development ⁷ | Voluntary goal: 15% of all units | 20-30 years; determined case-by-case depending on financing | In lieu of payments and other alternatives to on-site units permissible ⁸ | 25% ⁹ | None currently offered ¹⁰ |
| Longmont, Colorado | 1995 | 104 of 352 anticipated | No threshold # ¹¹ | 10% of all units in annexation areas | No control period for for-sale units 5 years for rental units | May make in lieu of payment to Affordable Housing Fund Case-by-case consideration of off-site construction | Yes | Relaxed regulatory requirements ¹² |
| Montgomery County, Maryland | 1974 | Over 10,000 | Development exceeding 50 units | 12.5-15% of all units Of these, PHA may purchase 33%, and qualified not-for-profits may purchase 7% | 10 years for for-sale units 20 years for rental units | May request approval to make in lieu of payment or build affordable units off-site in contiguous planning area if low and moderate income residents will not be able to pay expected housing costs | Up to 22% | Waiver of water, sewer charge and impact fees. Offer 10% compatibility allowance and other incentives ¹³ |
| Santa Fe, New Mexico | 1998 | 1 of 36 anticipated | No threshold # ¹⁴ | 11% in developments targeted over 120% AMI ¹⁵ 16% in developments targeted over 200% AMI ¹⁶ | 30 years for all units; 30 year period starts over with each new occupant | Not permitted, except in case of economic hardship | Bonus equals set-aside %. 16% in developments targeted under 80% of AMI ¹⁷ | Waiver of building fees |

Examples of Inclusionary Housing Program Characteristics

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- ¹ Boulder had an prior inclusionary housing ordinance in effect in the 1980s and early 1990s. The current ordinance was designed to improve flaws in the former program.
- ² Projects of 4 or fewer units may either provide one unit of affordable housing on or off-site, dedicate land for affordable housing, or make an “in lieu of” contribution. Boulder may negotiate affordable housing set-asides of up to 50% in projects built on annexed land; in such cases, the units are split evenly between low-income households and moderate-income households.
- ³ Developers of affordable rental units have flexibility with regard to the on-site/off-site mix, and the extent to which they may meet their obligation by donating land or dedicating pre-existing homes for low-income households.
- ⁴ 25% set-aside achieved through combination of on-site construction and land dedication.
- ⁵ 35% set-aside required for rental projects over 20 units; 25% set-aside required for projects between 5 and 19 units; set-aside achieved through on-site construction and land dedication.
- ⁶ Developers must pay a fee equal to 1% of sales prices if a development does not exceed 50 units. In addition to meeting the 50 unit threshold, housing must be developed at a density greater than one dwelling unit per acre in an approved sewer service area to trigger an affordable housing set-aside obligation.
- ⁷ The applicability of Irvine’s program is dependent upon city and federal funding availability. Compliance with its terms is a “goal,” not a strict requirement, though a city official reported that nearly all developments comply with the program.
- ⁸ Developers in Irvine may pursue a range of alternatives to construction of affordable units on-site. In addition to fees in lieu of construction, developers may provide land to not-for-profit developers of affordable housing, convert existing market rate housing into affordable housing, and extend the term of affordability on current affordable units.
- ⁹ California state law requires a 25% density bonus for developers of affordable housing. In Irvine, however, not many developers take advantage of this option.
- ¹⁰ Although Irvine currently offers no developer incentives other than a state-required density bonus, it has in the past (and will consider doing so again in the future) offered developers of affordable housing reduced parking requirements, reduced fees, reduced park land dedications, and expedited permitting.
- ¹¹ All residential development on land annexed to the city triggers an affordable housing obligation.
- ¹² Developers who construct affordable housing are eligible for regulatory incentives, including reduced parking requirements, smaller setback requirements, and reduced landscaping obligations.
- ¹³ Montgomery County permits developers to increase the sales prices of units by 10% to fund amenities that make the affordable units visually compatible with market rate units. Developers of affordable units also may build up to 40% attached units in an otherwise detached unit development, and they may receive some concessions on lot sizes that enable them to use their land more efficiently.
- ¹⁴ Santa Fe triggers an affordable housing obligation if any dwelling unit in a development is targeted to households with incomes over 120% of the area median income (AMI).
- ¹⁵ Homes targeted to households earning between 120 and 200% of area median income (AMI) are priced between \$240,000 and \$400,000.
- ¹⁶ Homes targeted to households earning in excess of 200% of area median income (AMI) are priced over \$400,000.
- ¹⁷ Homes targeted to households earning less than 80% of area median income (AMI) are priced under \$150,000.



BUSINESS AND PROFESSIONAL PEOPLE
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Voluntary or Mandatory Inclusionary Housing? Production, Predictability, and Enforcement

November 2003

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Summary

In response to the nationwide affordable housing crisis, many municipalities are turning to inclusionary zoning programs as an effective tool for generating much needed affordable housing. Research shows that local governments increasingly favor mandatory inclusionary zoning programs rather than voluntary programs for three reasons:

- 1) **Mandatory programs produce more affordable units.** The lack of affordable housing, particularly in job-rich communities around the country, harms vulnerable households and hinders local economic development. Mandatory inclusionary zoning programs generate more units of affordable housing. This means more workforce housing near jobs, reduced sprawl, and less traffic congestion and air pollution.
- 2) **Mandatory programs produce more affordable units for a wider range of income levels within the affordable spectrum.** While voluntary programs may produce upper-range moderate-income housing, mandatory programs more effectively generate housing for low-income entry-level workers, who help drive local economies.
- 3) **Mandatory programs offer uniformity and predictability in their implementation and enforcement.** Developers benefit from uniform expectations and certainty throughout the development process, and municipalities benefit from a more predictable level of affordable housing production.

With all the benefits of mandatory programs, it is not surprising to find that more municipalities around the country are adopting mandatory, rather than voluntary, inclusionary zoning programs.

Comparing Mandatory and Voluntary Inclusionary Zoning Programs

1. Mandatory programs produce more affordable housing units.

Experts agree that mandatory, rather than voluntary, inclusionary zoning programs are more effective at generating a larger supply of affordable housing. A 1994 study conducted on inclusionary zoning programs in California found that “mandatory programs produce the most very-low- and low-income affordable units compared with voluntary programs, both in terms of absolute numbers and percentage of total development.”¹ The report concluded that the effectiveness of inclusionary programs in California was closely correlated with their mandatory nature; in fact, nine of the top fourteen most productive inclusionary housing programs in California are mandatory.² Two counties cited in another California study “specifically blame the voluntary nature of their programs for stagnant production [of affordable housing]

¹ *Creating Affordable Communities*, Prepared by the California Coalition for Rural Housing Project, November 1994: 42.

² *Creating Affordable Communities*, Prepared by the California Coalition for Rural Housing Project, November 1994: 48.

despite a market-rate boom.”³ A Massachusetts study regarding inclusionary zoning programs reached similar conclusions. The report stated that the “greatest potential” for inclusionary zoning lies in mandatory, rather than voluntary, inclusionary zoning programs.⁴

2. Voluntary programs fail to produce enough housing affordable to low- and very-low-income households.

While voluntary inclusionary zoning programs can generate upper-range moderate-income housing (with a significant number of developer incentives), they generally fail to produce affordable housing for low- and very-low-income households in the absence of subsidies. For example, Austin, Texas, adopted a voluntary program called the S.M.A.R.T. (Safe, Mixed-Income, Accessible, Reasonably-priced, Transit-oriented) Housing Initiative in April 2000. While the program has created a substantial number of units for moderate-income households (through aggressive program implementation and an agreement to waive 100% of the building fees if a 40% set-aside is included⁵), it has only produced a small percentage of housing for low- and very-low-income households. While 62% of the total units in the program to date are affordable to families at or below the median family income (MFI), only 2% of the total units are affordable to low-income households earning at or below 40% of the MFI.⁶

Voluntary inclusionary zoning programs that succeed in generating affordable housing units for a range of low-income households must rely heavily on federal, state, and local subsidies in most cases. The City of Roseville, California adopted an “Affordable Housing Goal” (AHG) program in 1988, which encourages developers to work with the city to voluntarily build affordable housing within residential developments. Since 1988, the program has produced 2000 affordable units through significant federal, state, and local subsidies. However, \$233,708,554 in subsidies would be necessary to meet the city’s goal of 5,944 affordable units by 2007—that is \$217,608,554 more in funding than the city is expected to capture between 2002 and 2007.⁷ In the absence of expanded funding, it will be impossible for Roseville to meet its regional affordable housing goal through its voluntary program.

³ *Inclusionary Housing in California: 30 Years of Innovation*, prepared by the California Coalition for Rural Housing and the Non-Profit Association of Northern California, 2003.

⁴ Ziegler, Clark. *Inclusionary Zoning: Lessons Learned in Massachusetts*, National Housing Conference Affordable Housing Policy Review, VI. 2, Issue 1, January 2002

⁵ Interview of Regina Copic, S.M.A.R.T. Housing Program Director, July 2003.

⁶ A reasonable priced housing unit in Austin is defined as being affordable for a family that earns 80% of the MFI and spends no more than 30% of the gross income on housing. To qualify for the program, a family of four that lives in Austin must earn no more than \$56,500 a year.

⁷ Roseville General Plan, *Revisions to Draft Update to Housing Element 2002 for HCD Review*, August 23, 2002: 12.

3. Mandatory programs are more predictable in enforcement and results.

Mandatory programs offer reliability and predictability in their ability to create integrated affordable units and/or generate fee in-lieu payments, depending on how the program is structured. Developers also benefit from mandatory programs because they offer uniform expectations and provide more certainty throughout the development process. Mandatory programs create a level playing field for developers, ensuring that all developers must adhere to the same guidelines throughout the development process. Developers in Irvine, California recently lobbied the city council to change the city's inclusionary housing ordinance from voluntary to mandatory enforcement due to the confusion and uncertainty developers experienced in the development process under a voluntary program.⁸

The most successful voluntary programs are treated in practice as mandatory requirements.

A dedicated city staff is critical to the success of any inclusionary zoning program, voluntary or mandatory. However, for a voluntary program to succeed, it is particularly important to have a dedicated city staff willing to aggressively implement such a program. Calavita and Grimes, for example, have attributed the success of the voluntary inclusionary zoning program in Irvine, California to an "unusually sophisticated" and "particularly gutsy" staff committed to making the program work.⁹ (In fact, Irvine's voluntary inclusionary housing policy changed to a mandatory inclusionary housing ordinance in the spring of 2003).

In Chapel Hill, North Carolina, the city's voluntary ordinance is aggressively enforced in a mandatory fashion.¹⁰ The policy began as an "expectation" for developers with residential rezoning requests to include at least a 15% affordable housing set-aside. However, the voluntary program is so rigorously enforced by town staff and the Town Council that no new residential developer, regardless of requiring a rezoning request, has approached the Planning Commission without at least a 15% affordable housing set-aside or plans to pay a fee in lieu of building affordable units.¹¹ In practice, developers construe the inclusionary zoning expectation as mandatory because residential development proposals are difficult, more expensive, and less likely to win approval without an affordable housing component.¹² However, because the program is voluntary, developers do not have the benefit of a policy that is uniform and predictable.

The trend in inclusionary zoning is towards the adoption of mandatory, rather than voluntary, inclusionary zoning programs.

⁸ Interview of Barry Curtis, Associate Planner for the City of Irvine, June 16, 2003.

⁹ Calavita, Nico and Kenneth Grimes. "Inclusionary Housing in California: The experience of two decades," *Journal of the American Planning Association*. Chicago: Spring 1998, Vol. 64, Is. 2: 150-170.

¹⁰ The State of North Carolina has not legally enable municipalities to pass mandatory inclusionary zoning ordinances.

¹¹ Interview of Phil Mason, Senior Planner for the Town of Chapel Hill, June 2003.

¹² Ibid.

The current trend in inclusionary housing programs is towards the mandatory end of the implementation spectrum. BPI's research has so far identified only one municipality in the country that has changed from a mandatory to a voluntary program: Orange County, California. This switch in enforcement led to a dramatic drop in the production of affordable housing.¹³ Meanwhile, as the table below demonstrates, other communities around the country have recently switched to a mandatory status in order to gain the benefits of additional affordable units and greater predictability.

A. Switching from Voluntary to Mandatory Inclusionary Zoning

| Municipality or County | Reason for Change | Result |
|-------------------------------|---|--|
| Cambridge, MA | 10 years of voluntary inclusionary zoning districts failed to generate any affordable housing. | In 1999 Cambridge switched to a mandatory program that has since produced over 100 affordable units. |
| Irvine, CA | Developers initiated a switch to a mandatory ordinance after over two decades of confusion and uncertainty under a voluntary program. ¹⁴ | New mandatory ordinance (adopted in the spring of 2003) is a concise program with uniform expectations and rewards for developers. |
| Pleasanton, CA | Voluntary ordinance proved ineffective at creating affordable housing in the face of increasing housing costs and decreasing availability of land. | Passed mandatory ordinance in late 2000. ¹⁵ |
| Boulder, CO | Throughout the 1980s and 1990s, the city's voluntary ordinance proved an ineffective tool to generate affordable housing. | Mandatory ordinance went into effect in 2000 and has generated 56 units of affordable housing, with more in the pipeline. |

B. Switching from Mandatory to Voluntary Inclusionary Zoning

| Municipality or County | Reason for Change | Result |
|-------------------------------|--------------------------|--|
| Orange County, CA | Local political reasons. | A decrease in the production of affordable housing units: the mandatory program produced 6,389 units of affordable housing in four years (1979-1983), while the voluntary program has produced just 952 units over eleven years (1983-1994). ¹⁶ |

¹³ *Creating Affordable Communities*, Prepared by the California Coalition for Rural Housing Project, November 1994: 45.

¹⁴ Interview of Barry Curtis, Associate Planner for the City of Irvine, June 2003.

¹⁵ Statistics on the number of units generated under the new mandatory ordinance are not yet available.

¹⁶ *Creating Affordable Communities*, Prepared by the California Coalition for Rural Housing Project, November 1994.

C. Recent trend in large cities adopting mandatory ordinances

Inclusionary zoning is quickly becoming a mainstream policy tool for increasing the supply of affordable housing. In most cases, municipalities are adopting mandatory inclusionary zoning programs to increase the supply of workforce housing. The five largest cities to adopt inclusionary zoning, Boston, Denver, Sacramento, San Diego, and San Francisco, chose mandatory ordinances in the face of severe affordable housing shortages.¹⁷ This decision reflects both the perceived and documented effectiveness of requiring developers to set aside affordable units or pay a fee in lieu of building units on-site.

Inclusionary zoning programs can fall between mandatory and voluntary enforcement based on nuances in the ordinances.

Not all inclusionary zoning ordinances fit neatly into the categories of mandatory or voluntary enforcement. Policies may fall between mandatory and voluntary compliance if applied to certain districts or types of developments, such as a revitalizing business district or a PUD. Policies might also fall between if they apply only to projects with a rezoning request, or only affect projects proposed after the adoption of the ordinance.

For practical reasons, some municipalities design ordinances that are mandatory but include voluntary provisions. For example, Cambridge, Massachusetts adopted an inclusionary zoning ordinance that exempts rehab projects because one of the city's main developer incentives is a density bonus, which is difficult to accommodate in rehabs. Boston, Massachusetts currently has an effective mandatory inclusionary zoning policy that applies to any residential project of 10 or more units that requires zoning relief or is financed by or developed on property owned by the City of Boston or the Boston Redevelopment Authority (BRA). Due to the nature of Boston's zoning code, practically every new residential development over nine units is subject to zoning relief, and thus the policy.

The Bottom Line

The experience of municipalities and counties nationwide demonstrates that mandatory inclusionary zoning works as a practical and successful tool for generating affordable housing. While the success of voluntary programs is contingent on the availability of subsidies and aggressive staff implementation, mandatory programs have produced more affordable units overall, and more units for a wider range of income levels within the affordable spectrum. Not only are more municipalities establishing mandatory inclusionary zoning programs, many municipalities with experience implementing voluntary ordinances are switching to mandatory ordinances. Their uniform and predictable nature, coupled with their documented effectiveness at producing more affordable units, has made mandatory programs overwhelmingly more popular.

¹⁷ All five cities have a population exceeding 400,000 people.



BUSINESS AND PROFESSIONAL PEOPLE
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**Keeping For-Sale Units Affordable Over Time:
One Important Step in Administering a Successful Inclusionary
Zoning Program**

November 2003

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Introduction

The majority of inclusionary zoning ordinances nationwide include an affordability control period for both rental units and owner-occupied units. These range in time from ten years to perpetuity. Keeping rental units affordable over time rarely presents a challenge; in fact, numerous state and federal financing programs include control periods for rental units produced under the programs. However, communities often lack successful models for keeping for-sale units affordable over time.

Resale prices on affordable owner-occupied units can be controlled. Deed restrictions, covenants that run with the land, contractual agreements, and land trust arrangements have all been used successfully in various communities around the country.¹ Examples from Massachusetts, Montgomery County, Maryland, and San Diego, California all provide useful models for keeping for-sale units affordable over time.

Models

Inclusionary housing programs can be structured in different ways to keep for-sale housing units affordable over time. The specific structure of affordability controls on for-sale units should be dictated by a local government's policy goals. If a local government's primary goal is to revitalize economically depressed areas and build wealth and equity among historically disadvantaged groups, then shorter control periods would be most appropriate. However, if a local government's primary goal is the preservation and production of an attractive supply of affordable housing for the social, workforce, and economic development needs of the community, then longer control periods would be a better choice. Some communities may wish to target their control period policies to meet a combination of both policy goals.

Chapter 40B in Massachusetts

In 1969 Massachusetts passed a zoning law known as Chapter 40B. The law was meant to address the statewide shortage of affordable housing by giving developers two mechanisms to overcome local government obstacles to affordable housing developments. Chapter 40B homes are all deed restricted, and the deed restriction requires that a monitoring agent oversee the sale of affordable housing units. The monitoring agent ensures that the home is resold to an eligible buyer at an affordable purchase price without any major equity sharing for the original buyer. When the control period ends, the owner may sell to any buyer as long as the extra profit is turned over to the municipality or to another appropriate entity identified in the deed restriction.

Montgomery County, Maryland

The deed restriction in Montgomery County, Maryland requires that affordable homeownership units be resold to eligible buyers at the original purchase price, plus the annual increase in the Consumer Price Index related to home construction. At the end of the control period, the owner may sell to any buyer and retain a certain amount of the higher resale price, provided that the excess profit is paid to the Housing Initiative Fund of Montgomery County.

¹ Business and Professional People for the Public Interest, *Opening the Door to Inclusionary Housing*, 39.

San Diego, California

The City of San Diego, California recently adopted an inclusionary zoning ordinance that makes the equity a homebuyer receives for the sale of an inclusionary unit contingent on the length of time the unit owner lived in the home. This mechanism allows the city to strike a balance between keeping the city's housing stock affordable over time while allowing homeowners to receive equity from their investment.

Community Land Trusts

Under the Community Land Trust model, the Trust leases land to homeowners. The homes built on this land cannot be sold above a maximum resale price. This price allows the seller to keep some percentage of the increase in the appraised value of the home, based on the appreciation in the market value of the home. Either the municipality or the trust in each of these programs is guaranteed the right of first refusal as to the purchase of the affordable housing units upon expiration of the control period.

These four options provide alternative models for keeping owner-occupied homes affordable over time. All four provide a slightly different way to balance the policy goal of preserving long-term affordability with the policy goal of providing low-income households with the opportunity to build wealth and equity.

I. Massachusetts

Massachusetts keeps its Chapter 40B housing units affordable through deed restrictions overseen by monitoring agents. All 40B units must be sold and resold at prices affordable to households earning less than 80 percent of the area median income (AMI). The affordability of the homeownership housing units is guaranteed through three important documents: the regulatory agreement, the monitoring services agreement, and the deed rider. These documents are signed by the developer and the lender, and the municipality may also choose to be part of this agreement.

A. Setting an Affordable Sales Price

The monitoring agent is responsible for working with the seller to determine an affordable sales price. The monitoring agent also ensures that the profit to the developer or any other shareholder does not exceed the maximum allowable profit (e.g. 20 percent of total development costs, not including development fees). The developer pays for the services of the monitoring agent at the beginning of the agreement. Monitoring services for the resale of affordable units are paid for through closing costs as a percentage of the resale price.

The affordable sales price determined by the monitoring agent and the seller is based on the 80 percent of AMI limit on the prospective buyer's income. This is a newer method, as the first approach to ensuring affordable resale prices proved untenable.² Originally, the regulatory agreement established a ratio between the market value of the 40B unit and the affordable sales

² Phone interview with Bill Reylet, Massachusetts Department of Housing and Community Development August (2003).

price. This ratio would have to hold over time, such that it would apply to the market value at the time of resale. However, this method failed due to the dramatic increase in the market value of housing. Housing costs rose considerably more than incomes, such that when the ratio was applied to the market value at the time of resale, it no longer yielded an affordable sales price. For this reason, the monitoring agent now bases affordability on the incomes of households earning 80 percent of AMI.

The developer must require the buyers of affordable units to execute a deed rider that requires the unit owner to notify the monitoring agent at the time of resale.³ The monitoring agent and the owner then come up with a marketing plan that must be approved by the subsidizing agency, which is usually either the Massachusetts Department of Housing and Community Development (DHCD) or the Massachusetts Housing Partnership.⁴ Upon resale, the owner works with the monitoring agent to establish a maximum sales price. This price cannot be less than the price paid by the current owner, and it must include the costs of marketing expenses and approved improvements to the property.⁵

While there is no equity sharing, the final sales price is designed to reasonably compensate the owner for the money put into the property. The owner does not keep any of the profit after selling the property.

B. Selecting an Eligible Buyer

Once the discounted sales price is determined, the owner must offer the unit for sale to the municipality, which has the right of first refusal. If the municipality declines to purchase the housing unit, then the seller must work with the monitoring agent to ensure that the prospective buyer earns less than 80 percent of AMI. Particular housing units are generally matched to household sizes that equal the number of bedrooms plus one. Exceptions can be made in some instances. For example, a single parent with two children who are over the age of eight and of opposite sexes may qualify for a three-bedroom household.

If multiple eligible buyers are found, then generally the municipality chooses the ultimate buyer by lottery. The details of the lottery are a part of the original marketing plan devised by the monitoring agent and the owner. If the municipality does not take part in the lottery process, it can be carried out by the developer, hired consultants, or the monitoring agent. The monitoring agent then signs and acknowledges the Eligible Purchaser Certificate, which confirms the property, purchaser, sales price, and overall legitimacy of the sale.

³ The resale procedure outlined here is based on the provisions of a sample regulatory agreement and deed rider, which were provided by Bob Engler, an affordable housing developer in Massachusetts.

⁴ All affordable units under 40B are state or federally subsidized.

⁵ It is highly unlikely that any approved improvements to the property would have a sizeable effect on the sales price. This is because large-scale improvements, such as a three-room addition, would probably not be approved by the monitoring agent and the subsidizing agency. There is no formal process for determining what improvements are acceptable. Improvements to the property are approved on a case-by-case basis, but substantial modifications are generally not authorized.

For the first 120 days the housing unit is on the market, the owner is required to make the unit available for purchase only to eligible buyers. After this period, the owner may offer the housing unit for sale to the general public. In this event, the unit will be free of any future sale restrictions, but the seller must turn over to the municipality any profit on the sale. This profit, which is the difference between the maximum sales price and the actual sales price, will be paid to an affordable housing fund used by the municipality. In the event that the municipality is not involved and does not have a housing fund, the profit will be directed to some other entity that is specified in the regulatory agreement. The vast majority of municipalities do have a fund, and otherwise profits are generally directed back into the project from which they arose.

C. Sale after the Expiration of the Control Period

Both the regulatory agreement and the deed rider make provisions for the end of the control period. The agreements expire after ninety-nine years, but the provisions of these two documents that address the end of the control period will survive the expiration of the agreements themselves. When the control period ends, the housing unit will be sold for its fair market value. However, the owner must nevertheless determine what the maximum sales price would be as if there were still a price control. Upon resale, the owner must pay any amount in excess of the maximum sales price to the municipality or any other entity specified in the regulatory agreement. Alternatively, the owner may make a payment to the municipality through refinancing or other sources that would equal the amount the municipality would receive from resale. In that case, the owner would hold the property free and clear of all prior restrictions.

II. Montgomery County, Maryland

In 1974, Montgomery County, Maryland put into place the first mandatory inclusionary zoning law in the United States. The Moderately Priced Dwelling Unit Program (MPDU) requires that every new development with more than 35 housing units set aside 12.5 to 15 percent of the units to be affordable to households earning at or below 65 percent of the area's median income.⁶ These units must remain affordable for a period of ten years.⁷ The Department of Housing and Community Affairs (DHCA) guarantees the affordability of the housing during this control period by restricting the sale prices and reserving the right of first refusal on the purchase of any affordable unit put up for sale.

A. Setting an Affordable Sales Price

Montgomery County has precise regulations regarding the sales prices of affordable housing units. The County Executive determines the initial sales price for low- and moderate-income households based on general market trends and statistics collected from the building industry, area employers, and professional and citizen groups. The sales price takes into account closing costs as well as brokerage fees.⁸ The County Executive determines the appropriate sales price for affordable units every five years; in other years, the price is increased according to the

⁶ Montgomery County Ordinance, 25A-5(c)(3). Income limits are adjusted each year and are available at the DHCA website, <http://hca.montgomerycountymd.gov/Housing/MPDU/mpdu.htm>.

⁷ Montgomery County Ordinance, 25A-3(g).

⁸ Montgomery County Ordinance, 25A-7(a).

Consumer Price Index.

The MPDU program provides that the maximum sales price of an affordable housing unit during the ten-year control period shall be the original sales price plus the following factors:

- (a) A percentage of the unit's original sales price equal to the increase in the cost of living since the unit was first sold, as determined by the Consumer Price Index for All Urban Consumers (CPI-U);
- (b) The fair market value of improvements made to the unit between the date of original sale and the date of resale;
- (c) An allowance for closing costs which were not paid by the initial seller, but which will be paid by the initial buyer for the benefit of the later buyer;
- (d) A reasonable sales commission if the unit is not sold during the priority marketing period to an eligible person from the Department's eligibility list.⁹

Alternatively, the upper limit on the resale price may instead be reduced if the unit has suffered abnormal wear and tear due to neglect, mistreatment, or poor maintenance.¹⁰

These factors are included in the sales price in order to guarantee that the MPDU owners do not lose money on their investments. However, compensation for improvements to the property is limited to those improvements allowed by the MPDU program. A list of approved improvements is available on the DHCA website.¹¹ Given these restrictions, it is unlikely that the value attributed to the improvements would be significant enough to render the sales price of the housing unaffordable.

B. Selecting an Eligible Buyer

The DHCA has the right of first refusal for sixty days to purchase the affordable unit from the seller at the affordable price. If the DHCA does not elect to purchase the unit, then the DHCA must notify eligible buyers of the resale.¹² Once the eligible buyers are notified, the DHCA can either give certain potential buyers priority through a lottery, or give the seller permission to sell to any eligible buyer. The County Executive may set certain requirements for the sale through administrative regulations. For example, the seller may be required to provide the DHCA with copies of the proposed sales contract and other documents verifying the legitimacy of the sale.¹³

The DHCA establishes a "priority marketing period" in which the seller must seek a buyer who has been issued a certificate of eligibility by the DHCA. Individuals may only purchase 2-bedroom or smaller units, a 2-person and larger household may purchase a 3-bedroom unit, and 4-bedroom units are restricted to 4-person households and larger. If at the end of this period there has not been a sale, then the seller is free to offer the housing unit to the general public. The price of the MPDU remains the same, and all of the controls remain in effect. Montgomery

⁹ Montgomery County Ordinance, 25A-9(a).

¹⁰ Montgomery County Ordinance, 25A-9(a).

¹¹ Available at <http://hca.montgomerycountymd.gov/Images/PDF/improvement%20list.pdf>.

¹² Montgomery County Ordinance, 25A-9(b)(1).

¹³ Montgomery County Ordinance, 25A-9(b)(3).

County will extend the priority market period until everyone on the lottery list has been contacted before it offers the affordable unit to the general public.¹⁴

C. Sale after the Expiration of the Control Period

Affordable homeownership units are subject to price controls for a ten-year period. However, if the unit is sold to an eligible buyer within ten years after its initial sale, then the unit is treated as a new sale and a new ten-year control period begins.¹⁵ After the expiration of the ten-year control period, the affordability limits are no longer tied to the housing unit. However, if the DHCA purchases the affordable unit and resells it to an eligible buyer after the control period ends, a new ten-year control period starts from the date of sale.¹⁶ This creates an opportunity for the DHCA to guarantee a consistent supply of affordable housing.

If the control period expires and the DHCA does not purchase the housing unit, then the seller can put the house on the open market. When the sale is completed, the seller must pay the Housing Initiative Fund “one-half of the excess of the total resale price over the sum of the following:

- (a) The original selling price;
- (b) A percentage of the unit's original selling price equal to the increase in the cost of living since the unit was first sold, as determined by the Consumer Price Index for All Urban Consumers (CPI-U);
- (c) The fair market value of capital improvements made to the unit between the date of original sale and the date of resale; and
- (d) A reasonable sales commission.”¹⁷

This amount can be adjusted to guarantee that the seller retains at least \$10,000 of the excess in the sales price. This enables the seller to get a fair return for his or her investment.

Although Montgomery County does not make use of a monitoring agent as Massachusetts does, the administrators of this program have found the system to be successful. The legal restrictions on the property have been an effective mechanism for guaranteeing the affordability of housing. Homeowners and their lawyers tend to comply with the deed restrictions because any sale that fails to adhere to these requirements would be illegal and voidable.¹⁸

III. San Diego, California

San Diego's inclusionary zoning ordinance does not contain an affordability control period for owner-occupied units. However, the city designed an incremental system by which equity from the sale of the affordable unit is split between the City and the homeowner if the home is sold within the first 15 years of homeownership. A homeowner is entitled to a larger share of the

¹⁴ Interview of Eric Larsen, MPDU Program Administrator, August, 2003.
¹⁵ Montgomery County Ordinance, 25A-3(g).
¹⁶ Montgomery County Ordinance, 25A-9(c)(3).
¹⁷ Montgomery County Ordinance, 25A-9 c (3).
¹⁸ According to Bernie Tertrault of Montgomery County, former administrator of the MPDU Program.

equity for each year of ownership. For example, if a unit is sold after two years the owner is entitled to 21% of the equity, whereas a unit sold after ten years entitles an owner to 69% of the equity. If a home is resold within the first fifteen years, the shared equity agreement restarts and applies to the new buyer for the subsequent 15 years. All funds collected by the City from the shared equity agreement are deposited in the Inclusionary Housing Fund to support affordable housing projects. The City is also entitled to a right of first refusal on any for-sale unit, regardless of the period of homeownership.

IV. Community Land Trusts

The Institute for Community Economics (ICE) developed the Community Land Trust model (CLT) in the 1960's with the purpose of creating affordable housing supplies that could be controlled locally. A CLT is a nonprofit organization that owns real estate in order to make it available to low-income households.

A. Land Leases

CLTs acquire land as well as buildings. Housing units can be owned by those who occupy them, but the land is permanently held by the CLT and only leased to the homeowners. The lease is usually in the range of ninety-nine years, which generally enables the homeowners to use the land for as long as they desire. The lessee has a one-time option of renewing the lease at the end of the ninety-nine year period. Yet the fact that the CLT retains ownership of the land means the costs of the land are permanently limited, which guarantees lower housing costs over time.¹⁹

In the event that the CLT decides to sell the land, the lease remains in effect under the new owner. However, if the CLT attempts to sell the land to anyone other than a nonprofit corporation, charitable trust, governmental agency, or other similar entity sharing the CLT goals, the lessee has the right of first refusal on the purchase of the land.²⁰ If the lessee is not given the opportunity to exercise this right, any sale is void.

B. Setting an Affordable Sales Price

Any buildings, structures, fixtures, and other improvements purchased by the lessee or constructed by the lessee on any part of the leased land shall be the property of the lessee.²¹ The first step in the sale of property and transfer of rights to the land is the lessee's written notice to the CLT of intent to sell.²² Within ten days of the CLT's receipt of the notice, the CLT and the lessee must agree upon and commission a licensed appraiser to determine the market value of the leased premises and the property owned by the lessee. The CLT pays for the appraisal services.

The sales price, or the "purchase option price," equals the price paid by the lessee at the time of

¹⁹ Information regarding the CLT structure was derived from the Revised Model CLT Ground Lease document provided by ICE. More detailed information is available in the form of a legal manual for CLT's that can be purchased from ICE at a cost of \$100.

²⁰ Revised Model CLT Ground Lease, Article 3.3.

²¹ Revised Model CLT Ground Lease, Article 7.1.

²² Revised Model CLT Ground Lease, Article 10.4.

sale, plus 25 percent of the increase in market value.²³ This enables the lessee to share in the profit that stems from increased market value and improvements to the property. The increase in the market value is calculated using the appraisal value for the property owned by the lessee. This amount, less the appraisal value at the time the property was purchased, is the increase in market value. Then 25 percent of this increased value is added to the price originally paid by the seller, and that is the purchase option price. The CLT may also add an additional percentage of the increase in market value to the final sales price in order to cover some of their administrative fees. Despite the fact that housing values are rising significantly in many parts of the country, adding this portion of the market value to the sales price does not interfere with the affordability of the property. One CLT suggested that income levels would actually have to drop in order for this system to render housing unaffordable.²⁴

If the calculated purchase option price turns out to be higher than the current appraised value, the purchase option price will instead be this appraised value. This would mean that either the value of the property has deteriorated and the lessee has to absorb some of this loss, or the value did not increase as anticipated and the lessee's share in the profit must correspond to the actual increase in value.

C. Selecting an Eligible Buyer

Article 10.1 of the Revised Model Community Land Trust Ground Lease clearly states that the purpose of the lease is to keep the housing affordable for low-income households. The CLT, as lessor, reserves the right to buy back the home or other improvements to the land when a lessee decides to sell. The land-lease agreement guarantees the CLT forty-five days from receipt of the appraisal to exercise their right of first refusal. The purchase must then be completed within sixty days of the CLT's notification of intent to purchase.

If the CLT does not take the opportunity to purchase the property or the right to do so expires, the lessee must sell to an income-qualified buyer. An income-qualified buyer is a household whose total income does not exceed a certain percentage of the area median income.²⁵ This percentage varies among different CLT's. Most CLT's assume 1.5 people per bedroom in their affordable housing units.²⁶ If, for example, a three-bedroom home matches up to a household of 4.5 people, then the CLT takes the average of the maximum incomes for four- and five-person households as the maximum income for eligible households. The lessee may recommend a prospective buyer who meets the income qualifications. The CLT is required to make reasonable efforts to secure this person a purchase option, unless the CLT believes that affordable housing objectives would be better served with a different buyer. All sales are subject to review by the CLT.

If the property is not sold to a qualified buyer after six months, then the lessee may sell to any buyer, regardless of qualifications. However, the sales price in every case must be the same restricted affordable price – the purchase option price – regardless of whether the buyer is the

²³ Revised Model CLT Ground Lease, Article 10.9.

²⁴ Telephone interview with Mary Houghton of the Burlington Community Land Trust (August 2003).

²⁵ Revised Model CLT Ground Lease, Article 10.2.

²⁶ Houghton, *supra* note 22.

CLT, a low-income household, or any other buyer.²⁷ This aspect of the CLT model distinguishes it from the methods used in Massachusetts and Montgomery County. It guarantees that the housing remains affordable regardless of who ends up purchasing the property.

Once the sale is completed according to the guidelines of the seller's lease, the parties to the sale must establish a lease for the new owner. The CLT may either assign the seller's lease to the new buyer, or assign a new lease that includes the same rights, benefits, and obligations as the seller's old lease.²⁸ The restrictions run with the land regardless of who buys the property built upon it.

Conclusion

There are various ways to keep for-sale housing units affordable as ownership changes. The models from Massachusetts, Montgomery County, San Diego, and the Community Land Trust structure illustrate four distinct ways to balance policy considerations. Montgomery County, the CLT, and San Diego models enable homeowners to benefit from their investment even after they resell the property. Some methods require the services of a monitoring agent, some give the local community the right of first refusal at the time of resale, and some make it easier for units to be transferred to the open market. These models differ in implementation, but they have all found some measure of success in addressing the thorny issue of whether and how to keep for-sale units affordable over time.

²⁷ Revised Model CLT Ground Lease, Article 10.7.

²⁸ Revised Model CLT Ground Lease, Article 10.11.

Keeping For-Sale Affordable Units Created by Inclusionary Zoning Affordable Over Time

| Municipality | Affordability Control Period | Income Target | Setting an Affordable Resale Price | Selecting an Eligible Buyer |
|-----------------------|--|---|--|--|
| Montgomery County, MD | 99 years | <65% of the AMI for for-sale units | County Executive sets sales price affordable to low- and moderate-income households based on general market trends, the building industry, and area employers; updated every five years and increased according to the Consumer Price Index in intermediate years ²⁹ | Department of Housing and Community Affairs (DHCA) has the right of first refusal; has 60 days to purchase affordable unit from the seller at an affordable price; DHCA must notify eligible buyers of the resale if it does not purchase the units; buyers chosen through a lottery or seller may sell to any eligible buyer; ³⁰ DHCA establishes priority marketing period during which seller can only sell to eligible buyers |
| San Diego, CA | None, but equity from the sale of the affordable unit is split between the homeowner and the city on an incremental scale up to 15 years of homeownership; the equity splitting agreement is lifted after 15 years of homeownership, but restarts with each resale | <65% of AMI for rental units and <100% AMI for for-sale units | Homeowners are entitled to a larger share of the equity for each year of ownership; e.g. if unit is sold after two years, the owner is entitled to 21% of the equity, and if unit is sold after ten years the owner is entitled to 69% of the equity; all funds collected are deposited in the Inclusionary Housing Fund | City entitled to right of first refusal for for-sale units |
| Burlington, VT | 99 years | 75% of the median income adjusted for household size | City limits equity appreciation to an amount that does not exceed 25% of the increase in the inclusionary unit's value, as determined by the difference between fair market appraisal at the time of purchase and a fair market appraisal at the time of resale, with adjustments for improvements and sales costs ³¹ | City of Burlington Housing Trust Fund or a "designated housing agency" assigned by the Trust Fund has the right of first refusal to purchase any inclusionary unit for 90 days from the date on which the Housing Trust Fund is notified of its availability |

²⁹Montgomery County Ordinance, 25A-7 (a).

³⁰Eligible buyers must be issued a certificate of eligibility by the DHCA.

³¹The Housing Trust Fund must approve adjustments.

| Municipality | Affordability Control Period | Income Target | Setting an Affordable Resale Price | Selecting an Eligible Buyer |
|---------------------|---|---|---|--|
| Cambridge, MA | 50 years | Moderate-income households (65% of the Boston MSA) | Resale price is based on a formula that accounts for the original price, a calculation based on interest rates of equity earned for each year of ownership, and a factor for capital improvements ³² | City has the right of first refusal; city's Community Development Department runs a lottery of eligible buyers; preference is given to Cambridge residents, families with children under 18, with higher priority given to families with children under six years of age, and to families with emergency housing needs |
| Boulder, CO | Perpetuity | Average of HUD's definition of low income | Maximum sales price for affordable units is set on a quarterly basis by the city; the resale price for a permanently affordable unit is based on the original purchase price, closing cost, consideration of permanent home improvements, inflationary factor or shared appreciation factor | A developer or owner selects a low-income purchaser after completion of a good faith marketing and selection process approved by the city manager; the city also keeps a list of eligible homebuyers available upon request |
| Fairfax County, VA | 15 years | <70% of the AMI | Resale price is based on the original sales price plus a percentage of the original sales price adjusted by the Consumer Price Index, the current market value of any structural improvements, and an allowance for closing costs | Eligibility based on obtaining a Certificate of Qualification from the Fairfax County Redevelopment and Housing Authority (FCRHA); for rental units, the landlord submits the following to the FCRHA on a monthly basis: the number of affordable units vacant, the number of units rented to eligible households, and evidence of a household's eligibility |
| Highland Park, IL | Perpetuity or as long as permissible by law | At least 50% of the units must be sold to low-income households. On average, the set-aside units must be affordable to households earning 65% of the AMI, remaining units sold to households earning 100% of the AMI on average | Restrictions on resale prices are not stated in the inclusionary zoning ordinance; rather each unit is required to include an as yet to be determined formula for the resale price in the deed restriction (the formula is developed by the Housing Commission) | Housing Commission or a city designated not-for-profit has the right of first refusal |

³²Interview of Robert Vining, City of Cambridge Inclusionary Zoning Administrator, August 2003.



Issue Brief #4

Inclusionary Housing in Montgomery County, MD

Montgomery County, MD, the nation's sixth richest county, is located immediately north and northwest of Washington, D.C. With more than 800,000 residents, it is the most populous county in Maryland. During the 1970s and 1980s, Montgomery County grew from a Washington D.C. bedroom community to the region's second largest employment center. Now more than 60 percent of residents work and live in the County. Montgomery County is notable for its integrated neighborhoods—by racial and ethnic group, and by income, and most attribute this to an affordable housing law passed over 25 years ago.

In the 1960s, Montgomery County began experiencing a shortage of affordable housing. As demand for residential building lots exceeded supply, prices increased at rates higher than general inflation. Builders saw a reduction in their housing output and began constructing the largest and most profitable houses they could on virtually irreplaceable lots. Increases in new housing costs caused the price of existing houses to increase, making it difficult for young families to find housing in the County.

By 1967 the League of Women Voters, Suburban Maryland Fair Housing and other housing advocacy groups set out to secure county policies to diversify the local housing supply. In 1974, as a result of their persistent efforts, the Montgomery County Council passed local legislation creating an innovative countywide inclusionary zoning and density allowance program—the Moderately Priced Housing law. Believed to be the country's first mandatory, inclusionary zoning law, Montgomery County's Moderately Priced Dwelling Unit program requires that between 12.5 and 15 percent of the total units in every new subdivision or high-rise building of 50 or more units be sold or rented at specified, affordable prices. Developers are granted density bonuses of up to 22 percent, which allow them to build more units on a particular parcel of land than zoning normally allows.

In addition, the law gives the County's public housing authority, the Housing Opportunities Commission (HOC), the right to purchase one-third of the affordable housing units. These units are used for HOC's programs to assist low-income families and to ensure that subsidized housing is dispersed all over Montgomery County—and not concentrated in a few areas—avoiding segregation by race and income.

The affordable housing units are designed to blend into the larger developments of which they are a part. The style, quality and construction of the units are often indistinguishable from that of nearby market rate housing. While each development's Homeowners Association oversees maintenance of common areas and sometimes exteriors, the HOC maintains its subsidized rental units, and individual owners are responsible for keeping up their own properties.

Resale and occupancy restrictions are also imposed on the affordable units. The price at which a unit can be resold is controlled for 10 years and, from 11 to 20 years a portion of the appreciated resale price of an affordable unit must be paid to the County, and after 20 years these are no restrictions. Households with an income at or below 65 percent of the area's median income, adjusted by family size, qualify for the program.

According to the County's Department of Housing and Community Affairs, overall goals of the program are:

- To produce moderately priced housing so that County residents and persons working in the County can afford to purchase or rent decent housing;
- To help distribute low and moderate-income households throughout the County's growth areas;
- To expand and retain an inventory of low-income housing in the County;
- To provide funds for future affordable housing projects by sharing the windfall appreciation when affordable housing units are first sold at the market price.

The affordable housing program has received broad support in Montgomery County. New homebuyers are among the most vocal supporters because the program makes affordable housing available to families who otherwise might not have been able to live in the County. Employers and businesses support the program because it creates housing for entry level and mid-management employees. Affordable housing advocates support the program because it provides for a geographic distribution of low and moderate-income housing, encouraging racial and economic integration. Elected officials support the program because it doesn't require a large financial investment by the County. Although builders initially expressed objection to some of the program's procedures and regulations, they are now generally supportive and have made suggestions for its improvement.

Recent studies conducted by the Innovative Housing Institute have shown that resale prices of market value homes are not adversely impacted by their proximity to affordable housing. This is true whether the subsidized housing is in the same subdivision, within 500 feet of, or directly adjacent to the market rate housing.

Since 1974, more than 10,000 units of affordable housing have been built in Montgomery County. More than 1,600 of those units are owned and managed by the Housing Opportunities Commission.



BUSINESS AND PROFESSIONAL PEOPLE
FOR THE PUBLIC INTEREST

The Impact of Inclusionary Zoning on Development

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The Impact of Inclusionary Zoning on Development

I. Summary

Inclusionary housing has become a popular tool nationwide for addressing the shortage of affordable housing.¹ Inclusionary zoning requires developers to reserve a certain percentage of new residential development as affordable to low-and moderate-income households. Most inclusionary zoning ordinances contain a threshold level for coverage (e.g. developments of 5 units or more or 10 units or more); categories for types of development covered (e.g. new construction, condo conversion, substantial rehabilitation); income targets for the population to be served (e.g. 80% of the Area Median Income); cost offsets and developer incentives (such as density bonuses, expedited permitting, flexible zoning, etc.); and in-lieu-of alternatives that allow a developer to pay a fee, build off-site, or rehab units in lieu of building affordable units within the covered development.

Hundreds of communities across the country now use some form of inclusionary zoning at the local level in order to address affordable housing needs. According to a recently completed survey and study, at least 107 inclusionary zoning programs exist in California as of March 2003.² In Massachusetts, there are 118 programs in which the local jurisdiction uses traditional inclusionary zoning or some sort of incentive zoning to create affordable housing.³ 266 de facto inclusionary housing programs exist in New Jersey as a result of the *Mt. Laurel* litigation and the state's Fair Housing Act.⁴ Two or three dozen more programs exist in cities and counties scattered around the country (with four alone in the Washington D.C. metro area and programs in local jurisdictions in a diverse mix of states such as North Carolina, New Mexico, Florida, Illinois, Vermont, and Colorado).⁵

Communities value this tool for many reasons:

- **Strengthens Communities:** Inclusionary housing produces affordable homes and apartments for valued community members: policemen, firefighters, and other important public sector employees; seniors; young families; and social

¹ The terms "inclusionary housing" and "inclusionary zoning" will be used interchangeably throughout this policy brief referring to local programs that require or encourage developers to reserve some portion of the housing units in covered developments as affordable to low-and moderate-income households.

² California Coalition for Rural Housing and Non-Profit Housing Association of Northern California. 2003. *Inclusionary Housing in California: 30 Years of Innovation*. San Francisco, CA: California Coalition for Rural Housing and Non-Profit Housing Association of Northern California, p.7.

³ Clark Ziegler. 2002. "Introduction," in *Inclusionary Housing: Lessons Learned in Massachusetts*. National Housing Conference (NHC) Affordable Housing Policy Review. Vol. 2, Issue 1. Washington, D.C.: National Housing Conference, p.1.

⁴ The *Mt. Laurel* litigation ruled "exclusionary zoning" practices to be unconstitutional under the New Jersey State Constitution and provided a "builder's remedy" to developers wishing to build affordable housing. The legislatively-enacted Fair Housing Act creates an obligation on local governments to produce their "fair share" of affordable housing. Richard Tustian. 2000. "Inclusionary Zoning and Affordable Housing," in *Inclusionary Zoning: A Viable Solution to the Affordable Housing Crisis?* New Century Housing, Vol. 1, Issue 2. Washington, D.C.: The Center for Housing Policy, p. 23.

⁵ Compiled from resources produced by the Innovative Housing Institute, PolicyLink, and Business and Professional People for the Public Interest. 2003.

service professionals and service sector workers such as day care instructors, home health care aides, security guards, and others who provide necessary services.

- **Market-Driven and Fiscally Responsible:** Inclusionary housing harnesses the power of the marketplace to produce affordable homes and apartments without significant outlays of public subsidy.
- **Economic Development:** Inclusionary zoning aids economic development efforts by providing housing for the workforce (which helps to retain and attract new business investment) and providing more disposable income for low-and moderate-income households by ensuring that they only have to spend 30% of their income for housing instead of 35-50% or more. This additional disposable income can provide economic stimulus as low-and moderate-income households spend that money on goods and services in the local economy.
- **Smart Growth and Protection Against Disinvestment:** Inclusionary housing contributes to smart growth and reinvestment in already-developed areas by making it possible to produce affordable housing in the urban core and not just on the suburban fringe.
- **Economic and Racial Integration:** Inclusionary housing promotes economic and racial integration which can lead to a host of positive social and economic outcomes such as improved schools, decreased crime, and reduced poverty, all of which have not only significant social benefits, but also significant fiscal benefits to city government.
- **Overcoming NIMBY:** Inclusionary zoning helps to demonstrate that affordable housing can be successfully mixed with market-rate housing and thereby can help to overcome longstanding stereotypes.

However, no policy tool is perfect or a panacea. One major criticism and concern about inclusionary zoning is that it will slow the pace of development. Slowing the pace of development can be a negative outcome for two major reasons:

- 1) It could contribute to the undersupply of housing (which would in the long run exacerbate the problem of affordability of housing). If less housing is being built or rehabbed and more people are chasing fewer homes, the price of housing will increase.
- 2) It could also harm a community's tax base and economic development as developers take their private investment elsewhere. The community would thus lose not only the developers' capital, but also the property tax revenue that comes from new homebuyers who move into the units built by developers.

This concern should and must be addressed by those considering inclusionary zoning programs. Does inclusionary zoning slow development?

In answering this question, one must begin by acknowledging that there is not a long line of studies that have empirically examined this question. However, one can infer much about the impact of inclusionary zoning from four sources:

- 1) Economic literature about the “theoretical” incidence of inclusionary zoning.
- 2) The performance of inclusionary zoning ordinances in different communities around the country, and the response by those local communities to the performance of inclusionary zoning ordinances.
- 3) Broader studies examining this issue or the broader “pros and cons” of inclusionary zoning, based on real-world experiences.
- 4) The reaction of developers and other concerned constituencies to inclusionary zoning over time. Do developers and others maintain a negative posture towards inclusionary zoning after implementation?

This policy brief will examine these four sources to determine whether inclusionary zoning is likely to have a negative impact on levels of housing production. In addition, this policy report will examine “why” inclusionary zoning does or does not have a negative impact on development.

From these four sources, one can conclude that inclusionary zoning is unlikely to slow or dampen private, residential development and in some cases, may actually help it to accelerate. Of course, whether or not development will slow or rapidly increase in a specific community depends to a much larger degree on the strength of the local housing market, larger economic trends, and the specifics of the inclusionary housing program. As a general rule, larger market forces (interest rates, the unemployment rate, levels of aggregate demand and consumer confidence, overall economic growth rates, etc.) will determine whether development in any particular community will rise or fall; the presence or absence of inclusionary zoning will determine whether or not more moderate- and low-income working people will be able to live in the communities where they work.

II. Does Inclusionary Zoning Slow or Dampen Development?

This policy brief examines four sources for determining whether or not inclusionary zoning has a negative effect on the level of development in a community: 1) economic literature examining the theoretical incidence of inclusionary housing; 2) the performance of inclusionary zoning ordinances around the country; 3) broader studies examining the “pros and cons” of inclusionary zoning; and 4) the reaction of developers and other concerned constituencies to inclusionary housing programs over time.

A. The Theoretical Incidence

Basic economic theory suggests that an inclusionary set-aside (without sufficient cost offsets or incentives to cover the cost of producing the affordable units) would cause developers to take one or some combination of the four following actions :

- 1) Raise prices on market-rate housing units;
- 2) Develop less housing;
- 3) Reduce profits; or
- 4) Bargain for and pay less for certain “inputs” into the development process (such as land).

Though universal agreement among scholars does not exist, most of the economic literature indicates that #4 above is most likely.⁶ Developers will most likely incorporate the cost of the affordable homes or apartments into their projects ahead of time and bargain for a lower land price in order to develop the housing. Thus, the theoretical incidence of an inclusionary zoning program (without sufficient cost offsets or incentives) over time, would be born by landowners of vacant land that would support the size of development subject to the inclusionary housing requirement (e.g. 10 units). Of course, the level of “cost offsets” that a community chooses to include in its inclusionary housing program would limit the level of this moderation in land prices. With more generous “cost offsets,” a developer need not bargain for a lower price in land.

This outcome is not surprising, given the fact that zoning does in large part determine the price of land. Nor is this outcome necessarily inequitable. Because most inclusionary housing programs contain a unit “threshold” of 5, 10, or even 50 units, the incidence of the program would be born by landowners of vacant land of significant size, not single-family homeowners dependent upon the equity in their homes for their livelihood and retirement. Landowners of vacant land large enough to require an affordable component (for example 10 units of housing in many ordinances) could see a reduction in the rising price of their land over time. However, this moderate reduction in a rising real estate market will most likely not deprive the se owners of earning anything less than a healthy return on their investment in that land. Furthermore, a moderate reduction in land costs is exactly the kind of measure that is most needed to help improve affordability and enable developers to produce affordable units in a market with rapidly rising real estate values.

It is important to remember that this notion is theoretical; it has not been empirically proven.⁷ Most programs around the country do contain cost offsets.

B. The Performance of Inclusionary Zoning Programs and Local Governmental Response

One way to examine whether an inclusionary housing program is slowing development is to look at whether the program is producing affordable units. After all, with inclusionary zoning, if private residential activity does not continue, affordable homes and apartments cannot be produced.⁸

⁶See: Alan Mallach. 1984. *Inclusionary Housing Programs: Policies and Practices*. New Brunswick, NJ: Center for Urban Policy Research -- Rutgers University.; Dr. Robert W. Burchell and Catherine C. Galley. 2000. “Inclusionary Zoning: Pros and Cons,” in *Inclusionary Zoning: A Viable Solution to the Affordable Housing Crisis?* New Century Housing, Vol. 1, Issue 2. Washington, D.C.: The Center for Housing Policy, p.7.; Nico Calavita and Kenneth Grimes. 1998. “Inclusionary Housing in California: The Experience of Two Decades.” *Journal of the American Planning Association*. Vol. 64, No. 2, Spring. Chicago, IL: American Planning Association (APA), pp. 150-170.; Arthur O’Sullivan. 1996. *Urban Economics*. 3rd. Ed. Chicago IL: Irwin Publishers, p. 294.

⁷ Calavita and Grimes, “Inclusionary Housing in California,” p. 152.

⁸ This of course will not absolutely determine whether development has slowed or not, but it does provide some indication of whether development has slowed or stopped.

A review of results from a sample of communities with inclusionary zoning indicates that a significant number of new affordable units have been produced. No evidence exists to indicate that development has slowed in these communities. Appendix I lists a number of programs across the country. What is striking about this review of programs from around the country is that it shows that inclusionary zoning has worked in many different localities: from wealthy counties with large suburban populations to small, mid-sized, and more recently, large cities. In addition to units, many of these programs have generated significant amounts of fee-in-lieu dollars that can be used to support affordable housing efforts in the community in other ways.

The record of production has been quite impressive (See Table 1 below). In California, one-third of the more than 107 programs (some passed many years ago and others passed more recently) have produced over 34,000 affordable units over thirty years.⁹ In the Washington D.C. metro area, four programs (passed in 1973, 1990, 1993, and 1991) at the county level have produced over 15,000 units over the past thirty years.¹⁰ In the state of New Jersey, “de facto” inclusionary housing programs exist in 250 of the state’s 566 communities due to the *Mt. Laurel* litigation and the state’s Fair Housing Act. Over 15,000 affordable units were directly produced under these programs from approximately 1985 to 2000 at one-third of the cost of market-rate units (\$75,000 per unit).¹¹

Table I: Levels of Housing Production from Around the Country

| Region/State | # of Programs | # of Affordable Units | Time Period |
|-----------------------------|-------------------------|--|--------------------|
| California | At least 107 | Over 34,000 (from 1/3 of the 107 programs) | 30 years |
| Washington, D.C. Metro Area | 4 County-based programs | Over 15,000 | 30 years |
| New Jersey | 250 “de facto” programs | 15,000 | 15 years |

A number of individual programs stand out as impressive examples when it comes to production of units. Montgomery County, Maryland alone has produced over 11,500 units since 1973 and has generated \$477.4 million of private sector investment in affordable housing.¹² Fairfax County, Virginia has produced 1746 units since passage of its program in 1991 with another 2000 in the development or planning pipeline. Irvine, California has produced 3415 units, and Longmont, Colorado, despite a population of only 70,000 people,

⁹ California Coalition for Rural Housing. *Inclusionary Housing in California: 30 Years of Innovation.*, p. 7.

¹⁰ The record of production comes from four programs: Montgomery County, MD; Fairfax County, VA; Loudon County, VA; and Prince George’s County’s, MD. Prince George’s County repealed its program in 1996, but the community of Rockdale, MD recently passed a new program bringing the total number of programs in the D.C. metro area back to four. Radhika K. Fox and Kalima Rose. 2003. *Expanding Housing Opportunity in Washington, D.C.: The Case for Inclusionary Zoning.* A PolicyLink Report. Oakland, CA: Policy Link, p. 15.

¹¹ Tustian, “Inclusionary Zoning and Affordable Housing,” p. 23.

¹² Phone Interview with Eric Larsen, August 2003.; Karen Destorel Brown. 2001. *Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area.* Washington, D.C.: Brooking Institution, Center on Urban and Metropolitan Policy, p.14.

has produced 450 units since 1995 with 484 more units in the production or planning pipeline.

Larger cities have also produced impressive results with relatively new programs. Denver, Colorado, has 804 units in the development pipeline since passage of its program in 2002. San Francisco, California, has produced 90 affordable units since passage in 2002 with approximately 800 more in the development pipeline. Successful programs also exist in larger urban centers such as San Diego, Boston, and Sacramento, California.¹³

In fact, in many communities, development under inclusionary zoning has continued so robustly that it has led local officials to consider measures to slow development in the interest of protecting rural and open space. In Loudon County, Virginia, the nation's fourth-fastest growing county, the decade-old inclusionary zoning program was recently amended because it was producing so much new construction that local officials were concerned about its effects on Loudon's shrinking amounts of remaining rural countryside.¹⁴

Mini Case Study: Four Locations with Inclusionary Housing Programs, but Few Cost Offsets or Incentives for Developers.

These numbers are significant and suggest that development does not slow after passage of inclusionary zoning. However, affordable units could be produced by a program even as overall development slows or declines. The four programs profiled below provide a closer look at this issue. Recent experience from three large cities - San Diego, Boston, San Francisco - and one smaller college town - Chapel Hill, North Carolina, (population 48,000) suggest that inclusionary housing does not stifle development and that development under an inclusionary housing program can thrive without large cost offsets or developer incentives. In these communities, by and large, municipalities are treating the affordability component as part of the zoning code no different from zoning requirements such as minimum lot size, limited building height allowance, required setbacks, etc. This decision stems from a belief that a strong housing market and the ability to negotiate land purchase price negate the need for a municipality to provide significant cost offsets or incentives in order to subsidize an affordable component.¹⁵

In Boston, Mayor Thomas Menino signed an Executive Order in 2000 that requires a 10% affordability component in any residential project of ten (10) or more units financed by or developed on property owned by the City of Boston or the Boston Redevelopment Authority (BRA) or requiring rezoning relief. Under the Boston Zoning Code, practically every residential development over nine units requires rezoning relief. Only projects

¹³ Sacramento, CA (population 407,075) and Denver, CO (population 554,636) also qualify as "large cities" with inclusionary housing programs. Sacramento passed its program in 2000 and as of the summer of 2003, the program had produced 254 units, with hundreds more in the development pipeline. Denver passed its program in 2002 and as of the summer of 2003, 804 affordable units were already in the development pipeline. There is no evidence that development has slowed in either city as a result of the programs.

¹⁴ Brown. *Expanding Affordable Housing*, p.9.

¹⁵ Calavita and Grimes. "Inclusionary Housing in California," pp. 152.

located in the financial district may receive height bonuses under the inclusionary program. A project with 10% affordable housing receives a 150 to 300 foot height bonus and a project with 20% affordable housing receives a 400 foot height bonus. If the project is covered by the program but does not lie within the financial district, no bonus or incentive is provided.

The City of San Francisco adopted an inclusionary zoning ordinance in 1992 that applied to projects of ten (10) or more units requiring a conditional use permit or zoned as a Planned Unit Development (PUD). The limited scope of the 1992 ordinance proved ineffective at meeting the demand for affordable housing, which led to the program's expansion in January of 2002. The ordinance now requires a 10% set-aside in all major projects of ten or more units, regardless of their location. Unlike most inclusionary zoning programs in the nation, San Francisco does not supply significant incentives like a density bonus or flexible zoning. San Francisco does provide refunds on environmental review and building permit fees for the portion of the development that is affordable.

In 1992, voters in the City of San Diego imposed an inclusionary housing requirement in the North City Future Urbanizing Area (FUA), a developing section of the city with no rental or affordable housing. The policy requires that 20% of all new dwelling units be affordable to households earning 65% of the AMI. The FUA inclusionary requirement is responsible for 1,200 units in the last decade. This program was recently expanded to a mandatory, citywide law. The citywide law requires a 10% affordability component in all projects of 10 or more units. The program contains no "cost offsets" for developers.

City planners in these three large cities recently analyzed development trends before and after the adoption of inclusionary zoning ordinances and found no decrease in overall development (See Table II below). According to Meg Kiely, Deputy Director of Community Development and Housing at the Boston Redevelopment Authority, inclusionary zoning has not had a negative effect upon the pace of housing construction in the city. Thanks to the new policy, the city can now reach both its market rate *and* affordable housing production goals.¹⁶ According to Theresa Ojeda, a city planner for the city of San Francisco, there was no slowdown in permit and planning approval after the inclusionary zoning program was expanded in 2002 to cover all developments over ten units. In fact, there was an increase in development due to prime market conditions in the city.¹⁷ According to San Diego senior city planner Bill Levin, development did not slow after passage of inclusionary zoning in 1992 covering a specific part of the city called the North City Future Urbanizing Area (FUA).¹⁸ In fact, the success of the FUA ordinance contributed to San Diego's recent adoption in 2003 of a citywide, mandatory inclusionary zoning law.

¹⁶Kiely, Meg. "Boston's Policy Gives Developers Choice," In: Inclusionary Zoning: Lessons Learned from Massachusetts, NHC Affordable Housing Policy Review, January, 2002.

¹⁷ Phone Interview of Theresa Ojeda, San Francisco City Planner, July, 2003.

¹⁸ Phone Interview of Bill Levin, San Diego Senior Planner, August, 2003.

Table II: Production Under Programs with Few or No Cost Offsets

| City and Year Passed | % Set Aside | Cost Offsets | # of Units | Effect on Level of Market Rate Development |
|--|---------------------------|---|--|---|
| Boston, MA (2000) | 10% | Height bonus in financial district | 200 units with more in the development pipeline | <u>No effect</u> – can now meet market <i>and</i> affordable production goals |
| San Francisco, CA (1992, expanded in 2002) | 10% | Refunds on environmental review and building permit fees for affordable units | 128 units from 1992-2002; 90 since 2002 with 745 more in the pipeline | Market-rate development <i>has increased</i> |
| San Diego, CA (1992, expanded in 2003) | 20% in FUA; 10% elsewhere | No Offsets in either program | 1,200 units between 1992 and 2003 from the FUA. 1,200 more anticipated from the new citywide ordinance | <u>No effect</u> |
| Chapel Hill, NC | 15% | No Offsets | 154 units between 2000 and 2002 | <u>No effect</u> |

This experience extends beyond these three large urban centers to a smaller city and college town in North Carolina. The town of Chapel Hill recently stopped waiving the development application fee, which was previously offered as a cost off-set under the Town's voluntary inclusionary zoning policy, which calls for a 15% set-aside in all developments of five (5) or more units.¹⁹ According to Senior Planner Phil Mason, the fee waiver was originally put into the fee structure as an incentive to encourage applicants to propose affordable housing as a component of new development. Since the policy's adoption, it has become the Council's expectation and common practice for all residential developments to set aside affordable units. The city no longer views inclusionary zoning as a policy that necessitates a town subsidy in the form of a fee waiver.²⁰ Thus far, the lack of incentives has not discouraged development in Chapel Hill.²¹

There are strong policy, political, and legal reasons for including real and substantial “cost offsets” or “incentives” for developers in any inclusionary housing program. As a matter of policy, such incentives can ensure that the burden of producing affordable housing is equally born by the entire community. Politically, the presence of cost offsets can help to

¹⁹ The city’s program, though officially voluntary, is implemented by city staff very aggressively, as if it were mandatory. Phone Interview of Phil Mason, Town of Chapel Hill Senior Planner, June 2003.

²⁰ Phone Interview of Phil Mason, Town of Chapel Hill Senior Planner, June 2003.

²¹ Ibid.

win broader support for an inclusionary housing program. Legally, the inclusion of cost offsets can help to ensure that an inclusionary zoning program will not be judged unconstitutional as an illegal taking.²² However, it is instructive to note that in a number of communities, despite the lack of significant cost offsets, housing production has not been negatively affected.

Reaction by Governmental Jurisdictions to Inclusionary Housing Programs

Hundreds of inclusionary programs of some nature now exist around the country. More and more communities are adopting this tool; many communities are strengthening the programs they already have; and almost no communities have repealed programs after adopting them.

Despite hundreds of programs over the past thirty years, research conducted by Business and Professional People for the Public Interest (BPI) uncovered only two communities where inclusionary housing programs have been repealed. In one of those communities -- Fairfax County, Virginia -- the program was invalidated by the courts in the early 1970s, in part because the program lacked any cost offsets for developers.²³ However, in 1991, Fairfax County, Virginia passed a mandatory ordinance with cost offsets that has seen strong and successful production. The other community, Prince George's County, Maryland had an inclusionary zoning ordinance from 1991 to 1996, which was extremely successful in terms of production as it produced 1600 units in only five years without stunting development.²⁴ However, county officials repealed the program in 1996 because they felt that the county already had its "fair share" of affordable housing in the D.C. metro area.²⁵

Many more communities are adopting this tool, seeing it as a viable way to address the affordable housing crisis in a world of shrinking federal and state housing subsidies. Between 1994 and 2003, at least 43 communities in the state of California alone adopted inclusionary housing programs.²⁶ Since 1990, three communities in Colorado, one in New Mexico, two in Florida, one in Vermont, and one community in Illinois (the first ever in that state) have adopted mandatory inclusionary zoning laws.

A number of jurisdictions that already have inclusionary housing programs are expanding them and making them stronger by changing them from voluntary programs to mandatory programs. Cambridge, Massachusetts; Irvine, California; Pleasanton, California; and Boulder, Colorado, all recently switched their programs from voluntary to mandatory status. The result of each of these changes to mandatory status has been a significant

²² This is not to say that inclusionary housing programs without cost offsets do not meet constitutional muster, just that one's legal defense of a program is enhanced with prudent cost offsets.

²³ See: *Board of Supervisors of Fairfax County v. Degroff Enterprises, Inc.* 198 S.E.2d 600 (VA 1973). Business and Professional People for the Public Interest (BPI). 2003. *Opening the Door to Inclusionary Housing*. Chicago, IL: Business and Professional People for the Public Interest, p. 56.

²⁴ Brown, *Expanding Affordable Housing*, p.11; Fox and Rose, *Expanding Housing Opportunity in Washington D.C.*, p.15.

²⁵ Ibid.

²⁶ California Coalition for Rural Housing et al., *Inclusionary Housing in California*, p.2.

increase in the production of affordable housing.²⁷

C. Broad Studies of Inclusionary Zoning and Feasibility Studies from Specific Cities

In addition to looking at levels of production in programs around the country, one can look to broad studies or surveys examining the experience with inclusionary zoning and its major strengths and weaknesses. Some of these studies examine the issue of production specifically and fail to find evidence of a negative impact. Others examine a wide range of strengths and weaknesses. None suggests that inclusionary zoning dampens or stifles development.²⁸

No Negative Impact in California

A study by David Paul Rosen and Associates examining the effect of inclusionary housing programs on the pace of development in 28 cities in California over a twenty-year period provides the closest thing to a comprehensive study addressing the question of whether inclusionary housing dampens or slows development.²⁹ The study examined new construction residential building permit figures for 28 cities in Orange, San Diego, San Francisco, Los Angeles, and Sacramento counties – including jurisdictions with and without inclusionary zoning -- and also examined the effect of variables independent to inclusionary housing for their impact on housing production. These variables included changes in the prime rate, the median price for new construction homes, the 30-year mortgage rate, unemployment levels, and the 1986 Tax Reform Act.

The study found that passage of an inclusionary housing program did not have a negative effect on levels of housing production. In fact, in a number of jurisdictions (including San Diego, Carlsbad, Irvine, Chula Vista, and Sacramento), housing production increased, in some cases quite dramatically, after passage of inclusionary zoning.³⁰ In only one

²⁷ See: Business and Professional People for the Public Interest. November, 2003. *Voluntary or Mandatory Inclusionary Housing? Production, Predictability, and Enforcement*. Chicago, IL: Business and Professional People for the Public Interest.

²⁸ California Coalition for Rural Housing. 1994. *Creating Affordable Communities: Inclusionary Housing Programs in California*. Sacramento, CA: California Coalition for Rural Housing.; Center for Housing Policy. 2000. *Inclusionary Zoning: A Viable Solution to the Affordable Housing Crisis?* New Century Housing, Vol. 1, Issue 2. Washington, D.C.: Center for Housing Policy.; National Housing Conference (NHC). 2002. *Inclusionary Zoning: Lessons Learned from Massachusetts*, NHC Affordable Housing Policy Review, Vol. 2, Issue 1. Washington, D.C.: National Housing Conference.; David Paul Rosen and Associates. 2002. *City of Los Angeles Inclusionary Housing Study: Final Report*. Los Angeles, CA: Prepared by David Paul Rosen and Associates for the Los Angeles Housing Department.; Nico Calavita, Kenneth Grimes, and Alan Mallach. 1997. "Inclusionary Housing in California and New Jersey: A Comparative Analysis." *Housing Policy Debate*. Vol. 8, Issue 1. Washington, D.C.: Fannie Mae Foundation. P. 122.; Marc Brown and Ann Harrington. 1991. "The Case for Inclusionary Zoning," *Land Use Forum* 1(1): 23-24.; San Diego Housing Commission. 1992. *Inclusionary Housing Analysis: Balancing Affordability and Regulatory Reform*. Report to the Deputy City Manager. San Diego, California.; Brown, *Expanding Affordable Housing Through Inclusionary Zoning*.; Calavita and Grimes. "Inclusionary Housing in California" 150-170.; California Coalition for Rural Housing et al. *Inclusionary Housing in California: 30 Years of Innovation*.; Fox and Rose. *Expanding Housing Opportunity in Washington, D.C.* pp. 15-16.

²⁹ See: David Paul Rosen and Associates. 2002. *Los Angeles Inclusionary Housing Study*, pp. 49-57.

³⁰ *Ibid.*, pp. 49-53.

community, Oceanside, did housing production fall after passage of inclusionary zoning, but this drop in production was most likely caused by increasing unemployment and increasing housing vacancy rates over this same period of time.³¹ The study also found that housing production was heavily affected by unemployment levels (in general, as the unemployment rate rises, housing production falls and vice versa) and the median price of new construction homes (as median home prices rise, housing production rises and as median home prices fall, housing production falls as well).

A recent 2003 study by the California Coalition for Rural Housing and the Non-Profit Housing Association of Northern California came to the same conclusion.³² The study examined 107 inclusionary zoning programs across the state of California and failed to uncover any evidence that inclusionary zoning has or is slowing or dampening development. The study documents that:

“...the market arguments that inclusionary policies will stifle construction or dramatically increase market-rate real estate prices have yet gone unproved. During the 1990s, construction rates and permit valuations remained steady or rose in inclusionary jurisdictions, as they did statewide. Anecdotal reports confirm that developers continue to build and that more newly constructed units are affordable as a result of local inclusionary programs.”³³

In fact, the survey goes on to find that there is no evidence that programs that target the affordable units to a deeper income target (e.g. 80% of the AMI instead of 100% of the AMI) discourage development in any way.³⁴ Two other studies examining the performance of inclusionary zoning in the state of California, one from 1994 and the other from 1998, also suggest that inclusionary zoning has produced significant numbers of affordable units without any evidence of a decline in market production.³⁵

National Reports Indicate No Negative Effect on Development

Another recent report on inclusionary zoning by PolicyLink came to a similar conclusion.³⁶ This 2003 report, entitled *Expanding Housing Opportunity in Washington D.C.*, examines the pros and cons of inclusionary zoning and its record of performance in the Washington D.C. metro area. The report addresses the issue of whether inclusionary zoning slows development quite directly when it states,

“While research on this question shows that housing production has not declined in jurisdictions with inclusionary zoning, no studies have undertaken a comprehensive analysis of changes in developer profit once IZ [inclusionary zoning] is adopted.”
(p.15)

³¹ Ibid.

³² California Coalition for Rural Housing et al. *Inclusionary Housing in California*.

³³ Ibid, p.20.

³⁴ Ibid., p.22.

³⁵ California Coalition for Rural Housing, *Creating Affordable Communities*.; Calavita and Grimes. “Inclusionary Housing in California”, pp. 150-170.

³⁶ Fox and Rose. *Expanding Housing Opportunity in Washington, D.C.* pp. 15-16.

The PolicyLink study went on to note that feasibility studies conducted by local municipalities in advance of adopting an inclusionary requirement have shown that residential developers can build the affordable units and still make a profit (San Diego and Salinas, California). These studies show that developers can continue to see a healthy return, especially when the program includes density bonuses for covered developments.³⁷

Finally, a Center for Housing Policy report examines the pros and cons of inclusionary zoning.³⁸ However, the report does not mention any existing municipalities with inclusionary zoning that have seen a decrease in development or their tax rolls as a result of the program. The report does identify a number of “potential” weaknesses of inclusionary zoning as an approach to addressing the affordable housing crisis.³⁹ Given the length and the thoroughness of the report and its willingness to address these major weaknesses of inclusionary zoning, it is telling that the report fails to identify decreased housing production as one of the problems that implementing local governments have faced with inclusionary housing.

Development Continues in the D.C. Metro Area

Another study on inclusionary zoning in the Washington Metro Area, entitled *Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area*, examines the performance of four inclusionary zoning programs in the D.C. metro area.⁴⁰ It finds that these programs have successfully produced significant numbers of new affordable housing.⁴¹

The report examines the programs’ successes and failures and suggests that residential development has continued successfully under the inclusionary housing programs. However, the report does indicate that in Montgomery County, Maryland, the development of high-rise rental buildings may be limited by the inclusionary housing ordinance, due to a lack of sufficient and appropriate cost offsets (no density bonuses were offered in central business districts) and the failure to design the correct rent structure for such developments.⁴² Montgomery County is responding to these difficulties and addressing the issue. It is important to realize that despite this specific difficulty with a specific kind of development, no evidence exists that overall housing production has suffered as a result of inclusionary zoning. In fact, to the contrary, given the impressive levels of production

³⁷ Ibid., p.15.

³⁸ Center for Housing Policy. *Inclusionary Zoning*.

³⁹ Weaknesses or challenges identified in the report include: 1) shifting the burden of producing affordable housing to the developer; 2) potential shifts in costs to landowners or consumers; 3) the potential to cause overdevelopment (cuts against the argument that inclusionary housing will stop development); 4) moving the most talented and skilled low-income households out of areas that need revitalization; 5) problems with increased density bonuses; 6) legal challenges, and others. See: Burchell and Galley, “Inclusionary Zoning: Pros and Cons” and Bernie Tetreault. 2000. “Arguments Against Inclusionary Zoning You Can Anticipate Hearing,” in *Inclusionary Zoning: A Viable Solution to the Affordable Housing Crisis?* New Century Housing, Vol. 1, Issue 2. Washington, D.C.: Center for Housing Policy, pp. 17-21.

⁴⁰ Montgomery County, MD; Fairfax County, VA; Loudon County, VA; Prince George’s County, MD.

⁴¹ Brown, *Expanding Affordable Housing*, p. 13.

⁴² Ibid., pp. 19-21.

in all four programs and the recent efforts to scale back one of the programs due to concerns about excessive growth, it is safer to say that under inclusionary housing programs in the D.C. metro area, housing production has prospered.

Feasibility Studies

Finally, a handful of “feasibility studies” from individual cities exist (e.g. San Diego and Salinas, California). These studies indicate that local offsets and/or hot housing markets can sufficiently address the “affordability gap” faced by developers under an inclusionary zoning program.⁴³

From California to metropolitan Washington D.C., from individual feasibility studies to national reports, the best available evidence from broad studies indicates that inclusionary housing does not negatively affect development.

Reactions of Developers and Other Concerned Constituencies to Inclusionary Zoning Over Time

In general, opposition to inclusionary zoning initially surfaces from developers and other concerned constituencies (such as realtors), who perceive it as a danger to their economic well-being and an unjustified intrusion on their business. However, over time, in a number of locations, these assumed “opponents” of inclusionary zoning have become supporters, and in a number of cases, outright advocates.

In the Washington D.C. metro area, where four⁴⁴ inclusionary housing programs exist, a number of developers and realtors have expressed support for inclusionary housing programs and their ability to create affordable housing, while still allowing for a healthy return on investment.⁴⁵ Tony Natelli, Chairman of Natelli Communities, has served as an informal resource to community and civic groups working to create inclusionary housing programs in Maryland and Virginia. He provides great credibility when he speaks to the fact that one can develop, make a return, and produce housing (both affordable and market) under inclusionary zoning.⁴⁶

⁴³ Calavita et al. “Inclusionary Housing in California and New Jersey.” p. 122.; Brown and Harrington.

1991. “The Case for Inclusionary Zoning,” pp. 23-24.; San Diego Housing Commission. *Inclusionary Housing Analysis.*; Fox and Rose. *Expanding Housing Opportunity in Washington, D.C.* pp. 15-16.

⁴⁴ Rockville, MD recently passed an inclusionary zoning law. They join Montgomery County, MD, Loudon County, VA, and Fairfax County, VA. Prince George’s County repealed its ordinance in 1996.

⁴⁵ See: Center for Housing Policy. 2000. “Inclusionary Zoning: The Developers’ Perspective,” in *Inclusionary Zoning: A Viable Solution to the Affordable Housing Crisis?* New Century Housing, Vol. 1, Issue 2. Washington, D.C.: Center for Housing Policy, pp. 30-32. -- Richard Dubin, President of The Dubin Company and David Flanagan, Principal and President of Elm Street Development, Inc. speak about how they have developed successfully under inclusionary housing programs.; Phone Interview with Bernard Tetreault, former Executive Director of the Housing Authority of Montgomery County (MD) and the Housing Opportunities Commission and President and Founder of the Innovative Housing Institute. March 2003.

⁴⁶ Phone Interview with Bernard Tetreault, March 2003; Comments by Tom Doerr, Senior Associate of the Innovative Housing Institute, during a panel discussion on problem-solving for inclusionary zoning at “Creating Mixed Income Communities through Inclusionary Zoning” Innovative Housing Institute Conference. Bethesda, Maryland: October 10, 2003.

In Massachusetts, where a number of inclusionary housing programs exist in the Boston suburbs, individual developers, homebuilders and realtors have all expressed support for inclusionary housing programs.⁴⁷ In fact, the Massachusetts Homebuilders have publicly expressed support for the adoption of inclusionary housing programs by local jurisdictions, provided that such programs include sufficient “cost offsets” such as density bonuses. Robert Engler, a developer and consultant to developers in Massachusetts, has been a strong proponent of inclusionary housing, writing articles and speaking about how inclusionary housing can work to serve both the needs of a developer and the needs of a community.⁴⁸

In California, developers have come to support inclusionary housing programs in certain instances as well. In fact, in Irvine, California, developers recently lobbied the city council to change the inclusionary zoning program from a voluntary to a mandatory program. Developers had successfully built under the voluntary law for nearly thirty years but wanted to create a more predictable process. According to Irvine senior planner, Barry Curtis, developers initiated the change in response to confusion and uncertainty under the voluntary program.⁴⁹ What is instructive here is that the developers did not lobby for repeal of the program; they lobbied to strengthen it.

The case should not be overstated. Developers and homebuilders, as an industry or interest group, remain, at best, skeptical.⁵⁰ Some developers, realtors, and homebuilders remain steadfastly opposed to inclusionary housing as an unwanted mandate and a less than optimal solution to the affordable housing crisis.⁵¹ However, even in their criticism, developers and realtors tend to focus on the unjustified burden of inclusionary zoning and its inability to solve the affordability crisis. On the whole, they do not claim that inclusionary zoning has slowed development.⁵² The fact remains that many developers,

⁴⁷ Interview with Ben Fierro, Counsel for the Homebuilders Association of Massachusetts. Boston, MA: October 3, 2003.; Presentation by Robert Engler, BPI Common Interest Luncheon, Palmer House Hilton, Chicago, IL: September 17, 2002.

⁴⁸ Robert Engler. 2002. “An Inclusionary Housing Case Study: Newton, Massachusetts,” *Inclusionary Zoning: Lessons Learned in Massachusetts*. NHC Affordable Housing Policy Review. Vol. 2, Issue 1. Washington, D.C.: National Housing Conference, pp. 18-22.; Presentation by Robert Engler, BPI Common Interest Luncheon, September 17, 2002.

⁴⁹ Interview of Barry Curtis, Irvine Senior Planner, June 2003. The City of Irvine offers developers both financial and processing incentives, which include modifications for setbacks or building heights, fee waivers, density bonuses, and expedited permit processing. Chapter 2-3, Section 6, “Role of Financial and Processing Incentives,” Affordable Housing Implementation Procedure for the City of Irvine.

⁵⁰ Kent Conine. 2000. “Inclusionary Zoning: A Viable Solution to the Affordable Housing Crisis? A Home Builder’s Policy View on Inclusionary Zoning.” In *Inclusionary Zoning: A Viable Solution to the Affordable Housing Crisis?* New Century Housing, Vol. 1, Issue 2. Washington, D.C.: Center for Housing Policy, pp. 30-33. Also found in: Institute for Local Self Government. 2003. *The California Inclusionary Housing Reader* Sacramento, CA: Institute for Local Self Government, pp. 33-36.

⁵¹ See: Michael D. Pattinson. 2001. “Inclusionary Zoning in California: If Everything is So Good, Why Does It Feel So Bad?” California Building Industry Association (CBIA). Available Online: <http://www.cbia.org/featur4e.asp?siid=113>. Accessed: 12-1-03.; Brian W. Blaesser and Janet R. Stearns. 2002. “The Inclusionary Housing Debate: How Really Pays for Affordable Housing?” *On Common Ground* Winter, pp. 34-39.

⁵² Ibid.

homebuilders, and realtors in locations with inclusionary zoning have become supportive after doing business under an inclusionary housing program. Support from these groups for inclusionary zoning in areas where it has existed for some time suggests that production can continue at a healthy clip with inclusionary zoning.

III. Why Doesn't Inclusionary Zoning Stop Development?

The available evidence, both theoretical and empirical, indicates that inclusionary zoning does not stop development. But how can one explain this? How can an inclusionary housing program impose the additional cost of producing affordable units without creating negative impacts? "There is no free lunch," so who pays the bill for inclusionary housing?

A. Cost Offsets

In some cases, cost offsets help to pay the bill. In general, inclusionary zoning ordinances do not have a negative effect on development because they offer developers incentives that help offset the cost of building affordable units. Cost-offsets found in inclusionary zoning ordinances across the country include, but are not limited to: increased zoning allowances (density bonuses, increased Floor Area Ratios (FARs, etc.), relaxed development standards (reduced parking requirements), fee waivers, subsidies, and expedited permit and/or approval processes.

B. Hot Markets and Desirable Development Loci Offset the Cost of Development

In some cities, cost offsets are not provided, or not provided at a generous level. However, the best evidence available indicates that development has not slowed (such as Boston, Chapel Hill, North Carolina, San Diego, and San Francisco) in these communities either.⁵³ In these situations, it is most likely that some combination of slight price increases, reduced developer profit, or reduced land prices are paying for the cost of affordable units. As stated earlier, the economic literature indicates that the most likely scenario is a moderation in land prices over time. With a hot housing market, developers see the inclusionary housing requirement as a cost of doing business in a desirable location (not unlike requirements such as "all brick" construction, green roofs, open space dedications, limitations on FAR, height, bulk, etc.).

C. Certainty, Predictability, and a Level Playing Field

An inclusionary zoning ordinance can provide the added benefits of certainty, predictability, and a level playing field for developers of residential units. These added benefits can improve the climate for developers even as a new requirement is imposed upon them.

⁵³ Planning officials in these communities feel fairly confident that the strong local housing market allows developers to absorb the cost of producing the affordable units while still making a healthy return on investment. Phone interview of Therea Ojeda, San Francisco City Planner, July 2003.; Phone interview of Bill Levin, San Diego Senior Planner, August 2003.; Phone interview of Phil Mason, Town of Chapel Hill Senior Planner, June 2003.

In many communities, developers face high levels of uncertainty and unpredictability when proposing residential development. In many cases, the shape and form of an allowed development will change based on community pressure or political expediency. Under a mandatory, inclusionary housing program, the developer will be required to reserve a certain portion of the units as affordable. However, in return, a developer often receives a guarantee that he will receive certain “cost offsets.” In many cases, these cost offsets can be quite lucrative. In Montgomery County, Maryland, for example, a developer receives a 17-22% density bonus based on the percentage of affordable housing included in the development (12.5-15%).⁵⁴ So, under an inclusionary housing program, the developer gains greater certainty and predictability as to what he or she is required to do and what he or she will receive in return.

In addition, the developer gains a level playing field. In some communities, the local government may require affordable housing units from some developers while not requiring those units from others. This puts some developers at a competitive disadvantage and creates the opportunity for abuse as politically connected developers avoid the requirement to provide affordable housing while others do not. Under a mandatory, inclusionary zoning program with universal application to all developments of a certain size, all developers then confront the same standards and requirements.

D. Additional Benefits

Developers may also realize additional gains from an inclusionary housing program. First, they may find that they are now allowed to develop more housing for a broader market than they were before. In many cases, existing zoning ordinances and the high cost of land make it all but impossible for developers to produce housing units for households in the low-to moderate-income spectrum despite the presence of a strong market for this housing. The density bonuses, cost offsets, and the moderation in land prices that may come with inclusionary zoning can provide developers with the ability to produce housing that they otherwise could not build for an existing market. In addition, the anti-NIMBY effect that inclusionary zoning can have on “affordable housing” may also make it easier for developers to produce more housing in a certain location for a wider range of the market.⁵⁵

Second, developers may find that the affordable homes and apartments that they are required to build may be quite a benefit to them because of the high demand for such units. Inclusionary zoning can thus help to sustain developers through hard times. In Montgomery County, Maryland, over the thirty-year existence of the program, developers have found the Moderately-Priced Dwelling Units (MPDUs) (the affordable units) to be quite an asset because they always sell-out or rent-up quickly and help to sustain developers during slower economic times.⁵⁶

⁵⁴ See Section 25A-5 of the Montgomery County, MD inclusionary zoning ordinance.

⁵⁵ Interview with Ben Fierro, Counsel for the Homebuilders Association of Massachusetts. Boston, MA: October 3, 2003

⁵⁶ Comments by Eric Larsen, Administrator of the Montgomery County, Maryland MPDU program and John Clarke, Vice President for Elm St. Development, Inc. which develops regularly under the MPDU program

IV. Conclusion

Many communities around the country face a major dilemma: rising real estate markets are creating an affordable housing crisis that not only threatens the social fabric of their communities, but their economic well-being as well. In the face of scarce local resources and retreating commitments to affordable housing at the federal and state levels, many of these communities are turning to inclusionary housing programs to effectively address this problem. However, the concern has remained: are these local communities “shooting themselves in the foot” by adopting a local policy that hinders the development of housing?

Without a long line of studies specifically examining this issue, one must look to the best available evidence. Market theory indicates that developers are unlikely to stop developing residential housing under an inclusionary zoning law, because they will either take advantage of “cost offsets” offered by the local community and/or bargain for a lower land price before developing housing with the required affordable component. This theory is supported by: the experience of a wide diversity of communities with inclusionary housing programs over time, broad studies examining the issue, and the reaction of developers and realtors in locations where inclusionary housing has been implemented.

Programs in diverse locations around the country, with and without generous cost offsets and incentives for developers, have produced significant amounts of affordable housing without any evidence of a negative impact on housing production. Studies examining inclusionary zoning programs in California, the D.C. metro area, and the nation at large indicate no negative impact on development. In fact, there is some evidence from California and the D.C. metro area that inclusionary housing has helped to accelerate levels of housing production. Finally, the positive reaction of many developers, homebuilders, and realtors to inclusionary housing programs suggests that far from killing development, inclusionary housing programs may enhance development opportunities.

The best available evidence indicates that inclusionary housing does not slow development. Larger market forces will determine whether the residential real estate market will be robust or not. Inclusionary zoning will ensure that as development occurs, more households of moderate- and low-incomes will be able to find housing and live in the communities where they work.

in Montgomery County, “Creating Mixed Income Communities through Inclusionary Zoning” Innovative Housing Institute conference. Bethesda, Maryland: October 10, 2003.

Appendix I: Communities with Inclusionary Housing Programs

| | Affordable Units Produced | Set-aside Requirement | Density Bonus | Other Developer Incentives |
|--|---|--|--|--|
| Boston, Massachusetts (2000) | 200 | 10% of on-site units | None | Increased height and FAR allowances (in the financial district only) |
| Burlington, Vermont (1990) | 150 units completed since 1990 | 0-25% sliding set-aside | 15%-25% density bonus available | None |
| Boulder, Colorado (1999) | 150 | 20% low-income in for-sale and rental developments | None | Waiver of development excise taxes |
| Cambridge, Massachusetts (1999) | 131 | 15% | 30% | Increased FAR, decreased min. lot area requirement, no variances needed for affordable units |
| Chapel Hill, North Carolina (2000) | 154 units completed between 2000 and 2002 | 15% set-aside | None | Expedited permit and approval processing |
| Davidson, North Carolina (2002) | 230 units approved since 2002 | 12.5% for all new developments (with a few exceptions) | None | None |
| Davis, California (1990) | 1502 | 25% in for-sale developments 25-35% in rental developments | One-for-one in for-sale developments 15% in rental developments | Relaxed development standards |
| Denver, Colorado (2002) | 804 anticipated | 10% for-sale at 80% AMI or below. 10% rental at 65% AMI or below | 10% | Cash subsidy, reduced parking requirements, expedited review process |
| Fairfax County, Virginia (1991) | 1746 produced 2000 total anticipated | Sliding scale requirement-- cannot exceed 12.5% for single family developments; 6.25% for multi-family | 20% for single family units 10% for multi-family units | None |
| Highland Park, Illinois (2003) | Ordinance Adopted August 26, 2003 | 20% set-aside | 1-for-1(PUDs can receive up to 1.5-for-1) | Fee waivers (ex. impact, demolition, utility connection fees) |

| | Affordable Units Produced | Set-aside Requirement | Density Bonus | Other Developer Incentives |
|---|---|--|--|---|
| Irvine, California (1978) | 3415 | Mandatory; 15% of all units | 25% | None currently offered |
| Longmont, Colorado (1995) | 450 of 934 anticipated | 10% of all units in annexation areas | Yes | Relaxed regulatory requirements |
| Montgomery County, Maryland (1974) | Over 11,500 | 12.5-15% of all units Of these, PHA may purchase 33%, and qualified not-for-profits may purchase 7% | Up to 22% | Waiver of water, sewer charge and impact fees. Offer 10% compatibility allowance and other incentives |
| Pleasanton, California (adopted mandatory ordinance in 2002 but has had voluntary inclusionary policies since the late 1970s) | 300 units between 1997 and 2001 under city's voluntary policy; 154 units in the pipeline | 15-20% sliding scale | None | Fee waiver or deferral, design, priority processing |
| Newton, Massachusetts (1977) | 225 | 25% | 20% | None |
| Sacramento, California (2000) | 465 | 15% of all units. 1/3 priced affordable to households between 50-80% of AMI. | 25% | Expedited permit process, fee waivers, relaxed design standards. |
| San Diego, CA (1992, expanded in 2003) Population: 1,223,341 | 1,200 units completed between 1992 and 2003 (1200 more anticipated) | 10% set-aside | None | None |
| San Francisco, CA (1992, expanded in 2002) Population: 776,733 | 128 units completed between 1992 and 2000; 90 units since 2002; 745 units in the pipeline | 10% set-aside | None | Refunds available on the environmental review and building permit fees that apply to the affordable units |
| Santa Fe, New Mexico (1998) | 12 produced 100 anticipated | 11% in developments targeted over 120% AMI 16% in developments targeted over 200% AMI | Bonus equals set-aside %. 16% in developments targeted under 80% of AMI | Waiver of building fees |

Examples of Inclusionary Housing Program Characteristics, Boston & Surrounding Suburbs

| | Year of Inception | Affordable Units Produced | Threshold Number of Units | Set-aside Requirement | Target Population | Development Covered | Control Period & Mechanism | "In lieu of" payment/ Off-site Development | Density Bonus | Cost Offsets |
|-------------------|----------------------------------|--|---|--|---|--|--|--|--|--|
| Boston | 2000 | 68 | <10 units seeking zoning variance or using City \$\$ | 10% units | _ units must be <80% BSMA, _ units may be 80-120% BSMA | New construction or rehabilitation | Maximum allowable by law | May build off site if 15% units affordable In-lieu payment permitted | Not explicit. Zoning variance may increase height or FAR. | Tax break |
| Brookline | 1987 | Approx. 54 bet. 1995-2002 ¹ (rental & ownership) | >6 residential units & >10-lot subdivisions seeking density increases ² | 15% units set aside (25% for low-income, 50% for moderate income, & 25% upper moderate-income ³) | Low = <50% BSMA ⁴ Moderate = 51-80% BSMA Upper = 81-100% BSMA ⁵ | New construction or adaptive reuse | Permanent restrictive covenant. Town of Brookline has right of first refusal. Income-eligible buyer required. Subsequent sale price limited. | May make cash contribution to Brookline Housing Trust if developing <16 units. ⁶ If >16 units, must build units unless Town opts for cash, off-site, or land/building conveyance | 20-30% total floor area (applies only to developments >20,000 ft ²) | Number of parking spaces otherwise required for affordable units may be reduced by 20% |
| Cambridge | 1999 | 88 units | >10 units OR if <10 units, developments w/ >10,000 ft ² (1000 ft ² = 1 unit) | 15% units (if >10 units) OR 15% square footage (if <10 units) | <80% of BSMA | New construction/ conversions (not rehab) | Permanent deed restriction. City of Cambridge has right of first refusal at sale or transfer. Income-eligible buyer required. ⁷ City retains mortgage on property transferred to subsequent owners. | Cash-out (but not off-site) offered only if demonstrate "significant hardship." Reviewed by Affordable Housing Trust & Planning Board. ⁸ | 15% for market rate units AND 15% for affordable units (total 30% per development) | Developer not required to seek zoning variance for construction of affordable unit(s) |
| Newton | 1977 ⁹ (amended 1987) | 225 units ¹⁰ (only rental units permitted ¹¹) | Units requiring special permit (all development >2 units, not incl. subdivisions) ¹² | 25% of bonus units under special permit ¹³ (i.e. 25% of units over 2 permitted by right) | Low-income only (Section 8 eligible) ¹⁴ | New construction or rehabilitation. | Developer retains ownership of affordable units for 40-year period. ¹⁵ Leased through Newton Housing Authority. ¹⁶ | In-lieu fees permitted for 2 to 9 units. In-lieu fee for <10 units less burdensome than on-site requirement for >10 units, resulting in <10 unit developments & \$1M in revenue. ¹⁷ | Up to 20% | None. |
| Lexington | 1985 | 111 ¹⁸ | > 10 units must provide "public benefit" (may include affordable units) | Varies based on negotiations bet. developer & planning board ¹⁹ | <80% of BSMA | New construction or rehabilitation. | Independently recorded covenant. Some units purchased by Lexington Housing Authority & leased as affordable. | If planning board determines units cannot be built on-site, may accept off-site construction or in-lieu fee of 3% sales price of all units | Up to 25% (at Planning Board's discretion) | None. |
| Somerville | 1990 (amended 2000) | N/A | >8 units requires special permit (incl. density bonus & set-aside requirement) | 12.5% units must be affordable (10% prior to amendment) If fractional unit <50%, developer must pay % of whole unit. If fraction >50%, developer must build unit. | Rental units: <80% BSMA Ownership: ²⁰ 50% units for low-moderate (<80% BSMA) 50% units for moderate (81-110% BSMA) | New construction, substantial rehabilitation or adaptive reuse | Permanent deed restriction, covenant, or contractual arrangement. City of Somerville has right of first refusal at sale or transfer. Income-eligible buyer required (waiting list held by City). | No in-lieu unless City prefers cash payment, conveyance of land/buildings, or off-site units (i.e. off-site provides better public transportation access, new units unsuitable for families). Off-site must be built in same ward. | If 12.5% affordable units: Permitted to go beyond by-right lot area per dwelling area ratio If > 12.5% affordable: Permitted to build 2 market rate units for every affordable unit above 12.5% up to 20% of lot area per dwelling unit ratio | Fast-tracking permit process. Fee waiver. ²¹ |

Examples of Inclusionary Housing Program Characteristics, Boston & Surrounding Suburbs

¹ Thirty-one units currently occupied; 23 units permitted and under development. No units produced during 1987 – 1995.

² Brookline is currently considering reducing the 10-lot special permit requirement to 6 lots.

³ At discretion of Board of Appeals, developers may be allowed to set aside less than 15% of the units (but no fewer than 10%) or may be required to set aside up to 20% of the units, depending on (1) percentage of units targeted toward low- and/or moderate-income households, (2) percent of multi-bedroom units suitable for families, and/or (3) availability of public subsidies.

⁴ Boston Standard Metropolitan Statistical Area

⁵ Brookline is considering raising the upper ceiling of this category from 100% to 120% of BSMA.

⁶ As of May 24, 2001, the Brookline Housing Trust had received \$1,905,747. By December 2002, the Trust expects to receive an additional \$3,059,850, for a total of \$4,965,327 (including interest). In lieu payments range from 3% of the sales price over \$100,000 for six-unit developments to 6% for fifteen-unit developments. Town of Brookline, “Affordable Housing Requirements Under the Zoning By-Law” (May 2001).

⁷ Owner must sell to income-eligible buyer on City of Cambridge’s list of potential buyers unless owner identifies income-eligible buyer subsequently certified by the City of Cambridge.

⁸ Significant hardship is defined as the property being unable to physically accommodate the units and/or related requirements. To date, Planning Board has rejected all request for in-lieu payment. If granted, the developer would be required to pay equivalent of value of provision of an on-site affordable unit, payable to Affordable Housing Trust.

⁹ Newton informally began requiring a 10% affordable housing set-aside in 1969 and adopted this policy as an ordinance in 1977.

¹⁰ Due to limited affordability preservation mechanisms in the original version of the inclusionary zoning ordinance (which restricted affordability only during a 15year period), 50 of these units are no longer affordable.

¹¹ Under Newton’s proposed revised ordinance, affordable units may be rental or ownership.

¹² Newton is considering requiring developers of more than four units to apply for a special permit, which would permit greater density and require an inclusionary housing set-aside.

¹³ A currently pending revision recommends a required set-aside of 15% of all units created (not only bonus units), with fractional units greater than .5 rounded up.

¹⁴ Newton is considering adopting a revision establishing the ordinance’s target population as 0-120% of median family income, with additional requirements that where a single affordable unit is provided the MFI cannot exceed 80% and where multiple units are provided, the average of all affordable units’ MPFI cannot exceed 65%.

¹⁵ Newton’s proposed revised ordinance would preserve affordability of rental and ownership units in perpetuity. The rental units’ affordability might be terminated by a two-thirds vote of the Board of Alderman, with the Mayor’s signature.

¹⁶ This arrangement requires the developer to retain ownership of affordable units (including heating the units & paying condo fees) even when all market rate units in the development are sold.

¹⁷ Newton is considering lowering bar for the in-lieu option to developments of six units or less and raising the in-lieu cash contribution requirement to 7.5% of total market price for all units in the development.

¹⁸ This figure does not include units purchased with funds obtained via in-lieu payments by developers.

Examples of Inclusionary Housing Program Characteristics, Boston & Surrounding Suburbs

¹⁹ Under Lexington's "Inclusionary Housing Policy" (included in the Housing Element of the City's Comprehensive Plan), developers may negotiate with the Planning Board to provide one of the following: (1) 5% low-income units donated by gift to the Lexington Housing Authority, (2) 15% low-income units purchased by the Lexington Housing Authority at HUD allowable cost for Boston area, (3) 25% moderate income units to be purchased or rented by eligible households, or (4) 40% middle income units to be purchased by eligible households.

²⁰ If only one affordable unit is constructed, it must be provided to a low-moderate income buyer.

²¹ If a development provides 14-24% affordable units (including a minimum 7% low-income), permit and hearing fees may be waived at twice the percentage of affordable housing provided (ex. 14% affordable units produces 28% of fees waived). If a development includes 25% or more affordable units, 100% of the fees may be waived.

Sample of Additional Cities with Inclusionary Housing Programs

| | Affordable Units Produced | Threshold Number Of Units and Income Target | Set-aside Requirement | Control Period | In lieu Fee Payment/ Off-site Development | Density Bonus | Other Developer Incentives |
|---|---|---|---|---|---|---|---|
| Burlington, Vermont (1990) | 150 units completed since 1990 | <u>Threshold:</u> 5 or more units for new construction projects; 10 or more units for adaptive reuse or conversion of non-residential to residential projects <u>Income Target:</u> 65% of the AMI for rental units and 75% of the AMI for for-sale units | 10-25% set-aside depending on the average sales price of project units in a development; the less affordable a development is, the higher the set-aside is (up to 25%) | 99 years for rental and for-sale units | Development Review Board can grant permission to build affordable units off-site, but density bonus is revoked and set-aside increases to 1.25 times the number otherwise required; developers are not allowed to build affordable units off-site if the project is located in a waterfront zoning district | 15%-25% density bonus available depending on which zoning district the project is located in | None |
| San Francisco, California (1992, expanded in 2002) | 128 units completed between 1992 and 2000; 90 units since 2002; 745 units in the pipeline | <u>Threshold:</u> 10 or more units <u>Income Target:</u> For rental units, the ordinance targets households earning 80% of the AMI; for-sale target up to 120% of the AMI | 10% set-aside on-site | 50 years for rental and for-sale units | Developers can elect to build affordable units off-site, but the set-aside requirement increases to 15% for off-site units; In-lieu fee payments are determined by several factors including the projected value of on-site affordable units. In-lieu payments are made to the Citywide Affordable Housing Fund | None | Refunds available on the environmental review and building permit fees that apply to the affordable units |
| San Diego, California (1992, expanded in 2003) | 1,200 units completed between 1992 and 2003 | <u>Threshold:</u> 10 or more units <u>Income Target:</u> Rental units are set aside for households at or below 65% of the AMI and at or below 100% for owner-occupied units | 10% set-aside | 55 years for rental and for-sale units | Developers can opt to pay an in-lieu fee, which is calculated based on the square footage of an affordable unit. In-lieu fee increases over the next three years from \$1.00 per square foot to \$2.50 per square foot in the third year; Developers can opt to build off-site (set-aside does not increase) | None | None |
| Chapel Hill, North Carolina (2000) | 154 units completed between 2000 and 2002 | <u>Threshold:</u> 5 or more units <u>Income Target:</u> low- and moderate-income households (HUD definition) | 15% set-aside | Affordability controls negotiated on a project-by-project basis | In-lieu fee and off-site construction negotiated on a case-by-case basis | None | Expedited permit and approval processing |
| Highland Park, Illinois (2003) | Ordinance Adopted August 26, 2003 | <u>Threshold:</u> 5 or more units <u>Income Target:</u> for for-sale units, at least 50% of the set-aside units must be sold to low-income households. On average, the set-aside units must target 65% of the AMI; remaining units target, on average, 100% of the AMI. For rental units, no less than 33% of the affordable units target between zero and 50% of the AMI, no less than 33% of the units are set aside for between 51% and 80% of the AMI, and 33% are set between 81% and 120% of the AMI | 20% set-aside | For-sale units: perpetuity or as long as permissible by law. Rental units: 40 years | In-lieu fee determined by the City Council and deposited in the Affordable Housing Trust Fund; Developer may also construct units off-site or donate land | One additional market-rate unit for each affordable unit built; PUDs can receive up to 1.5 times the number of market-rate units for each affordable unit | Fee waivers (ex. impact, demolition, utility connection fees) |
| Pleasanton, California (adopted mandatory ordinance in 2002 but has had voluntary inclusionary policies since the late 1970s) | 300 units between 1997 and 2001 under city's voluntary policy; 154 units in the pipeline | <u>Threshold:</u> 15 or more units, but projects under 15 units must pay an in-lieu fee <u>Income Target:</u> Very-low-, low-, and moderate-income households (based on HUD definition) | For new multiple-family residential projects, 15% set-aside for very-low- and/or low-income households; For new single-family projects, 20% set-aside for very-low-, low-, and/or moderate-income households (based on HUD definitions) | Perpetuity | Developers can opt to construct affordable units off-site, make a land dedication, or pay an in-lieu fee | None | Fee waiver or deferral, design modifications (ex. reduced setbacks, open space requirements, landscaping requirements, interior/exterior amenities, parking requirements, height restrictions), priority processing |
| Davidson, North Carolina (2002) | 230 units approved since 2002 | <u>Threshold:</u> Projects of 8 or more units must build on site and projects of less than 8 units can either pay an in-lieu fee or build on site <u>Income Target:</u> 30% of the set-aside units for households earning 50% or less of the median family income (MFI); 70% of the units for households earning 80% or less of the MFI | 12.5% for all new developments except farmhouse cluster, low-impact subdivision, and conservation easement subdivisions | 30 years for rental and for-sale units | Ordinance does not provide for off-site construction or in-lieu fee payment for projects of 8 or more units; Ordinance gives projects of less than 8 units the option to pay an in-lieu fee or build on-site | Affordable units don't count toward the density of the site | None |



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Introduction

Inclusionary zoning has often been viewed as a policy tool for medium-sized cities or relatively affluent east coast counties. The nation's oldest and most celebrated inclusionary zoning law exists in Montgomery County, Maryland.¹ For nearly three decades, inclusionary zoning grew in popularity across the country, including over 100 communities in both California and Massachusetts. However, until the late 1990s, no large major U.S. city had adopted a mandatory citywide inclusionary zoning law.²

Recently, that reality has changed. Large cities such as Boston, Massachusetts; Denver, Colorado; Sacramento, California; San Diego, California; and San Francisco, California, have all adopted mandatory inclusionary zoning laws (see Appendix). This policy brief provides: 1) a summary of the major benefits of inclusionary zoning; 2) a description of some of the unique aspects of the various programs adopted by large cities thus far; and 3) case studies of five large U.S. cities with inclusionary zoning programs.

Benefits to Large Cities from Inclusionary Zoning

Large cities are beginning to realize the many benefits of inclusionary housing:

- 1) **Addressing the Shortage of Affordable Housing.** Inclusionary zoning produces affordable housing. Most major U.S. cities lack sufficient affordable housing for moderate- to low-income families and individuals, seniors, and special needs populations. Inclusionary zoning stands as a proven tool to help address this need.
- 2) **Market-Based Tool Requiring Less in the Way of Public Subsidies.** Inclusionary zoning provides a proven market-driven tool to create affordable housing without large amounts of public subsidy. Large urban centers, despite their relative resurgence in the 1990s, still have difficulty raising sufficient public revenues to serve the extensive needs of their diverse populations. The fiscal capacity of large cities has been hamstrung by the thirty-year retrenchment in federal spending on cities and on housing in general. Poor economic conditions since 2000 and the recent rounds of federal tax cuts have left large urban centers with an even tougher challenge in raising sufficient public revenues to meet all their local needs. Inclusionary zoning provides large cities with a proven tool for producing affordable housing for their working families while using fewer public dollars. This allows large cities to preserve the federal and state housing dollars that they do receive for more vulnerable populations and to preserve more of their own local tax base for other pressing public needs.

¹ Nearby counties of Fairfax County, Virginia, and Loudon County, Virginia, (also affluent) also have inclusionary zoning programs.

² The City of San Diego, California, adopted an inclusionary zoning requirement for a specific part of the city in 1992, requiring a 20% affordable housing set-aside on all developments occurring in that area of the city. In 2003, the city adopted an inclusionary zoning ordinance for the entire city, requiring a 10% set-aside on all developments of 10 or more units. Boston, Massachusetts, adopted an inclusionary zoning program by Executive Order in 2000 with a 10% set-aside. San Francisco adopted an inclusionary zoning ordinance in January of 2002 with a 10% set-aside on developments of 10 or more units. Sacramento adopted an inclusionary zoning ordinance in 2000, requiring 15% affordable units on developments of 9 or more units. Denver adopted an inclusionary zoning ordinance in 2002, requiring a 10% set-aside.

- 3) **Meeting Economic Development and Workforce Housing Needs.** Inclusionary zoning boosts local economic development by creating more workforce housing and by increasing the disposable income of moderate- and low-income households. Many cities lack enough affordable housing for key populations: teachers, firefighters, policemen, child care workers, janitors, entry-level manufacturing workers and technical workers, etc. Without affordable homes for people in these occupations, large cities risk their competitiveness in a global economy that requires a skilled and accessible workforce near jobs. In addition, more affordable housing means that working households spend less of their monthly income on their housing costs, leaving more disposable income to spend on goods and services in the local economy. Inclusionary zoning thus provides a “one-two” punch to aid large cities in their efforts to maintain a strong economic environment.
- 4) **Positively Impacting Patterns of Economic and Racial Segregation.** Inclusionary housing can positively impact the pattern of racial and economic segregation that plagues so many of our nation’s large urban centers. Racial and economic segregation have contributed to increased crime rates, failing schools, and a lack of social stability. Inclusionary housing can mitigate racial and economic segregation by producing low- and moderate-income housing in a healthy, mixed-income fashion with market-rate development.
- 5) **Helping to Prevent Sprawl and Disinvestment.** A lack of affordable housing in large urban centers provides one of the strongest incentives for increased sprawl. If affordable housing cannot be found in the city, developers and citizens will look to the fringe of the metropolitan region, where land costs are lowest, in order to develop and buy housing that is more affordable. Increased sprawl in a large metropolitan region can mean reduced public and private investment in large urban cores. Through an inclusionary zoning program, large cities can use density bonuses and other cost offsets to produce a stock of affordable housing within the city core, thereby helping to reduce the pressure to continually sprawl outward in order to produce affordable housing on the fringe.

Large cities face housing shortages that threaten the economic and social well-being of their communities. Inclusionary zoning provides them with one market-based tool to address the need for a wide range of housing options.

Fewer Cost Offsets in Large Cities

Unlike many of the smaller or medium-sized communities that have pointed the way for nearly three decades, three of the five large cities profiled in this policy brief have chosen to provide little or nothing in the way of “cost offsets” to help the developer pay for the cost of producing the affordable “set-aside” units.³ City staff interviewed in these cities indicated that “cost offsets” were not necessary because the strength of the local housing market and the ongoing demand from people

³ Most inclusionary zoning programs around the country include density bonuses, fee waivers, relaxed development standards, an expedited permitting process, or in some cases, outright subsidies that aid the developer in paying for the production of the affordable units.

to live and build housing in those cities allowed developers to build the “set-aside” units and still make their project work economically. Thus far, city officials in San Diego, San Francisco, and Boston indicate that development has continued apace since passage of inclusionary zoning.⁴ In fact, development has increased since passage of the ordinance in San Francisco.

⁴ Interviews with Teresa Ojeda, San Francisco City Planner, August 2003.; Interview of Bill Levin, San Diego Senior Planner, August 2003.; Interview of Susan Tinsky, Chief Policy Officer Adviser for the City of San Diego Housing Commission, August 2003.; Kiely, Meg. “Boston’s Policy Gives Developers Choice,” In: Inclusionary Zoning: Lessons Learned from Massachusetts, NHC Affordable Housing Policy Review, January 2002.

Case Studies from Five Large U.S. Cities

Case Study: Boston, Massachusetts

Background

Boston, a city of over half a million people, benefited significantly during the economic boom of the 1990s.⁵ However, while area incomes increased, they failed to keep pace with housing prices, which soared at a double-digit pace. As construction and land costs increased, gentrification spread from the central downtown areas to surrounding neighborhoods, causing the displacement of moderate-income families. In response to these changes in Boston's housing market and pressure from community-based organizations and housing advocates, Mayor Thomas Menino signed an Executive Order in February 2000 that created an inclusionary housing policy.

The Program

Under Boston's policy, any residential project that contains 10 or more units and is either financed by the City of Boston or the Boston Redevelopment Authority (BRA), is to be developed on property owned by the City or the BRA, or requires zoning relief, triggers the requirements of the program. Due to the antiquity of the Boston Zoning Code, practically all residential development over nine units is covered by the Executive Order.

The Boston policy requires qualifying developments to set aside 10% of the units as affordable. While the Boston policy does provide for off-site development of the affordable units, a developer who exercises this option must set aside 15% of the units as affordable instead of just 10%. This creates an incentive for developers to construct the affordable units on-site. Boston's program also allows for a fee in-lieu option, in which the developer is required to make a payment to the BRA equal to 15% of the total number of market-rate units multiplied by an affordable housing cost factor. The affordable housing cost factor, initially established at \$52,000, is derived from the average subsidy needed to develop a unit of affordable housing and is adjusted annually.⁶ The funds collected from the fee in-lieu option are used to subsidize other affordable housing developments in Boston.

Unlike the vast majority of other municipalities, the Boston policy does not provide a general density bonus for developers. However, developers do qualify for increased height and FAR allowances in the central financial district.

Boston has a higher income-target than most municipalities with an Inclusionary Housing Program. At least half of the set-aside units must be priced affordable for households making less than 80% of area median income (AMI) for the Boston MSA. The remaining set-aside units are priced affordable for households making between 80% and 120% of AMI, provided that on average these higher-tier units are affordable to households earning 100% of AMI.

⁵ U.S. Census Bureau, 2000 Census.

⁶ For the process for the annual determination, see City of Boston, Department of Neighborhood Development web site, <http://cityofboston.gov/dnd>.

The units must remain affordable for at least 30 years, with the possibility of extending the affordability period for an additional 20 years, for a total of 50 years.⁷ The resale price of the affordable units is also restricted to a maximum increase of approximately five percent per year, adjusted for approved improvements and other miscellaneous fees.

The Political Landscape

Prior to Mayor Menino's Executive Order, Boston had an informal inclusionary housing requirement. In 1999, affordable housing advocates investigated the enforcement of this requirement and discovered that two high-profile luxury developments had been approved that year without any affordable housing set-asides. Housing advocates pressured the Mayor to implement and enforce a formal inclusionary zoning policy. Soon thereafter, Mayor Menino issued his Executive Order.⁸

The Executive Order's off-site construction and fee in-lieu payment options reflect the policy preferences of many affordable housing advocates in Boston. Many advocates are more concerned about the quantity of affordable housing in Boston than the dispersal of the units among market-rate homes. In fact, many advocates expressed a preference for having the units in neighborhoods, rather than downtown, where much of the new residential development is occurring. Since many advocates were more concerned about the quantity of affordable units, there was a push for strong off-site and fee payment options, as these options could produce a larger number of units.⁹

Boston benefited from a receptive Mayor, a supportive City Council, positive media, a lack of an organized effort by developers, and the examples of nearby towns that already had successful inclusionary housing policies. These factors created the positive political environment for the creation of an inclusionary housing program.

The Impact of the Executive Order

In the initial year of implementation of the Executive Order, eight privately financed housing developments fell under the requirements of the policy. These developments were predominantly high-end luxury developments. As of January of 2002, developers have contracted to contribute over \$4 million for affordable housing construction. Over 200 affordable units have been constructed as a result of the policy, with many more in the pipeline.¹⁰ At the same time, new housing development continues to boom in Boston, and development projects continue to be quite lucrative, even with the affordable unit set-aside requirement.¹¹

⁷ Kiely, Meg. "Boston's Policy Gives Developers Choice," *Inclusionary Zoning: Lessons Learned in Massachusetts*, NHC Affordable Housing Policy Review, VI. 2, Issue 1, January, 2002.

⁸ Interview of Tom Callahan, Director of the Massachusetts Affordable Housing Alliance (MAHA), April, 2002.

⁹ Interview of Tom Callahan, Director of the Massachusetts Affordable Housing Alliance (MAHA), April, 2002.

¹⁰ Kiely, Meg. "Boston's Policy Gives Developers Choice," *Inclusionary Zoning: Lessons Learned in Massachusetts*, NHC Affordable Housing Policy Review, VI. 2, Issue 1, January, 2002.

¹¹ Interview of Tom Callahan, Director of the Massachusetts Affordable Housing Alliance (MAHA), April, 2002; Interview of Tim McGurthy, Special Assistant to the Director of the Boston Redevelopment Authority (BRA), March, 2001.

Case Study: Denver, Colorado

Background

Denver, a city of 554,636 people, has one of the newest inclusionary housing programs in the country.¹² Passed by the City Council in 2002, the ordinance is quite detailed in its requirements and incentives. The Housing and Zoning codes were amended to create a “moderately priced dwelling unit” (MPDU) program.

The MPDU Program

Unlike many local inclusionary zoning ordinances that do not cover rehabilitation work, Denver’s new program covers not only new residential construction, but also existing buildings that are being substantially rehabilitated or remodeled to provide dwelling units. “Substantial” is defined as the rehabilitation or remodeling of more than 50% of the existing building. The program is mandatory for for-sale developments of 30 or more units but is voluntary for rental developments, since limitations on rent levels on private residential property is not permitted under Colorado state law.¹³

For-sale developments are required to set aside 10% of the units in the development as affordable for households earning 80% of Area Median Income (AMI) or below. However, if the development is to be greater than three stories, has an elevator, and has over 60% of its parking as structured, the affordable units are to be priced affordable for households earning 95% AMI or below. Rental developments can voluntarily set aside 10% of the units as affordable to households earning 65% AMI, less a utility allowance. If the rental development is greater than three stories, has an elevator, and has over 60% of its parking as structured, the rental set-aside units should be priced affordable for households making 80% of the AMI.

The Incentives

In addition to the usual incentives provided by municipalities, Denver also provides a cash subsidy to developers for the affordable units.¹⁴ Developers of for-sale units can receive a \$5,000 reimbursement for each affordable unit produced, up to 50% of the total units in the development. Developers of rental units can receive a \$10,000 reimbursement per affordable unit if the units are priced for households making 50% AMI or below, less a utility allowance. However, only developments that provide at least the minimum number of affordable units required by the ordinance can receive the cash subsidies. Further, these cash subsidies are only available if funding exists in the “special revenue fund.” This special revenue fund is funded by fee in-lieu payments and allocations by the City Council.

Denver also reduces the parking requirements up to 20% of the required zoned parking if the developer produces at least one additional affordable unit for every 10 parking spaces reduced. Denver provides an expedited review process, allowing developers to have their review by the

¹² U.S. Census Bureau, 2000 Census.

¹³ The Local Control of Rents Prohibited Statute, Section 38-12-301, 10 C.R.S. (1999), precludes Colorado municipalities from “enact[ing] any ordinance . . . which would control rents on private residential property.” The Colorado Supreme Court struck down a municipal ordinance that required economic developers to mitigate the effects of that development by generating affordable rental housing units for 40% of the new employees created by the development. The Supreme Court found that the ordinance violated Section 38-12-301. *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (2000).

¹⁴ Denver provides cash subsidies for affordable units because the law does not permit the city to provide fee waivers to developers.

Community Planning and Development Agency completed within 180 days. Finally, Denver provides a density bonus of 10% to developers.

Off-Site Development

The Denver ordinance permits off-site development, though the standard is somewhat vague. The ordinance states that the Director of Denver’s Community Planning and Development Agency (CPDA) may allow a developer to build the affordable units off-site if the developer builds “more” affordable units than originally required. However, “more” is not defined in the ordinance.

Instead of constructing the affordable units, developers may also contribute an in-lieu fee to the “special revenue fund” in an amount equal to 50% of the price per affordable unit not provided. The price of the affordable unit is the maximum sales price provided by the CPDA without homeowners’ association fees.

Income Verification

Households interested in the affordable units must provide documentation of income eligibility to the CPDA. Households must provide a copy of the proposed sales contract; a copy of the proposed settlement cost document; “all documentation necessary for CPDA to determine eligibility of the buyer”; and affidavits from the buyer and the seller on the truth of the documents, as well as a signed memo of acceptance of the affordability covenants. The CPDA then reviews these documents and verifies the income levels of the household and their eligibility for an affordable unit.

Period of Affordability

The set aside for-sale and rental units must remain affordable for 15 years. The ordinance requires that a covenant be recorded against the property that binds the owners and all other parties with interest to the property for the entire control period. The CPDA still has a right to purchase at the fair market rate if the unit is placed on the market within ten years of the end of the control period.

The Denver Ordinance also creates a formula for the city to receive some of the market proceeds from the affordable unit once it is sold on the open market at the end of the control period. When an owner of an affordable unit sells it after the end of the control period, the owner must pay the special revenue fund one-half of the excess of the total resale price over the sum of: the prior maximum sales price; a percentage of the affordable unit’s prior purchase price with the cost of living increase since last sold; the fair market value of documented capital improvements; and a reasonable sales commission. If the amount remaining is less than \$20,000, the amount due to the special revenue fund will be adjusted so the seller receives \$10,000. If the amount is less than \$10,000, the seller will receive the entire amount.

Enforcement

Denver has several tools for enforcement for the various stages of development. If the developer violates the ordinance in any way, including not constructing the required affordable units, the city may deny, suspend, or revoke any and all building or occupancy permits. The city can also withhold any additional building permits until the affordable units are built. If the ordinance is violated by the sale of an affordable unit, the Director of the CPDA can enjoin or void any transfer of the affordable unit and require the owner to sell the unit to an eligible household.

Case Study: Sacramento, California

Background

Sacramento, a city of over 400,000, saw significant growth in the 90's in residential and commercial development on the outer-edges of the city.¹⁵ While the commercial development created new jobs at a variety of income levels, the majority of the residential development was geared towards upper-income households. In order to provide housing affordable to low- and moderate-income families near or within these job-rich areas, the City Council explored an inclusionary housing program. Eventually, through the work of a broad coalition of affordable housing advocates, labor unions, neighborhood associations, environmental groups, minority communities, the faith community, and the Chamber of Commerce, the Sacramento City Council passed the Mixed-Income Housing Ordinance in the year 2000.

The Program

The Mixed-Income Housing Ordinance applies to all residential development over nine units in “new growth areas,” i.e. large undeveloped areas of land at the city’s margins, newly annexed area, and large interior redevelopment project areas. The set-aside requirement under the Mixed-Income Housing Ordinance is 15% of all units. However, the affordable units can be single-family or multi-unit. This flexibility in the type of units helps developers determine a cost-effective way to construct the affordable units.¹⁶

The Mixed-Income Housing Ordinance specifically tiers the affordable units to create more units targeted to the lowest-income families. Of the affordable units that are produced within the development, one-third of the units must be priced for households making between 50 and 80% of area median income (AMI), while the remaining two-thirds of the units must be priced for households making less than 50% AMI. The affordable units must remain affordable for 30 years.

Sacramento provides a density bonus of 25%, which tracks the density bonus required under California state law.¹⁷ Besides the density bonus, developers may also receive expedited permit processing for the affordable units, fee waivers, and relaxed design guidelines. Also, developers of inclusionary projects may apply and receive priority for all available subsidy funding, including funds from the city’s housing trust fund, tax increment funds from redevelopment areas, and federal and state subsidies.

If the proposed development is an exclusively single-family development, the developer can dedicate land off-site or build the affordable units off-site only if there is insufficient land zoned multi-family at the development site. However, the alternative land or placement of the affordable units must be within the “new growth” area.

Impact

The Sacramento ordinance is responsible for the creation of 254 units, with hundreds more in the pipeline.

¹⁵ U.S. Census Bureau, 2000 Census.

¹⁶ Interview with David Jones, Sacramento City Council Member, March, 2001.

¹⁷ California state law entitles developers to a 25% density bonus if 20% or more of the total units of a housing development are affordable to lower income households or 10% are affordable to very low-income households.

Case Study: San Diego, California

Background

In 1992, voters in the City of San Diego imposed an inclusionary housing requirement in the North City Future Urbanizing Area (FUA), a developing section of the city with no rental or affordable housing. The requirement reserves 20% of all new rental and for-sale dwelling units for households earning 65% of the Area Median Income (AMI). The FUA's inclusionary zoning program, which does not offer developers the option to pay an in-lieu fee, generated 1,200 affordable units in the last decade. City planners estimate that the inclusionary zoning ordinance will result in a total of 2,400 affordable units by the time the FUA is built out.¹⁸

The political process to pass a citywide inclusionary zoning ordinance started in 2000 when the city began updating its Housing Element as required by state law. The Plan Commission, interested in adopting an inclusionary zoning ordinance, recommended the creation of a working group to explore the potential of a citywide ordinance. Initially, developers adamantly opposed an inclusionary zoning ordinance, but they became more cooperative as the two-year process unfolded. Developers ultimately worked closely with the city's Housing Commission on certain provisions, meeting on a weekly basis for several months. A detailed economic analysis of the potential impact of inclusionary zoning proved to be the most effective tool in convincing developers to support the ordinance.¹⁹

San Diego, now a city of over 1.2 million people, adopted a citywide inclusionary zoning ordinance in July 2003. The effort to pass the ordinance was based on the FUA program's success, the rising demand for affordable housing, and the recommendation of the inclusionary zoning working group. Inclusionary zoning is one tool the city is promoting to address a lack of affordable housing that forces employees "to live in less than adequate housing within the city, pay a disproportionate share of their incomes to live in adequate housing within the city, or commute ever-increasing distances to their jobs from housing located outside the city."²⁰ Unlike the FUA ordinance, the citywide ordinance offers developers the option to pay a fee in lieu of building affordable units on-site. Prime housing market conditions in San Diego create a financial incentive to pay a fee in lieu of building units on-site. Thus, it remains uncertain whether the new inclusionary zoning law will generate a large supply of integrated affordable housing.

The Program

Set-Aside Requirements

San Diego's city-wide inclusionary zoning ordinance requires all residential developments of ten or more units to set aside 10% of the units as affordable to households at or below 65% of the area median income (AMI) for rental units and at or below 100% of the AMI for owner-occupied units. The FUA is exempt from the citywide ordinance and will continue to adhere to the 1992 FUA inclusionary zoning framework, which has a higher developer set-aside requirement of 20%.

¹⁸ Interview of Bill Levin, San Diego Senior Planner.

¹⁹ Interview of Susan Tinsky, Chief Policy Officer Advisor for the City of San Diego Housing Commission, August, 2003.

²⁰ San Diego Ordinance Number O-2003-135, page 3.

Developer Incentives

Neither the 1992 FUA inclusionary zoning ordinance nor the 2003 citywide ordinance provides developers with incentives or cost off-sets for building affordable units. The city opted not to offer cost off-sets, such as fee waivers or density bonuses, because developers can easily cover the cost of affordable units through the sale of market-rate units, according to an economic analysis conducted by a private firm for the Housing Commission.²¹

On-site Construction

The ordinance requires that on-site affordable units be comparable to the market-rate units in bedroom mix, design, and overall quality of construction with the exception that the affordable units do not have to exceed three bedrooms. Allowances are also made for the interior features and square footage of the affordable units.

Income Targets

San Diego's inclusionary zoning ordinance targets households at or below 65% of the Area Median Income (AMI) for rental units and at or below 100% of the AMI for owner-occupied units. The new inclusionary zoning ordinance exempts a residential development or a portion of a residential development that is sold to households earning less than 150% of the AMI.²² The City Council insisted on this provision to encourage the development of condominiums within this price range.²³

Period of Affordability

The new citywide ordinance requires rents to remain affordable for 55 years. For-sale units do not have a required period of affordability, but the ordinance states that equity from the sale of the affordable unit should be split between the city and the homeowner. The city devised an incremental system by which equity is shared. A homeowner is entitled to a larger share of the equity for each year of ownership. For example, if a unit is sold after two years, the owner is entitled to 21% of the equity, whereas a unit sold after ten years entitles an owner to 69% of the equity. All funds collected by the city from the shared equity agreement are deposited in the Inclusionary Housing Fund to support affordable housing projects. The city is also entitled to first right of refusal on any affordable for-sale unit.

In-Lieu Options

Developers can opt to make a fee in-lieu payment, which is calculated based on the square footage of an affordable unit compared to the gross square footage of the entire project. The fee is phased in over a three-year period and rises from \$1.00 per square foot the first year to \$2.50 per square foot the third year.²⁴ Unlike the citywide ordinance, the FUA ordinance does not offer any fee in-lieu option. The large number of on-site affordable units created under the FUA ordinance is attributable to the absence of any in-lieu fee option.²⁵

²¹Interview of Bill Levin, San Diego Senior Planner, August 2003.

²²San Diego Ordinance Number O-2003-135, 142.303, c2.

²³Interview of Susan Tinsky, Chief Policy Advisor for the City of San Diego Housing Commission, August 2003.

²⁴San Diego Ordinance Number O-2003-135, 142.1310 d.

²⁵Interview of Bill Levin, San Diego Senior Planner, August 2003.

Off-site Development

The inclusionary housing requirements can also be satisfied by providing the same number of units at another site within the same Community Planning Area. In contrast to most ordinances in the nation, San Diego's ordinance does not require a higher affordable housing set-aside for units constructed off-site. Developers may provide affordable units through a combination of on-site and/or off-site construction and a fee in-lieu payment.

Developers must seek a variance from the Planning Commission to build affordable units off-site within a different Community Planning Area. Variance requests only exempt developers from adhering to portions of the ordinance and are subject to a Plan Commission decision with appeal to the City Council. To acquire a variance, a developer must demonstrate a special circumstance unique to that development; that the development would be infeasible without a modification; or that a substantial financial hardship would result from adherence to the ordinance.²⁶

The City Council may exempt a developer from the ordinance through a waiver. Requests for a waiver must satisfy the same criteria as an application for a variance, but a waiver request is subject to a higher degree of scrutiny than a variance. The San Diego Housing Commission processes all waivers, but final approval must come from the City Council.

Administration

The Inclusionary Housing Program is administered by two city agencies: the Development Services Department and the San Diego Housing Commission. The Chief Executive Officer of the San Diego Housing Commission is responsible for determining targeted rental and ownership affordability, resident qualifications, and monitoring the program.

The Impact of Inclusionary Zoning

The ability of inclusionary zoning to produce 1,200 affordable units in the FUA was a key factor in the decision to adopt a citywide ordinance. According to San Diego senior planner Bill Levin, the pace of development in the FUA did not slow after passage of an inclusionary zoning requirement.²⁷ This provided the development community with tangible assurance that inclusionary zoning does not have a negative impact on their industry. San Diego's Planning Department does not anticipate that the citywide ordinance will produce as many on-site affordable units as the FUA ordinance because the citywide ordinance provides developers with the option to pay an in-lieu fee. Due to the strong housing market in San Diego, planners project that the in-lieu fee will not be able to keep pace with the price of building on-site. Thus paying an in-lieu fee will be a less expensive option than building units on-site.

²⁶San Diego Ordinance Number O-2003-135, 142.1304 d.

²⁷ Interview with Bill Levin, San Diego Senior Planner.

Case Study: San Francisco, California

Background

In 1992, San Francisco, a city of almost 800,000 people, adopted a limited inclusionary housing program to address the shortage of affordable housing for very-low- and low-income residents. The California State Legislature requires all local governments to develop a comprehensive, long-term general plan that encourages the development of a variety of housing types for all income levels. Inclusionary zoning is a popular policy tool in California, where it has been adopted in over 100 municipalities. The 1992 ordinance only applied to planned unit developments (PUDs) and projects requiring a conditional use permit, neither of which affected a substantial amount of residential development in the city.²⁸ Most of San Francisco is built out, and the city lacks vacant lots that are large enough for PUDs. In addition, most projects in San Francisco do not require a conditional use permit.

The majority of housing built in the mid- to late 1990s consisted of live/work units. According to city planner Teresa Ojeda, live/work units were initially anticipated to provide cheap or relatively inexpensive housing for artists by allowing them to work in the same complex where they live. By the mid-1990s, live/work units were in high demand for vocations other than artists. This increased demand drove up housing costs in working-class neighborhoods.²⁹ Live/work units that started at about \$300,000 in the mid-1990s reached \$700,000 by the end of the decade.³⁰ During the 1990s, live/work units were zoned as commercial development and were exempt from the inclusionary housing requirement, as well as other building standards and fees normally imposed on residential development.

In January 2002, the inclusionary zoning ordinance was expanded from applying only to PUDs and projects requiring conditional use permits to all residential projects of ten units or more, including live/work units. The program's expansion came in response to the continuing affordable housing crisis and opposition from community groups to the displacement of low-income households as a consequence of rising property values and the increase in unattainable live/work units.

The Program

Set-Aside Requirements

Under the new ordinance, 10% of the units in a residential development of ten or more units must be set aside as affordable. The set-aside requirement jumps to 15% if the units are provided off-site. PUDs and developments that require a conditional use permit are subject to a 12% set-aside requirement, which increases to 17% if the affordable units are built off-site.

Developer Incentives

San Francisco offers minimal developer incentives. Such incentives are limited to receiving refunds on the environmental review and on the building permit fees for the portion of the housing project that is set aside as affordable.

²⁸Interview of Teresa Ojeda, San Francisco City Planner, August 2003.

²⁹Ibid.

³⁰Ibid.

On-site Construction

The affordable units must be comparable in number of bedrooms, size, exterior appearance, and overall quality to market-rate units.³¹ The ordinance makes allowances for square footage and interior features, which do not have to meet the same standards as the market-rate units.

Income Targets

For rental units, the inclusionary zoning ordinance targets households earning 80% of the area median income (AMI). For owner-occupied units, the ordinance applies to households earning up to 120% of the area median income. San Francisco's area median income calculation includes the wealthy counties of San Mateo and Marin. As a result, the AMI is substantially higher than other US cities. The AMI for a family of four is \$91,500, and the AMI for a single-person household is \$62,050. Therefore, a household of four at 80% of the AMI earns a maximum annual salary of \$73,200, and a household of four at 120% of the AMI earns a maximum annual income of \$109,800.³²

Off-site and In-Lieu Options

Developers can elect to construct affordable units off-site but are discouraged from doing so by a requirement that increases the affordable unit set-aside to one and one half more affordable units than are required for on-site construction. In-lieu fee payments are made to the Citywide Affordable Housing Fund and are appropriated for affordable housing. The amount of the fee is determined by several factors including the projected value of the affordable units had the developer constructed them on-site.

Period of Affordability

San Francisco's inclusionary zoning ordinance requires that both rental and for-sale units remain affordable for 50 years.³³ All housing projects must record a Notice of Special Restriction with the Recorder of the City and County of San Francisco that incorporates affordability restrictions. If an affordable rental unit is converted to an ownership unit, the ordinance requires that it remain affordable and continue to adhere to the affordability control period. The San Francisco Planning Commission and Planning Department monitor affordability controls.

Administration

The Mayor's Office of Housing and the Plan Commission administer the inclusionary zoning program. The ordinance requires that the Mayor's Office of Housing conduct a study every five years to determine the relationship "in nature and amount between the production of market-rate residential housing and the availability and demand for affordable housing in San Francisco."³⁴ The studies will be used to determine whether to increase affordability levels.

The Impact of Inclusionary Zoning

Since the adoption of comprehensive inclusionary zoning in 2002, the program has generated 90 affordable units through projects totaling 920 units. Currently, proposed housing projects under planning review total about 7,485 units, which could result in approximately 745 affordable units.³⁵

³¹San Francisco Zoning Ordinance, section 315.4 c.

³²Interview of Teresa Ojeda, San Francisco City Planner, August 2003.

³³San Francisco Zoning Ordinance, section 315.7 (a).

³⁴San Francisco Zoning Ordinance, section 315.8 e.

³⁵Interview of Teresa Ojeda, San Francisco City Planner, July 2003. Calculations based on the 2003 San Francisco affordable rental housing guidelines.

Large Cities with Inclusionary Housing Programs

| | Affordable Units Produced | Threshold Number of Units/ Income Target | Set-Aside Requirement | Control Period | In lieu-fee Payment/ Off-site Development | Density Bonus | Other Developer Incentives |
|--|---|---|------------------------------|--|--|----------------------|---|
| Boston, MA (2000) Population: 589,141 | 200 inclusionary units since 2000 | <i>Threshold:</i> 10 or more units <i>Income Target:</i> at least one-half of affordable units for households earning less than 80% of the AMI; remaining affordable units for households earning between 80-120% of the AMI, with an average of 100% of the AMI | 10% set-aside | “Maximum allowable by law” | <i>Fee:</i> must be equal to 15% of the total number of market-rate units times an affordable housing cost factor <i>Off-site:</i> may build off- site, but set-aside requirement increases to 15% | None | No citywide developer incentives, but increased height and FAR allowances permitted in the financial district |
| San Francisco, CA (1992, expanded in 2002) Population: 776,733 | 128 units completed between 1992 and 2000; 90 units since 2002; 745 units in the pipeline | <i>Threshold:</i> 10 or more units <i>Income Target:</i> for rental units, households earning 80% or less of the AMI; for for-sale units, households earning 120% of the AMI | 10% set-aside | 50 years for rental and for-sale units | <i>Fee:</i> determined by several factors including the projected value of on-site affordable units; in-lieu payments are made to the Citywide Affordable Housing Fund <i>Off-site:</i> Developers can elect to build affordable units off-site, but the set-aside requirement increases to 15% | None | Refunds available on the environmental review and building permit fees that apply to the affordable units |

| | Affordable Units Produced | Threshold Number of Units/ Income Target | Set-Aside Requirement | Control Period | In lieu-fee Payment/ Off-site Development | Density Bonus | Other Developer Incentives |
|--|--|--|--|--|--|---|---|
| Denver, CO (2002) Population: 554,636 | 804 planned units since 2002 | <i>Threshold:</i> 30 units or more <i>Income Target:</i> 65% of the AMI for rental units and less than 80% of the AMI for for-sale units | 10% of for-sale units or a voluntary set-aside of 10% for rental units | 15 years | <i>Fee:</i> 50% of the price per affordable unit not built <i>Off-site:</i> allowed if developer builds “more” affordable units than required on-site | Up to 20% for single-family units; up to 10% for multi-family units | \$5,000 reimbursement for each for-sale unit, up to 50% of the total units in the development; \$10,000 reimbursement for each affordable rental unit if unit is priced for households at 50% of the AMI or below |
| San Diego, CA (1992, expanded in 2003) Population: 1,223,341 | 1,200 units completed between 1992 and 2003 | <i>Threshold:</i> 10 or more units <i>Income Target:</i> rental units are set aside for households earning at or below 65% of the AMI; for-sale units are set aside for households earning at or below 100% of the AMI | 10% set-aside | 55 years for rental and for-sale units | <i>Fee:</i> calculated based on the square footage of an affordable unit. Fee increases between 2003 and 2006 from \$1.00 per square foot to \$2.50 per square foot <i>Off-site:</i> Developers can opt to build off-site (set-aside does not increase) | None | None |
| Sacramento, CA (2000) Population: 407,075 | 465 units completed, hundreds more in the pipeline | <i>Threshold:</i> Any development over 9 units <i>Income Target:</i> 15% of the units must be set aside as affordable. Of the affordable units that are produced in the development, one-third of the units must be priced for households making between 50% and 80% of the AMI. Remaining two-thirds must be priced for households making less than 50% of the AMI | 15% set-aside | 30 years | Can dedicate land off-site or build off-site if: <ul style="list-style-type: none"> • there is insufficient land zoned as multi-family on-site • Alternative land or units must be in “new growth” areas | 25% | Expedited permit process for affordable units; fee waivers; relaxed design guidelines; may receive priority for subsidy funding |

Summary of State Statutes on Fair & Affordable Housing

| State | Title (year passed) | Background/Concept | Administration/ Enforcement | Outcomes |
|---------------|--|--|---|---|
| California | General Plan Law amendment (1975,1980) Density Bonus Law (1979) | Require municipalities to develop a plan for affordable housing as part of their general plan and to provide density bonus as an incentive for the development of affordable housing. | Amendments to the planning statute require municipalities to develop 5 year plans to meet all housing needs (1975) and to meet their regional “fair share” of affordable housing (1980). Density Bonus Law requires municipalities to offer affordable housing developers 25% density bonuses. Department of Housing and Community Development must certify municipal housing elements. | A 1994 survey found that a total of 22,572 completed units and an additional 2,439 approved or under construction were attributable to inclusionary housing programs prompted by the planning and density bonus laws. Critics argue that the planning law is weak on implementation and has primarily benefited those with 80 to 120% AMI. |
| Connecticut | Affordable Housing Land Use Appeals (1989) | Allows developers to appeal local decisions rejecting affordable housing proposals. | Creates a state level appeals process available in towns with less than 10% affordable housing. The appeal is heard in Superior Court | As of July 2000, the courts have ruled in 27 cases in favor of developer but only seven developments were completed, producing over 800 units of affordable units. |
| Massachusetts | Comprehensive Permit Law (or Anti-Snob Zoning Act) (1969) | Requires municipalities to provide an expedited hearing and review process for affordable housing proposals and creates a state level appeals process. | Sets conditions for a comprehensive permit process at the local level and creates the Housing Appeals Committee to review appeals of permit denials (with the burden of proof on the municipality). | Between 1969 and 1997 more than 17,000 units of affordable housing were built with comprehensive permits. |
| New Jersey | Fair Housing Act (1985) | Developed in response to the Mt. Laurel NJ Supreme Court decisions establishing municipalities’ constitutional obligation to provide a realistic opportunity for the development of the community’s “fair share” of affordable housing. This law establishes a process for municipalities to develop and have certified affordable housing plans that provide for the development of affordable housing. | Created the Council on Affordable Housing (COAH) to define housing regions; estimate housing needs; set guidelines for determining “fair share” housing; and review and certify local housing plans and regional contribution agreements (allow municipalities to transfer up to 50% of their fair share housing obligation). Municipalities without certified housing plan are vulnerable to lawsuits from developers. | COAH reported that 26,800 units have been built or are under construction, 14,600 have realistic zoning for affordable housing, 6,700 RCA units built and 10,400 units rehabilitated by June 2000. Critics maintain that the law has had little impact on racial segregation in NJ and is complex to administer. |

Eliminating Barriers: Letting the Market Help Meet Illinois Housing Needs



**BUSINESS AND PROFESSIONAL PEOPLE
FOR THE PUBLIC INTEREST**

By Nicholas J. Brunick and D. Jo Patton
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I. INTRODUCTION

Nobody is in favor of exclusion. Few people will tell you it is OK to have policies or laws that exclude people from towns, schools, or businesses. The supreme law of our land, the United States Constitution, paints a compelling vision of an inclusive society in which everyone has the opportunity to pursue their dreams.

Unfortunately, some laws in towns throughout Illinois exclude hard-working families. These laws are not glaring or obvious. Nothing on the books states: “*No plumbers, police officers or nurses allowed in (except to work).*” But the effect is the same. Certain zoning requirements make it very hard for developers to build affordable housing. As a result, some communities have virtually no housing affordable to families with a household income of \$60,000 or less. The consequences of this exclusion are staggering.

THE PRICE OF EXCLUSION

When we first meet Carmen Smith, she is stifling a yawn as she starts the nearly two-hour commute to her nursing job in the northern suburbs. She is not alone. Every day thousands of residents commute from neighborhoods with few jobs to areas with plenty of entry-level jobs. But these job-heavy neighborhoods lack affordable housing for people making entry-level wages. Welcome to the jobs/housing mismatch – a shorthand phrase referring to the spatial mismatch between the location of jobs and affordable housing.

Economist John Kain first launched the debate regarding the impact of the geographic separation of entry-level jobs with the communities where residents needed those jobs. Kain hypothesized that residential segregation and the decentralization of jobs contributed significantly to black unemployment.¹ Discussions of this analysis, termed the spatial mismatch hypothesis, waxed and waned, entering the policy arena in the 1990s as a result of the welfare-to-work efforts. Facing the practical realities of locating work for people leaving welfare, political leaders and planners realized that the spatial mismatch posed a significant barrier. The result has been a focus on transportation options, from improving public transportation to helping workers purchase cars.

But the solution to the jobs/housing mismatch must include more than transportation improvements. If Carmen could find housing closer to her nursing job, it would mean a shorter commute and more time with her children. It could also mean better schools, parks, and other public services. However, finding affordable housing in the booming communities of northwest Cook and DuPage counties is tough and getting tougher.

¹ John F. Kain, “Housing Segregation, Negro Employment, and Metropolitan Decentralization,” *Quarterly Journal of Economics* 82, no. 2 (1968): 175-97.

Ask the person in the street about the jobs/housing mismatch, and you will probably get a blank stare. Describe Carmen's daily commute, and you'll probably find sympathy but still no recognition that her commute is a very direct consequence of the patterns of development in the Chicago region over the last half century. The rapid growth of suburban communities exists as the most obvious development trend in the region since World War II. Between 1970 and 2000, the city of Chicago's population dropped from 3.4 million to 2.8 million people while the population of the collar counties increased by 560,000, slightly less than the population loss in the city of Chicago.²

Jobs during those two decades also moved out to the suburbs, with the city of Chicago posting an employment loss of more than 20% and DuPage County gaining more than 260%. A Chicago Metropolis 2020 report documented that between 1980 and 1990, 56% of the region's new jobs were located in just 10% of its townships.³ The median home price in these townships was 40% higher than the region's median home price. In other words, areas with the greatest number of jobs have less affordable housing. Couple this growth with the fact that most of the development has been at low densities, much of it too spread out to be served efficiently by public transportation, and you begin to understand why there are thousands of people like Carmen with long commutes every day.

THE JOBS/HOUSING MISMATCH

But the jobs/housing mismatch is more than just a byproduct of suburbanization. If jobs and households spread outward with affordable homes available in all communities, then Carmen would have the option to find housing near her nursing job. The jobs/housing mismatch is also the consequence of segregation. As households and jobs moved out of the city, zoning, transportation investment and tax policy, along with the prejudices and preferences of local residents, steered the location of residential development. The result is that the Chicago metropolitan region is one of the most economically and racially segregated regions in the nation.

A 1998 study commissioned by the Leadership Council for Metropolitan Open Communities found that while there have been significant improvements in fair housing in the last three decades, the Chicago region remains heavily segregated by race and ethnicity.⁴ Author and former mayor David Rusk argues that economic segregation is worsening, with Chicago ranking fifth in the nation for isolation of poor families.⁵ The impact of the jobs/housing mismatch extends beyond the hardships of workers like Carmen. For employers, the challenge of attracting and retaining employees who must face a long commute can be difficult and expensive. And the long work trips contribute to the traffic congestion that, according to the Texas Transportation Institute, costs the

² U.S Census Bureau, 1990 and 2000 Summary Tables.

³ Chicago Metropolis 2020, *Recommendations for Developing Attainable Workforce Housing in the Region*. (Summer, 2002).

⁴ Leadership Council for Metropolitan Open Communities, *Black, White, and Shades of Brown: Fair Housing and Economic Opportunity in the Chicago Region*. (February, 1998).

⁵ Rusk, David. *Cities Without Suburbs*. Washington, D.C.: Woodrow Wilson Center Press. (1993).

Chicago region over \$4 billion dollars a year in wasted fuel, delayed shipments and lost work time.⁶

Beyond the issue of commuting lies the fundamental, democratic issue of what kinds of communities we wish to live in. Many residents express an interest to live in diverse communities, particularly for the sake of their children. Unfortunately, our region now grows more polarized, with exclusive communities dominating some parts of the region and communities with limited job opportunities, shrinking tax bases, and failing schools struggling to survive in others. This trend bodes ill for the region's economy and for its residents' quality of life.

WAKING UP

The first step in tackling a problem is recognizing it. Fortunately, that process is well underway. Carmen's story is one of several stories told in "No Place to Live," a documentary about the impact of the current pattern of housing development in the Chicago region. The program aired in April 2002 on WTTW public television as part of the *Chicago Matters: Inside Housing* series cosponsored with WBEZ public radio, the Chicago Public Library, and the Chicago Reporter. It helped fuel a growing discussion about affordable housing in the Chicago region. The mismatch between the areas with job growth and those with affordable housing was acknowledged as a critical gap.

Clearly, local leaders can play a critical role in tackling the barriers that prevent the market from developing adequate affordable housing in job growth areas. The Metropolitan Mayors Caucus, a coalition of mayors throughout the region formed in 1997, is now grappling with the problem of affordable housing and the jobs/housing mismatch. Through a task force on housing formed last year, the Mayors Caucus began considering programs and policies to preserve and create affordable homes.

As they ponder options, the mayors can look to the City of Highland Park for inspiration. A North Shore community with little affordable housing, Highland Park passed an ambitious affordable housing plan in 2001 and is now in the process of launching a Housing Trust Fund and a Community Land Trust. In August 2003, Highland Park became the first municipality in the region to pass an inclusionary zoning ordinance that links the development of market-rate residential units with a percentage of affordable units.

⁶ 2001 *Urban Mobility Study*. College Station, TX: Texas Transportation Institute, 2001. Full text at: http://mobility.tamu.edu/2001/study/issues_measures.stm

STATE ACTION

State leaders must also take steps to address barriers to affordable housing. While some local leaders may be willing to take the initiative to increase housing options in their communities, most hesitate. These leaders are fearful of a vocal minority of residents who consistently oppose any new housing development that is not priced higher than their own homes.

By setting policies at the state level that can bring down barriers to affordable housing, state leaders can help local leaders who want to do the right thing. These policies can also harness the power of the market to begin to produce more moderately priced homes. This can help meet the growing demand for affordable housing without requiring significant state subsidies.

II. MEASURING THE ABSENCE

Before proceeding to policy solutions, one might ask: do developers really face barriers at the local level that discourage or inhibit them from producing more affordable housing? What are these barriers? And if addressed, would developers actually build affordable housing?

Documenting exclusionary zoning practices can be challenging. A thorough analysis of the ordinances and maps of every town in Illinois would provide a detailed picture of the vast differences in zoning, but this task would be overwhelming and would not accurately capture the complex relationship of zoning, land prices, community attitudes and market demand. Another approach would be to monitor permit denials of affordable housing proposals. But the numbers of denials are not overwhelming.

The lack of dramatic stories detailing permit denials for affordable housing is easily explained: developers simply do not bother trying to develop affordable housing where they know it is not worth their time and money to propose it. Getting a residential project to the proposal stage requires time and money. Based on interviews with developers, it is clear that most cannot gamble on approvals. When local zoning will not support an affordable product, and the local community looks unfavorably on such projects, little incentive exists for developers to put forth projects that include moderately priced homes. If increasing the sales price and reducing the number of units helps win a speedy approval, why would a developer struggle to provide a range of housing options, even if there is market demand?

In order to gain a better understanding of the impact of local zoning and permit requirements on the development of affordable housing, Business and Professional People for the Public Interest (BPI) conducted a survey in August 2002 among developers and homebuilders in the Northeast Illinois region.⁷ In summary, the research revealed that:

- More than 9 out of 10 developers (93%) surveyed believe there are **local regulatory barriers** that impede the development of affordable housing,⁸ particularly:
 - Length of the approval process
 - Large minimum lot size requirements
 - Lower density requirements

- A majority of respondents identified a number of incentives that would encourage the development of affordable housing, namely:
 - A statewide housing appeals board with the power to overrule local denials of affordable housing developments

⁷ BPI designed the survey, and mailed it to 651 developers in the city of Chicago and suburbs. The respondents mailed the completed surveys back to BPI. The Coalition for Consumer Rights, a center for public interest research and education, provided tabulation and analysis of the 125 surveys completed. The findings contained in this report are indicative and not necessarily statistically significant, due to the relatively small sample size and the possibility of bias due to the reliance on voluntary responses.

⁸ The survey defined affordable housing as: a) rental developments including units that rent below \$1100 per month for a 2-3 bedroom, or b) for-sale housing that sells for less than \$125,000 per 2-3 bedroom unit or house.

- A comprehensive/unified permit process that includes all local approvals needed for development
- Density bonuses for developers who set aside affordable units

SURVEY RESULTS

More than 93% of developers surveyed believe there are local regulatory barriers that impede the development of affordable housing, such as restrictive zoning ordinances and burdensome permit requirements.

This view was consistent among all respondents, regardless of the geographic area in which they did most of their development or the types of development (e.g. single-family housing, new construction, etc.).

Developers cited the length of the approval process, large minimum lot size requirements, lower density requirements, and lack of land zoned for multi-family housing as the most significant barriers to developing affordable housing both in the city of Chicago and the suburbs. The table below details the aggregate responses.

Rankings of Zoning and Permit Issues as Barriers to Affordable Housing

| Zoning/Permit Issue | Significant Barrier | A Barrier | Not a Barrier | Don't Know |
|--|----------------------------|------------------|----------------------|-------------------|
| Length of approval process | 59% | 26% | 12% | 3% |
| Large minimum lot requirements | 48% | 22% | 23% | 8% |
| Lower density requirements | 48% | 26% | 22% | 5% |
| Lack of land zoned for multi-family housing | 42% | 32% | 20% | 7% |
| Number of permits required | 36% | 29% | 29% | 6% |
| Differing building codes among municipalities | 33% | 40% | 19% | 8% |
| Special or conditional use permit requirement for multi-family housing | 31% | 31% | 20% | 18% |
| High minimum parking space requirement | 23% | 37% | 28% | 13% |

The survey also revealed an unfortunate trend—the number of developers planning to build affordable homes is shrinking, and zoning barriers are a factor for many of them.

While 68% of developers surveyed indicated that they have developed affordable housing in the past, only 60% indicated that they planned to do so in the future.

Nearly three-fifths (60%) of those developers who do not plan to develop affordable housing in the future stated that local zoning and permit requirements were a factor in their decision.

Respondents were asked to list the three barriers that they felt were most responsible for preventing the development of affordable housing in the Chicago region. While individual responses were varied, certain commonalities are discernable. The following table indicates the most common categories into which developers’ responses can be grouped.

Responses to Open-ended Question on Barriers to Affordable Housing

| Barrier to Development | Percentage |
|---|------------|
| Zoning ordinances | 20% |
| Cost of land | 13% |
| Political and bureaucratic hurdles (in general) | 12% |
| Building codes too restrictive | 12% |
| Permit fees are too high | 10% |
| Length of permit application process | 8% |
| Lack of funding | 7% |
| Lot sizes too large | 6% |
| Community opposition (“N.I.M.B.Y.”) | 5% |
| Other | 5% |
| Taxes | 1% |

While many of the respondents’ open-ended statements mirror the range of specific barriers enumerated earlier in this section, several additional factors emerge as being salient to many developers. The costs associated with developing affordable housing are clearly a major factor, including both the price of land (13%) and high permit fees (10%). In addition, developers were concerned about the political and bureaucratic process required to build affordable housing (12%) and the length of the permit application process (8%). Another 12% indicated concern with restrictive building codes.

Finally, we asked developers to evaluate several policies that could address local regulatory barriers to affordable housing. Over 50% of the developers stated that **density bonuses** for affordable housing, a **comprehensive/unified permit process**, and a **statewide housing appeals board** with the power to hear appeals of local turn-downs of affordable developments would help them build more affordable housing.

CONCLUSION

It is clear that from the perspective of developers and homebuilders, zoning and permit requirements pose significant barriers to the development of affordable housing. It is also clear that in a developer's view, the state policies outlined above could help address these barriers.

III. ELIMINATING BARRIERS

Many towns and cities in Illinois face shortages in affordable homes for moderate- and low-income residents. This shortage can hinder economic development, increase traffic congestion, and limit opportunities for hard-working residents and their children. Unfortunately, local barriers contribute to the shortage of affordable housing. Exclusionary zoning laws, slow permit processes, and a vocal minority of residents with outdated stereotypes of affordable housing can make progress very difficult.

To identify practical solutions to these barriers, BPI conducted extensive research of state statutes that address barriers to the development of affordable housing. Findings from the survey of homebuilders and developers, and interviews with housing experts and local leaders were also considered in shaping a policy response. Based on this work, BPI has identified a proven policy option that can benefit Illinois communities and residents.

A PROVEN POLICY

A “Housing Appeals” law, or override statute, is an effective tool used by several states to tackle exclusionary zoning and unnecessary bureaucratic hurdles that discourage affordable housing development. These laws make it easier to build affordable homes in communities that have little or no affordable housing. While the laws vary, the core concept of a Housing Appeals law is to provide builders or developers of affordable housing a streamlined permitting process with flexible zoning at the local level and an opportunity to appeal a local zoning board’s permit denial. These statutes generally require local interests to be balanced against larger needs for affordable housing, and, most importantly, these laws shift the burden of persuasion from the developer to the local municipality to justify its decision to deny a project that contains affordable housing.

To date, Massachusetts, Connecticut and Rhode Island have established Housing Appeals statutes. California also has a limited version of such a law.⁹ The Massachusetts and Rhode Island laws combine two policy options that Illinois developers in the BPI survey indicated could help in addressing barriers to the development of affordable housing. See Appendix A for a summary of each state’s housing appeals statute.

ONE STATE’S EXPERIENCE: MASSACHUSETTS AND HOUSING APPEALS

The Massachusetts statute, also known as Chapter 40B, was enacted in 1969 to address the statewide shortage of affordable housing. Chapter 40B gives developers two mechanisms to overcome local government obstacles to affordable housing developments. Since 1970, Chapter 40B has produced 500 housing developments with nearly 30,000 units in more than 200 Massachusetts municipalities. More than 3,600 additional units are either under construction or nearing construction. Now, 119

⁹ New Jersey has a Housing Appeals remedy through their court system. The New Jersey Fair Housing Act is credited with creating the opportunity for approximately 60,000 affordable housing units between 1985 and 2001, many of them in suburban communities lacking in affordable housing.

communities that lacked affordable housing have it. The law requires local governments to allow developers of affordable housing to apply to the local Zoning Board of Appeals for a Comprehensive Permit, which includes all the required local approvals needed for development. It also authorizes a State Housing Appeals Committee to review developers' appeals of local government denials (or approvals with conditions imposed that render the project economically infeasible).

Chapter 40B expedites local review and reduces many of the barriers inherent in the local approval process. If less than 10% of the local housing stock is affordable, developers may appeal to the state Housing Appeals Committee when their projects are denied or granted with conditions that the developers view as adding unnecessary cost-generating requirements. Once a community has reached the 10% affordable housing requirement, rejections of additional developments cannot be appealed. Through 2002, 419 appeals had been filed with the Housing Appeals Committee (HAC):

- 45% of those cases were withdrawn, dismissed, or settled independently of HAC
- 24% involved a negotiated settlement
- 31% resulted in an actual decision by HAC

Of the cases that resulted in a decision, 84% were ruled in favor of the developer and 16% were ruled in favor of the municipality.

Typical developments built through Chapter 40B include:

- Multi-family housing developments
- Single-family housing
- Mixed-income condo projects
- Housing for seniors

To qualify for Chapter 40B, a development project must first be approved under a state or federal housing program, such as the Massachusetts Housing Finance Agency or U.S. Department of Housing and Urban Development.¹⁰ At least 25% of the housing must be affordable to households that earn no more than 80% of the area median income.

Alternatively, the project can provide 20% of the units to households below 50% of area median income. Affordability restrictions must be maintained for at least 15 years for rehabbed units and 30 years for new construction, though in practice, many communities are requiring units to remain affordable in perpetuity. Private developers must agree to restrict their profit on the project.

Once a project is eligible, the developer submits an application for a comprehensive permit to the local Zoning Board of Appeals. The Board has authority to grant all local approvals necessary for the project after consulting with other relevant agencies, such as the Planning Board, Conservation Commission, and Board of Health, resulting in a more streamlined review process.

¹⁰ Many of the 40B projects, though approved through a MHFA program, do not receive a government subsidy.

The Zoning Board of Appeals is also authorized to apply flexible zoning standards. For example, local zoning codes may limit development to one house per acre. Under Chapter 40B, the Zoning Board of Appeals can approve higher density development projects, making it financially feasible to develop affordable housing.

The combination of flexible rules and a right of appeal to the Housing Appeals Committee has meant that the majority of Chapter 40B proposals are negotiated at the local level and approved with conditions set by the local board of appeals. Issues such as density, buffer zones, conservation areas, and infrastructure improvements are typical items for negotiation.

While initially resistant to Chapter 40B, many municipal officials in Massachusetts now recognize the importance of the law. It gives them the opportunity to evaluate affordable housing proposals on their merits, rather than calculating the political consequence of supporting any affordable housing development. Some residents may still oppose affordable housing, but they recognize that their local leaders are simply complying with state law.

HOUSING APPEALS TAILORED TO ILLINOIS

After careful analysis of the various housing appeals statutes and research on housing markets in Illinois, BPI developed a Housing Appeals proposal for Illinois. A version of the Housing Appeals law (House Bill 220) was proposed in the 93rd Illinois General Assembly with two basic elements:

1. Comprehensive Permit

- The bill required local governments to allow developers of affordable housing to apply for a comprehensive, “one-stop” permit process to the local board or commission of the municipality’s or county’s choosing (e.g. the Planning Commission, the Zoning Board of Appeals, etc.).
- The permit would include all local approvals needed for development, thereby saving developers time and money.
- The local body chosen as the comprehensive permit body by the local government would be required to hold one public hearing on the proposed Affordable Housing Development. It would also be authorized to apply flexible zoning standards in order to make the project feasible.
- A comprehensive permit could be denied if it is demonstrated that the project would harm the environment or significantly conflict with the town’s comprehensive plan.
- The bill defined an Affordable Housing Development as a development with at least 20% of the units affordable to moderate- and low- income households (households below 80 percent of the AMI).

2. State-Level Housing Appeals Board

- The bill called for the creation of a State Housing Appeals Board that reviews developers' appeals of local government denials (or approvals with conditions that make the project infeasible) of proposed affordable housing developments.
- The Board's standard of review is deferential to affordable housing developers, requiring the municipality to justify the denial.
- The Board would have the authority to require a municipality to issue all approvals needed for an affordable housing development. The Board's order is enforceable in court.
- The State Housing Appeals Board would include representatives of local government, planning experts, appropriate state officials, developers, and affordable housing advocates.

Exemptions

- A Municipality or county would be exempt from the statute if at least 10% of its housing units are already affordable as defined in the statute. This means that the number of rental units affordable to households at or below 60% of the median household income for the county or the PMSA, and the number of owner-occupied units affordable to households at or below 80% of the median household income for the county or PMSA must equal 10% of the total housing stock in the local government. This provision provides local governments with an incentive to plan and actively promote affordable housing.

While House Bill 220 did not pass the 93rd General Assembly, Illinois lawmakers took a critical first step through the passage of House Bill 625, the Affordable Housing Planning and Appeal Act.

House Bill 625 contains important elements of a strong Housing Appeals law. It includes the creation of a State Housing Appeals Board empowered to hear appeals from developers who have been denied in their efforts to build affordable housing in communities with less than 10% affordable housing. The Board will hold hearings on an appeal and will require the local municipality to explain its local action. On the basis of the hearing, the Board could require the municipality to issue all approvals needed for the development. The Board will include representatives of local government, planning experts, and affordable housing advocates. A retired circuit or appellate judge will chair the board. The chairman of IHDA will serve as an ex-officio member.

The State Housing Appeals Board will not begin to hear appeals from developers until 2009 in order to give local governments the opportunity to produce more affordable housing on their own.

In addition to the State Housing Appeals Board, House Bill 625 also requires non-exempt local governments (communities where less than 10% of the housing stock is affordable as defined by HB 625 in section 15) to adopt an affordable housing plan. This plan must identify:

- The number of affordable units a community must produce to reach the 10% exemption level.
- Land or preexisting structures that are most suitable for affordable housing development.
- Incentives that local governments can provide to affordable housing developers.

Each local affordable housing plan must also contain one of three very specific goals:

- 1) 15% of all new development or redevelopment will be affordable.
- 2) The community will increase the overall percentage of affordable housing by three percentage points (e.g. from 2% to 5%).
- 3) The community will reach the 10% affordable housing exemption level.

This plan must be submitted to the Illinois Housing Development Authority by July 2004.

There are three ways to gain exemption from the requirements of HB 625. Any local government in which at least 10% of its total year-round housing units are affordable is exempt. Any municipality with a population of under 1,000 is also exempt. Finally, the state Board of Appeals will dismiss any appeal brought against a municipality if that municipality can prove that it has adopted and implemented its affordable housing plan and met the required statutory goal outlined in that plan.

The Affordable Housing Planning and Appeal Act offers important new strategies for overcoming local government obstacles to affordable housing. However, this act can be strengthened in a number of ways to assure that new affordable units are produced in job-rich communities:

- Include a comprehensive permit process.
- Outline clear standards delineating when a local community can and cannot deny an affordable housing development.
- Shift the burden of persuasion from the developer to the local municipality during the appeals process, or at the very least, provide for a “burden-shifting” procedure where both sides bear some responsibility for proving certain pieces of their case.

See appendices B, C, and D for a fact sheet for House Bill 220; a fact sheet for House Bill 625; and a profile of an ideal Housing Appeals law for Illinois, respectively.

ACTING NOW TO LET THE HOUSING MARKET WORK

The evidence that Illinois is experiencing a housing crisis is compelling. The Regional Rental Market Analysis, coordinated through the Metropolitan Planning Council, documented that 37% of renter households in the Chicago region spend more than 30% of their income on rent.¹¹ An affordable rent – which is considered 30% of income – for someone earning the federal minimum wage is \$257. This is far below the fair market rent for a one-bedroom unit in every area of the state, including the Chicago area where fair market rent is now \$778.¹²

Without quick action, this crisis is likely to worsen, causing more traffic congestion and threatening the economic development and quality of life of our region. As a result, more families will be forced to make terrible choices:

- ❑ Crowd in with family or friends.
- ❑ Spend most of the household income on rent and skimp on food, medicine, or school supplies.
- ❑ Find an affordable home, and then endure long and expensive commutes to distant jobs.
- ❑ Move often in search of an affordable home, disrupting school progress, friendships, and community ties.

Clearly, more resources are needed to address Illinois' housing crisis. Yet resources alone will not solve the problem. Leaders must act now to bring down barriers and allow the housing market to meet the market demand of working families for decent affordable housing. The Housing Appeals approach provides state leaders with a proven tool to help meet the growing need for affordable housing without an enormous strain on state or local funds. To make Housing Appeals a reality in Illinois requires the leadership and commitment of responsible citizens, businesses, local government, and state officials.

¹¹ A regional rental market analysis prepared for the Metropolitan Planning Council by the University of Illinois at Chicago. *For Rent: Housing Options in the Chicago Region*. (November, 1999).

¹² Fair market rent data obtained from U.S. Department of Housing and Urban Development.

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Appendix A: Summary of “Housing Appeals” State Statutes

| State | Title (year passed) | Background/Concept | Administration/ Enforcement | Outcomes |
|---------------|---|--|---|--|
| Connecticut | Affordable Housing Land Use Appeals (1989) | Allows developers to appeal local decisions rejecting affordable housing proposals. | Creates a state level appeals process available in towns with less than 10% affordable housing. The appeal is heard in Superior Court. | The courts have ruled in 27 cases in favor of developer. Seven developments have been completed, producing over 800 units. ¹³ As of October 2001, 32 Connecticut cities and towns exceeded the minimum requirements of the law. ¹⁴ |
| Massachusetts | Comprehensive Permit Law (or Anti-Snob Zoning Act) (1969) | Requires municipalities to provide an expedited hearing and review process for affordable housing proposals and creates a state-level appeals process. | Sets conditions for a comprehensive permit process at the local level and creates the Housing Appeals Committee to review appeals of permit denials (with the burden of proof on the municipality). | Approximately 30,000 units of housing have been built with comprehensive permits. Another 3,600 units are under construction. |
| Rhode Island | Low and Moderate Income Housing Act (1991) | Establishes a streamlined permitting process for affordable housing developments and creates a state-level appeals process. | Developers of affordable housing in communities with less than 10% affordable housing may apply for a comprehensive permit. The State Housing Appeals Board was created to review local permit denials. | The supply of affordable housing in Rhode Island has increased by 19% from 1992 to 2001. Since the law’s inception, 12 local decisions have gone to the Housing Appeals board. Together these cases represent almost 300 units of housing. ¹⁵ |

¹³ Connecticut General Assembly Office of Legislative Research. *Housing Projects Developed Under the Affordable Housing Land Use Appeals Procedure.* (2000).

¹⁴ Stuart Meck, et al. *Regional Approaches to Affordable Housing.* The American Planning Association. (2003).

¹⁵ Stuart Meck, et al. *Regional Approaches to Affordable Housing.* The American Planning Association. (2003).

APPENDIX B: HB 220: THE BUILDER'S APPEAL ACT

MAJOR COMPONENTS:

(1) Comprehensive Permit

- HB 220 (as introduced) called for the creation of a streamlined comprehensive permit process at the local level for developers of affordable housing. A development with at least 20% of the units set aside as affordable to moderate- and low-income households would be entitled to a “one-stop” permit process guided by the local Zoning Board of Appeals. The permit includes all local approvals needed for development.
- The local body chosen as the comprehensive permit body by the local government would be required to hold one public hearing on the proposed Affordable Housing Development. It would also be authorized to apply flexible zoning standards in order to make the project feasible.
- A comprehensive permit could be denied if it is demonstrated that the project would harm the environment or significantly conflict with the town's comprehensive plan (unless it conflicts with provisions in the comprehensive plan that make it infeasible to develop affordable housing while allowing for the creation of other types of housing).

(2) State-Level Housing Appeals Board

- HB220 called for the creation of a State Housing Appeals Board that would review developers' appeals of certain local government decisions affecting proposed affordable housing developments.
- An Affordable Housing Development is defined as a development in which at least 20% of the housing is set aside as affordable to moderate- and low-income households (households below 80% of the AMI). Under HB220, units must remain affordable for at least 15 years.
- The State Housing Appeals Board includes unpaid representatives of local government, regional planning boards, the development community, and the affordable housing advocacy community.
- The Board's standard of review is deferential to affordable housing developers. The municipality bears the burden of demonstrating that it correctly denied or conditionally approved an affordable housing development.
- The Board may require a municipality to issue all approvals needed for an affordable housing development. The Board's Order can be enforced in court.

EXEMPTIONS:

- Any local government in which at least 10% of its housing units have been subsidized by the federal or state government, by a private entity, and in which occupancy is restricted or intended for low- and moderate-income households is exempt.

COMMUNITIES AFFECTED:

- Based on preliminary calculations, about 85 communities in Illinois would be affected by HB 220 as introduced. About 90% of those communities are located in the northern and western suburbs of Chicago.

APPENDIX C:

HB 625: THE AFFORDABLE HOUSING PLANNING AND APPEAL ACT

MAJOR COMPONENTS:

(1) State-Level Housing Appeals Board

- The law creates a State Housing Appeals Board that reviews developers' appeals of certain local government decisions affecting proposed affordable housing developments.
- Such developments are defined as those in which at least 20% of the housing is set aside as affordable to households at 80% of the county median income. Rental units must remain affordable for at least 30 years, and owner-occupied units must remain affordable for at least 15 years.
- The State Housing Appeals Board includes governor-appointed representatives of local government, zoning boards of appeals, plan commissions, developers, and housing advocates and will be chaired by a retired judge. The Board will be effective January 1, 2006 and will be able to hear cases on appeal beginning January 1, 2009. The State Housing Appeals Board will be housed at IHDA.
- The Board may require a municipality to issue all approvals needed for an affordable housing development. The Board's Order can be enforced in court.

(2) Affordable Housing Plan

- Municipalities and counties with less than 10% affordable housing in their housing stock must approve an affordable housing plan that states the total number of affordable housing units needed to reach the goal of 10% affordable housing within its jurisdiction. This plan must be completed by July 1, 2004 and submitted to IHDA within 60 days.
- The affordable housing plan must also identify what lands within the local government's jurisdiction are most appropriate for the development of affordable housing, and what incentives can be provided to developers that would attract affordable housing to their jurisdiction.
- The plan must contain one of three very specific goals for increasing the stock of affordable housing in a community: 1) a minimum of 15% of all new development or redevelopment must be affordable as defined in the statute; 2) the community will increase its overall percentage of affordable housing by three percentage points (e.g. from 2% to 5%); or 3) the community will increase its overall percentage of affordable housing to 10% of the total housing stock.

EXEMPTIONS:

- Any local government in which at least 10% of its total year-round housing units are affordable is exempt.
- Any municipality with a population of under 1,000 is exempt.
- Communities that can prove that they have adopted and implemented their affordable housing plan and met the goal outlined in their plan will be exempt.

COMMUNITIES AFFECTED

- The law calculates the 10% exemption using census data to count the number of units that are affordable to households at or below 60% of the median household income for rental units and 80% of the median household income for owner-occupied units.
- Based on preliminary calculations, about 85 communities in Illinois would be affected by this law. About 95% of those communities are located in the northern and western suburbs of Chicago.

APPENDIX D: A MODEL HOUSING APPEALS LAW FOR ILLINOIS

MAJOR COMPONENTS:

(1) Comprehensive Permit Process

- A model Housing Appeals law should include the creation of a streamlined comprehensive permit process at the local level for developers of affordable housing. A development with at least 20% of the units set aside as affordable to moderate- and low-income households would be entitled to a “one-stop” permit process guided by the local Zoning Board of Appeals. The permit would include all local approvals needed for development (except a building permit).
- The local body chosen as the comprehensive permit body by the local government would be required to hold one public hearing on the proposed Affordable Housing Development. It would also be authorized to apply flexible zoning standards in order to make the project feasible.

(2) State-Level Housing Appeals Board

- A model Housing Appeals law should include the creation of a State Housing Appeals Board empowered to hear appeals from developers who have been denied in their efforts to build affordable housing in communities that lack it. Affordable housing should be defined as developments in which at least 20% of the housing is set aside as affordable to moderate- and low-income households (households below 80% of the median income). Units should remain affordable for 40 years.
- This State Housing Appeals Board should include representatives of local government, zoning boards of appeals, plan commissions, developers, and housing advocates. The Board should be able to hear cases on appeal beginning January 1, 2006.
- The Board could require a municipality to issue all approvals needed for an affordable housing development. Further, the Board’s Order could be enforced in court.
- The Board’s standard of review should be deferential to affordable housing developers. The municipality should bear the burden of demonstrating that it correctly denied or conditionally approved an affordable housing development.

(3) Affordable Housing Plan

- A model Housing Appeals law should require municipalities and counties with less than 20% affordable housing in their housing stock to approve an affordable housing plan that states the total number of affordable housing units needed to reach the goal of 20 percent affordable housing within its jurisdiction. This plan should be completed and submitted to IHDA within one year of the passage of the state legislation.
- The affordable housing plan should also identify what lands within the local government’s jurisdiction are most appropriate for the development of affordable housing, and what incentives can be provided to developers that would attract affordable housing to their jurisdiction.
- The plan should contain one of three very specific goals for increasing the stock of affordable housing in a community: 1) a minimum of 15% of all new development or redevelopment must be affordable as defined in the proposed legislation; 2) the community will increase its overall percentage of affordable housing by three percentage points every 5 years (e.g. from 2% to 5% in 5 years, from 5% to 8% in another 5 years); or 3) the community will increase its overall percentage of affordable housing to 20% of the total housing stock.

- A comprehensive permit could only be denied if it is demonstrated that the project would harm the environment or significantly conflict with the town's comprehensive plan (unless it conflicts with provisions in the comprehensive plan that make it infeasible to develop affordable housing while allowing for the creation of other types of housing).

(4) Home Rule Pre-emption

- A strong Housing Appeals law should include a home rule pre-emption to ensure that home rule communities could not ignore any decision made by the State Housing Appeals Board and to ensure that such communities could not ignore the planning requirement.

EXEMPTIONS:

- Any local government in which at least 20% of its total year-round housing units are affordable would be exempt.
 - 1) Currently, the law calculates the exemption using census data to count the number of units that are affordable to households at or below 60% of the AMI for rental units and 80% of the AMI for owner-occupied units. As a result, all units within these price ranges, regardless of whether they are subsidized or restricted to remain affordable over time, may count as affordable housing. This calculation is less stringent than other Housing Appeals laws. Massachusetts, for example, requires a stricter standard to reach 10%; only homes that are subsidized or deed restricted count as affordable. In fact, by Massachusetts standards, even the City of Chicago would be hard pressed to meet the 10% exemption. With a less stringent standard in Illinois, a 20% exemption level seems quite reasonable.
 - 2) Families earning 80% of the Area Median Income account for approximately 40% of an area's households. A 20% exemption level would mean that communities must ensure that 20% of their housing stock is affordable to 40% of the area's households in order to gain exemption.
- Any municipality with a population of under 1,000 would be exempt.
- Communities that can prove that they have adopted and implemented their affordable housing plan and met the goal outlined in their plan would be exempt.

COMMUNITIES AFFECTED

- A model Housing Appeal law would calculate the 20% exemption using census data to count the number of units that are affordable to households at or below 60% of the AMI for rental units and 80% of the AMI for owner-occupied units.
- Based on preliminary calculations, about 168 communities in Illinois would be affected by a law that included the exemptions outlined above. About 90% of those communities would be located in the Chicago region.

Appendix E:

The Affordable Housing Planning and Appeals Act (HB 625) Versus the Massachusetts Housing Appeals Law (Chapter 40B)

| Major Components | The Affordable Housing Planning and Appeals Act (HB 625) | Massachusetts Chapter 40B | A Model Housing Appeals Law for Illinois |
|---|---|---|---|
| <p align="center">State Housing Appeals Board</p> | <p>Illinois Law:</p> <p>HB625 established a State Housing Appeals Board that reviews developers’ appeals of certain local government decisions affecting proposed affordable housing developments.</p> <p>Affordable housing developments are defined as those in which at least 20 percent of the housing is set aside as affordable to households at 80 percent of the county median income.</p> | <p>Massachusetts Chapter 40B:</p> <p>The statewide Housing Appeals Committee (HAC) has the power to override local zoning decisions that deny affordable housing developments or impose conditions that make such developments “economically infeasible.”</p> <p>Affordable housing developments are defined as those in which 25 percent of the housing is set aside as affordable to households below 80 percent of the median household income for the area.</p> | <p>Ideal Illinois Law: Includes same provision for a State Housing Appeals Board outlined in HB 625 with one exception.</p> <p>HB625 defines an affordable housing development as those in which 20% of the housing is affordable to 80 percent of the <i>county</i> median income. A model bill would define such developments as those in which 20 percent of the housing is set aside for households at 80 percent of the <i>area</i> median income.</p> |
| <p align="center">Comprehensive Permit Process</p> <p>A Comprehensive Permit provides developers of affordable housing with a streamlined, “one-stop” permit process that includes all local approvals needed for development.</p> | <p>Illinois Law:</p> <p>Contains no comprehensive permit process.</p> | <p>Massachusetts Chapter 40B: Includes a Comprehensive Permit Process</p> <p>Qualified applicants file an application for a single “comprehensive permit” with the local Zoning Board of Appeals (ZBA). The local ZBA notifies all relevant boards and commissions then holds a public hearing within 30 days of the receipt of the application. The ZBA:</p> <ul style="list-style-type: none"> a) can provide approval for all necessary permits. b) can override local zoning and development regulations that are not “consistent with local needs.” c) must rule within 40 days of the end | <p>Ideal Illinois Law: Includes A Comprehensive Permit Process</p> <p>A comprehensive permit process is a critical component of a strong Housing Appeals law for two reasons: 1) <u>Incentive</u>: the comprehensive permit provides an incentive for developers to include affordable housing in their developments by saving them time and money. 2) <u>Certainty</u>: the comprehensive permit provides certainty by ensuring that local governments cannot use the permit process to delay or prevent the development of affordable housing.</p> |

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| | | of the public hearing to grant the permit unconditionally, grant the permit with conditions, or deny the permit. | The comprehensive permit requires local governments to approve or deny an application within a specified time period. |
| Period of Affordability | Illinois Law: 15 years for owner-occupied units; 30 years for rental units. | Massachusetts Chapter 40B: 15 years for rehab; 30 years for new construction, though many communities are requiring units to remain affordable in perpetuity. | Ideal Illinois Law: Units should remain affordable for 40 years. |
| Exemptions | Illinois Law: Communities with 10% Affordable Housing are Exempt <ul style="list-style-type: none"> Any local government in which at least 10 percent of its total year-round housing units are affordable is exempt. (Affordable units are defined as those which are affordable to households at or below 60 percent of the AMI for rental units and 80 percent of the AMI for owner-occupied units). Any municipality with a population of under 1,000 is exempt. Communities that can prove that they have adopted and implemented their affordable housing plan and met the goal outlined in their plan will be exempt. | Massachusetts Chapter 40B: <ul style="list-style-type: none"> Any municipality in which 10 percent of the dwelling units are affordable to families making at or less than 80 percent of the AMI is exempt. To count towards the 10 percent standard, units must be either subsidized or deed restricted. Any municipality in which 1.5 percent of its total zoned land is used for affordable housing is exempt. A municipality is exempt if the application in question would result in the commencement or construction of low- and moderate-income housing on 3/10 of one percent of the municipality's zoned land or 10 acres, whichever is larger. | Ideal Illinois Law: Communities With 20% Affordable Housing Would Be Exempt Currently, the law calculates the exemption using census data to count the number of units that are affordable to households at or below 60 percent of the AMI for rental units and 80 percent of the AMI for owner-occupied units. As a result, all units within these price ranges, regardless of whether they are subsidized or restricted to remain affordable over time, may count as affordable housing. This calculation is less stringent than other Housing Appeals laws. Massachusetts, for example, requires a stricter standard to reach 10%; only homes that are subsidized or deed restricted count as affordable. In fact, by Massachusetts standards, even the City of Chicago would not meet the 10% exemption. With a less stringent standard in Illinois, we believe a 20% exemption level is reasonable. |

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| | <ul style="list-style-type: none"> The law calculates the exemption using census data to count the number of units that are affordable to households at or below 60 percent of the AMI for rental units and 80 percent of the AMI for owner-occupied units. As a result, all units within these price ranges, regardless of whether they are subsidized or restricted to remain affordable over time, may count as affordable housing. | | |
| <p>Burden of Persuasion at the Housing Appeals Board</p> | <p>Illinois Law: Places The Burden Of Persuasion On The Developer</p> <p>Currently, the law states that in any proceeding before the State Housing Appeals Board, the developer bears the burden of demonstrating that he/she has been unfairly denied or that unreasonable conditions have been placed upon the approval</p> | <p>Massachusetts Chapter 40B:</p> <p>Burden lies with municipality.</p> | <p>Ideal Law: Places Burden Of Persuasion On Local Government</p> <p>An ideal Housing Appeals law would place the burden of persuasion on the municipality or county to prove that they had acted correctly in denying an affordable housing development. Local decisions and regulations are presumed valid under Illinois law; without shifting the burden to the municipality, or at the very least providing a balancing test, the developer will continually face an uphill battle in overcoming this presumption.</p> |
| <p>Standards Governing the Local Review of Affordable Housing Developments</p> | <p>Current Law: Contains No Standards Governing the Local Review Of Affordable Housing Developments.</p> | <p>Massachusetts Chapter 40B:</p> <p>Contains strong standards governing the local review of affordable housing developments.</p> | <p>Ideal Law: Contains Clear Standards Outlining When A Community Can and Cannot Deny an Affordable Housing Development</p> <p>A strong Housing Appeals law would not permit local governments to deny</p> |

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| | | | an affordable housing development unless 1) the development has adverse effects on the environment, or 2) the development conflicts with stated goals or policies in the government's comprehensive plan (provided that the goals or policies in that plan do not render the development of affordable housing infeasible while permitting other forms of housing). |
| Home Rule Pre - emption | Current Law: Does Not Include A Home Rule Pre -Emption | Massachusetts Chapter 40B: Not applicable . | Ideal Law: Includes A Home Rule Pre-Emption Without a home rule preemption clause, home rule communities may choose to ignore both the planning provisions of this law as well as any ruling from the State Housing Appeals Board, if they are ever subject to its authority. |