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Policy, Practical, and Legal Challenges to Inclusionary Zoning: A Resource Manual for NAHB Members

National Survey of Statutory and Case Law Regarding Inclusionary Zoning

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Submitted to:

National Association of Home Builders

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I. INTRODUCTION AND EXECUTIVE SUMMARY.

This report provides the National Association of Home Builders ("NAHB") (1) in the form of a "Resource Manual," a list of policy, practical, and legal strategies that NAHB members may adopt when dealing with inclusionary zoning proposals; and (2) an accessible guide to state statutory and case law authority for municipal or county governments to enact inclusionary zoning ordinances.¹

We have defined "inclusionary zoning" in this paper as **any municipal or county ordinance that requires or allows a property owner, builder, or developer to restrict the sale or resale price or rent of a specified percentage of residential units in a development as a condition of receiving permission to construct that development.** This definition thus covers both voluntary inclusionary programs in which the owner/builder/developer has an option to impose price restrictions, usually in return for certain incentives; and mandatory programs, in which the price or rent restrictions are a condition of approval. This definition also includes ordinances that allow payment of a fee as a way to opt out of an inclusionary program. We have **excluded** from our working definition the following:

- ordinances and programs that provide development incentives, such as density bonuses, but do not specifically involve or impose sale price or rent restrictions;
- "fair share" policies (*e.g.*, New Jersey's *Mount Laurel* doctrine, which requires municipalities to promote production of lower cost housing through comprehensive plans, land use regulations, and infrastructure investment), except to the extent such policies also authorize or require inclusionary zoning;
- ordinances or statutes that express a policy in favor of affordable housing or establish a system of funding to support the development of affordable housing, but without a price or rent restriction component; and

¹ Co-author Tim Hollister prepared a similar report for NAHB in 2007. This paper updates that report.

- ordinances or statutes regarding rent control that are not otherwise related to inclusionary zoning.

Thus, the primary focus of this paper is state laws and municipal or county ordinances that constitute **government intervention in the housing market by imposing limits on maximum rent or price on a certain percentage of proposed residential units.**

This report is divided into four parts: (1) Research Summary, which explains our methodology; (2) Policy, Practical and Legal Challenges to Inclusionary Zoning Proposals; (3) the 50 State Survey; and (4) a list of selected articles and ordinances. The 50 State Survey, examines inclusionary zoning statutes, regulations, and cases, if any, in each state. We have provided to the extent possible a description of each state's constitutional or statutory home rule or municipal powers provision, which, absent an express statute or regulation, is a key determinant of whether a municipality or county has the authority to enact an inclusionary zoning ordinance.

We would summarize the survey of state law as follows:

- fifteen states have statutes or regulations that either expressly authorize inclusionary zoning (using the actual words "inclusionary zoning") or clearly imply such authority by granting broad powers to promote affordable housing (California, Connecticut, Florida, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New York, Rhode Island, Utah, Vermont, and Virginia);
- sixteen states have no express authorization for inclusionary zoning, but one or more major municipalities in the state law have adopted inclusionary zoning programs, some of which are voluntary (Colorado, Delaware, Georgia, Hawaii, Idaho, Maine, Michigan, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Pennsylvania, Tennessee, Washington, and Wisconsin);
- four states (Arizona, Montana, Oregon, and Texas) prohibit inclusionary zoning by statute in some way; and

- in the remaining 15 states,² there is no express or implied authorization or prohibition.³

Note that the above categories are for purposes of providing a high-level summary. The state-by-state summaries should be reviewed for specifics.

Because there is **relatively little statutory authority and case law guidance** on inclusionary zoning, we conclude that absent a relatively clear statutory or case law prohibition, the best strategy for NAHB and its members who are confronted with a proposed inclusionary

² Alabama, Alaska, Arkansas, Indiana, Iowa, Kansas, Kentucky, Mississippi, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, West Virginia, and Wyoming.

³ For the purpose of evaluating how the 50-state survey has changed since the 2007 inclusionary zoning report, we have included a summary of the 2007 survey here:

- thirteen states had statutes or regulations that either expressly authorized inclusionary zoning (using the actual words "inclusionary zoning") or clearly implied such authority by granting broad powers to promote affordable housing (Connecticut, Florida, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Virginia);
- seven states had no express authorization for inclusionary zoning, but one or more major municipalities in the state law had adopted inclusionary zoning programs (California, Georgia, Idaho, Maine, New Mexico, New York, and Washington);
- two states (Texas and Oregon) prohibited inclusionary zoning by statute;
- in two states (Colorado and Wisconsin), inclusionary zoning ordinances were been invalidated as conflicting with the state's prohibition on rent control; and
- in the remaining 26 states (Alabama, Alaska, Arizona, Arkansas, Delaware, Hawaii, Indiana, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wyoming), there was no express or implied authorization or prohibition.

zoning program and want to challenge it, is to challenge proactively the **practicality, feasibility, and effectiveness of the proposed program**. To the extent an argument can be made, based on statutes or case law, that a proposed program is not permitted by state law, that argument obviously should be made first, but barring that approach, pointing out the practical problems with inclusionary zoning is the best, universal approach. Put another way, government intervention in the housing market is a highly complicated undertaking, and in our experience and from our review of inclusionary zoning programs across the country, their most common failing is to omit, fail to address, or vaguely define critical administrative details. This reality is the subject of Section V, below, a discussion of how to deal with the practical aspects of inclusionary zoning programs.

II. DISCLAIMER.

As required by our Code of Professional Responsibility, we reaffirm to NAHB and any member who may review this document that (1) the attorneys who have prepared this paper are admitted to the practice of law only in Connecticut and/or Massachusetts; (2) this paper provides a national overview of the law of inclusionary zoning but it does not, and is not intended to, provide legal advice with respect to the law of any particular state or specific jurisdiction, or any particular proposed or enacted ordinance; and (3) with respect to any specific factual or legal situation regarding inclusionary zoning in any particular state, the reader and NAHB are advised to consult competent counsel in that state or jurisdiction.

III. SUMMARY OF RESEARCH SCOPE AND METHOD.

Our research was undertaken between January and May 2023. Our cutoff date for municipal ordinances and caselaw was March 10, 2023. Our update has consisted of three parts: a review of and update to the 50 state survey of state-level statutes and regulations, previously done for the 2007 NAHB inclusionary zoning report; a survey of court decisions since 2007

challenging inclusionary zoning; and a review of significant changes since 2007 to, or creation of, municipal inclusionary ordinances and programs. We relied on both the Westlaw and LexisNexis databases for our research, but also reviewed resources provided by national and local housing advocacy groups, law review articles, local state and municipal websites, and the like.

The 50 state survey required an individualized approach. For each state, we identified the home rule / Dillon's Rule provision in the state constitution or home rule enabling statute, and then searched for statutes or case law authority to enact inclusionary zoning laws. To locate statutes authorizing inclusionary zoning in the Westlaw / Lexis databases, we conducted our searches under the "general laws" database for each state and used a variety of search terms, including:

"inclusionary zoning;" "moderate income housing;" "exclusionary zoning;" "inclus! housing;" "inclusion!;" "affordable housing;" and "affordable w/15 housing."

We also entered similar search terms into the Google search engine in an effort to capture news articles and the like on recent updates that may not yet have made it to Westlaw or Lexis, such as pending legislation, threatened litigation, and grassroots efforts to create or eliminate inclusionary zoning rules at the local level.

To locate relevant case law, we conducted similar searches in the "federal and state cases" database for each state. We are confident that, if it exists, we have located the appropriate enabling authority for each state; if we have reported that no statute or regulation exists, we are confident in this description.

In order to locate cases that challenged or discussed the merits of an inclusionary zoning ordinance, we searched under "federal and state cases, combined" using the following terms:

Headnotes ("inclusion! w/5 zon!"), and then filtered for those cases after 01/01/2007 – this search produced 20 cases, most of which were irrelevant;⁴ and

Opinion ("inclusionary zoning"), and then filtered for those cases after 01/01/2007 – this search produced 49 cases, some of which were duplicative of the first search.

In total, we identified three court decisions that fit within the framework of this paper.

IV. A NOTE ABOUT HOME RULE AUTHORITY.

As can be seen from the state-by-state review, relatively few states (15 states) expressly authorize or prohibit inclusionary zoning by a state-level statute or regulation. Thus, in most cases, we are left to analyze the state's home rule/municipal powers. This is best achieved by identifying the state's constitutional and statutory provisions and characterizing the structure of the state's law as fitting one of the categories set forth below.

Dillon's Rule: Dillon's Rule is derived from a written decision by Judge John F. Dillon of Iowa in 1868. It is a cornerstone of American municipal law. It maintains that the powers of a political subdivision of a state are limited to those expressly stated in state law or necessarily implied from that law. The first part of Dillon's Rule states that local governments have only three types of powers:

- those granted in express words;
- those necessarily or fairly implied in or incident to the powers expressly granted; and
- those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.

The second part of Dillon's Rule states that if there is any reasonable doubt whether a power has been conferred on a local government, then the power has *not* been conferred. This is the rule of strict construction of local government powers.

Clay Wirt, "Dillon's Rule," 24 Virginia Town & City, no. 8, at 12-15 (Aug. 1989).

⁴ For instance, this search retrieved a number of cases throughout the country regarding a board or commission's "inclusion" of certain provisions in its zoning ordinances, most of which had nothing to do with inclusionary zoning.

Otherwise, home rule is a delegation of power from the state to its sub-units of government (counties, municipalities, towns or townships, or villages). The power is limited to specific fields, and subject to judicial interpretation. Home rule creates local autonomy and limits the degree of state interference in local affairs. There are four primary areas in which home rule powers are exercised by governments:

Structural – power to choose the form of government, charter and enact charter revisions;

Functional – power to exercise powers of local self-government;

Fiscal – authority to determine revenue sources, set tax rates, borrow funds, and other related activities; and

Personnel – authority to set employment rules and conditions ranging from remuneration to collective bargaining.

See National League of Cities, Home Rule, recently updated in NLC’s “New Principles of Home Rule” available at [Home20Rule20Principles20ReportWEB-2-1.pdf \(nlc.org\)](https://www.nlc.org/~/media/2023/04/Home20Rule20Principles20ReportWEB-2-1.pdf) (last visited April 30, 2023).

V. POLICY, PRACTICAL, AND LEGAL CHALLENGES TO INCLUSIONARY ZONING PROPOSALS.

A. Introduction: How To Use This Resource Manual.

As housing affordability problems grow throughout the United States, more and more municipal and county governments⁵ are turning to inclusionary zoning as part of their public policy response. NAHB's April 2010 official policy on inclusionary zoning, opposing it in principle, is reprinted below in Section B.

⁵ In this manual, the term "local government" is used to refer to any political subdivision of a state, a county, city, town, township, special district, or borough. In addition, the term "price" is used generally to either refer to a sale price or rent for housing, unless otherwise specified.

The purpose of this Resource Manual is to assist NAHB members in understanding and responding to the policy, practical, and legal issues that arise when inclusionary zoning is proposed. This Manual is intended to provide a thorough checklist of (1) "talking points" about inclusionary zoning as a policy choice; (2) the practical considerations and administrative details that an inclusionary ordinance, if adopted, must address if it is to be workable; and (3) legal theories that may be applicable if an ordinance needs to be challenged in the courts.

As the reader will see, most of this Manual falls under the second category, practical consideration and administrative details. This focus arises from the fact that **inclusionary zoning is government intervention in a complex, variable economic market**, and in addition to the questionable policy choice that it implements, **the single biggest failing of adopted inclusionary ordinances is that they leave important details vague or entirely unaddressed, and thus are ineffective due to resulting confusion or uncertainty.**

For the home building community, an inclusionary proposal by or to a local government presents a sequence of challenges. In order, these are:

1. convincing government officials that an inclusionary ordinance is an **unwise, ineffective, or unfair policy choice**;
2. if political forces favor a proposed inclusionary ordinance, identifying to the drafters **the critical administrative choices and details that need to be considered**, lest the ordinance be unworkable, ineffective, and detrimental to housing production;
3. as a proposal proceeds through the governmental process, **shaping those choices and details as favorably as possible to the building community**;
4. if the proposal proceeds through formal "on the record" consideration by government agencies, making as much of an **administrative record** as possible in the event of a **subsequent legal challenge**; and
5. if the ordinance is adopted, considering legal challenges, starting with the basic **procedural compliance**, then **substantive authority** to enact the ordinance, and then **substantive challenges** to the ordinance **as it applies** to a specific development.

Subsection C discusses the "big picture" policy choices, and the rest of the Manual deals with numerous practical and administrative issues.

B. NAHB's Policy on Inclusionary Zoning, Adopted April 2010.

NAHB resolves to:

1. *Oppose the use of inclusionary zoning laws or ordinances that are not voluntary or do not include measures such as density bonuses, subsidy grants, or others that do not fully compensate for costs associated therewith,*
2. *Oppose existing inclusionary zoning laws or ordinances that are not voluntary or do not include measures such as density bonuses, subsidy grants, or others that do not fully compensate for costs associated therewith,*
3. *Support addressing housing affordability through the use of a competitive housing market that encourages and accommodates housing options for all income levels,*
4. *Support the provision of affordable housing through a broad and comprehensive strategy to address housing affordability at the state and local level that closely examines the causes of that problem and relies on a variety of targeted approaches to address those causes, including direct income and housing subsidies, removal of zoning and regulatory barriers to provide for a sufficient number of housing units to meet projected growth, rather than relying primarily on mandatory inclusionary zoning,*
5. *Support the production of a broad spectrum of housing by the home building industry that guarantees appropriate development incentives and subsidies,*
6. *Guarantee that the cost is not borne disproportionately by the new home buying public, and*
7. *Continue monitoring research on the actual effectiveness of inclusionary zoning and actively communicate results to date.*

C. Policy Challenges To Inclusionary Zoning; Talking Points For Discussions With Policy Makers.

From the standpoint of the home building industry, the primary policy objections to inclusionary zoning may be summarized as follows:

1. **Inclusionary zoning is a form of price control.** It imposes a direct cost, in the form of below-market price restrictions, on builders and residents/tenants.

Economic studies in housing and other industries have shown consistently that price controls distort the free market but do not solve underlying economic problems.

2. Lack of affordable housing in a particular community is the result of many factors, usually including a local government's past and existing restrictive land use regulation. **The home building industry – a supplier of housing – is rarely if ever the cause of a shortage of housing in a particular market.** Thus, imposing price controls on builders imposes a direct cost on a constituency whose contribution to the affordability problem is minimal at best, and most likely non-existent.
3. Inclusionary zoning requires the production and sale or rental of housing at below-market prices, thereby imposing a cost on builders. Builders either absorb this cost directly or pass some or all on to purchasers or tenants of market-rate residential units. **Thus, inclusionary zoning does not reduce the cost of constructing housing, but it increases the price of the non-restricted units.**
4. The following factors have been identified as affecting housing affordability:
 - land cost;
 - financing rates;
 - land use regulation;
 - construction material availability and costs;
 - construction labor availability and costs;
 - prices and rents of comparable properties in the same market;
 - household incomes –both the median and the range;
 - vacancy rates;
 - property management and maintenance costs;
 - availability of government subsidies for planning, construction, operations, and rent or mortgage payments;
 - infrastructure costs;
 - impact fees;

- non-essential design changes made at the request of the local authority; and
- citizen opposition.

However, because inclusionary zoning is government intervention in land use regulation only, it generally **does not affect most of the factors that determine the affordability of housing.**

5. **Inclusionary zoning only works if a particular combination of conditions exist in a particular housing market.** Because inclusionary zoning is a substantial cost, a builder who has opportunities elsewhere in a market or region where inclusionary zoning does not exist will, theoretically, always try to build in that less restrictive market or jurisdiction. Thus, inclusionary zoning is most likely to work only where there is a strong demand for housing and surrounding or neighboring markets present to a builder similar restrictions or obstacles.
- D. Practical And Legal Challenges To Inclusionary Zoning Proposals.⁶

Practical Considerations and Challenges

1. Factual justification.

There are, of course, numerous articles and studies about whether inclusionary zoning programs actually produce a supply of price-restricted housing or have an opposite, adverse effect. In a famous article, *The Irony of Inclusionary Zoning*, Professor Robert Ellickson concluded that inclusionary programs actually exacerbate housing shortages. *See also* Emily Hamilton, *Inclusionary Zoning and Housing Market Outcomes*, Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, September 2019 (concluding that housing prices have increased about one percent per year since the advent of inclusionary zoning in the Baltimore-Washington area). Housing market economics and causation are beyond the scope of this manual, but reams of information on this topic are available from NAHB and other

⁶ In this section, we have provided several "sample provisions." These samples do *not* constitute recommendations by NAHB or the authors with respect to policy or wording; they are simply provided for the reader's convenience to illustrate the item being discussed. In addition, all comments in this section are subject to the Disclaimer stated in Section II of this report.

sources. Suffice it to say that a critical, first, practical challenge to an inclusionary program is: **Will the ordinance result in greater housing affordability as its drafters intend, and what evidence exists to support this contention?** This, of course, requires a case-by-case analysis. That analysis should include a comprehensive review of existing housing stock, housing conditions, vacancy rates, market trends, and existing funding sources for rehabilitation of existing units. Inclusionary zoning proposals should not be considered in a vacuum, without consideration of these important contextual factors. For case studies on the potential negative impacts of inclusionary zoning programs, and ideas for how to mitigate those “harmful market distortions,” see Connor Harris, *The Exclusionary Effects of Inclusionary Zoning: Economic Theory and Empirical Research*, The Manhattan Institute, August 2021 (available at: <https://media4.manhattan-institute.org/sites/default/files/exclusionary-effects-inclusionary-zoning-CH.pdf>).

2. Voluntary vs. mandatory.

If an inclusionary ordinance requires a specified percentage of units to be subject to price or rent controls, but it is a developer's option whether to build and subject itself to the program's restrictions, **is the program truly voluntary or mandatory?**

Mandatory, was the finding of the Wisconsin courts in *Apartment Assoc. of South Central Wisconsin, Inc. v. City of Madison*, 2006 WI App. 192 (Wis. 2006), *review denied*, 2007 WI 16 (Wis. 2006). In that case, a state statute banned rent control, but contained an exception for voluntary "agreements" between a local government and a developer. Madison, Wisconsin adopted an inclusionary zoning program for rental units, which local builders challenged as a violation of the statewide rent control law. The city argued that because a developer had no obligation to build housing at all, compliance with the inclusionary program was a voluntary agreement. The state Court of Appeals, however, held that the inclusionary program was a use of government's land use regulatory power, and thus compliance with that program was not voluntary. A truly voluntary inclusionary zoning ordinance would provide that a builder could

undertake *either* a market-rate development *or* one in which a portion of the units are subject to price restrictions. Conversely, any program in which the acceptance of price controls is a condition of receiving permission to build should be regarded as mandatory.

In general, **the home building industry should carefully scrutinize whether a claim that a proposed inclusionary ordinance is "voluntary" is accurate.**

3. Linking inclusionary requirements to other regulations.

Occasionally, inclusionary programs link their requirements to compliance with other land use programs not related to housing affordability. For example, some local governments have adopted a cap on the number of building permits issued annually, but made an exception for a development that will comply with inclusionary requirements. Other exceptions are tied to reduced or waived impact and/or infrastructure improvement fees. The possibilities for such links are limitless. Obviously, **these links greatly complicate the policy and practical analysis of an inclusionary proposal. In general, it would seem most prudent to avoid linking whenever possible.**

4. Construction incentives.

Inclusionary zoning only provides builders with an "incentive" to include price-restricted units if the ordinance sufficiently offsets and exceeds the cost of compliance with those price and rent restrictions. Thus, it is important for an inclusionary ordinance to provide specific incentives. Possibilities include:

- density bonuses;
- infrastructure assistance;
- fast-track permitting; and
- modified dimensional standards, such as zero lot lines, increased floor area ratios, reduced setbacks, or greater maximum building height.

5. Financial incentives.

Obviously, if inclusionary requirements are going to be imposed, builders will want as much financial relief from the cost burden as possible. The following are types of financial incentives that local governments can offer:

- fee reductions;
- fee deferrals;
- fee waivers;
- post-development fee rebates;
- planning grants or subsidies;
- construction grants, subsidies, or low interest loans;
- building permit fee reductions/deferrals/waivers;
- property or sales tax reductions or abatements (*see also* No. 34 below);
- land donation; and
- transferable development rights ("TDRs").

Indeed, some experts opine that property tax abatement or tax fixing agreements are the most effective incentives for developing affordable units.

6. In lieu fees.

Many inclusionary ordinances provide an alternative method of compliance to constructing inclusionary housing. This comes in the form of payments or fees-in-lieu of such construction. *See, e.g.*, California state statute *requiring* "alternative means of compliance" in Cal. Gov. Code § 65850, at p. 52. Such payments can be a flat fee per market rate unit, a percentage of the market value of the land, or a percentage of the construction cost. The legal issues that arise with such fees are (1) whether there is an "essential nexus," or some causation, between the builder's housing proposal and the government's requirement of payment; and (2)

whether there is "rough proportionality" between the housing proposal and the amount of the fee. These are discussed further in Nos. 7 and 45 below. Having this alternative can be critical to builders whenever compliance with the construction mandates of an inclusionary ordinance are problematic.

7. Waivers/exemptions.

Based on case law in California, it appears that an inclusionary zoning ordinance has a better chance of surviving a constitutional challenge if it contains a waiver provision.

The Fifth Amendment of the U.S. Constitution prohibits government takings without just compensation. The United States Supreme Court has interpreted this to prohibit commissions from attaching conditions to a permit that do not have an "essential nexus" to the development and are not "roughly proportional" to its impact. In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), a zoning commission could not demand the dedication of a bicycle path in exchange for its approval of an expansion of a hardware store, unless the expansion of the hardware store affected public need for a bike path. Engrafted onto inclusionary zoning ordinances, this so-called "*Nollan-Dolan*" test for exactions and permit conditions means that **if a local government, imposing a mandatory inclusionary ordinance, cannot make a finding of essential nexus and rough proportionality, then it must waive the ordinance's applicability.**

As applied to inclusionary zoning, a leading case on this point is *Home Builders Ass'n of Northern Cal. v. City of Napa*, 90 Cal. App. 4th 188 (2001). In that case, the court upheld an inclusionary ordinance because it permitted the commission to waive its requirements "based upon the absence of any reasonable relationship or nexus between the impact of the development and the inclusionary requirement." *Id.* at 192. Conversely, in a 2006 California case, a court invalidated an inclusionary ordinance because it listed elements that an *applicant* had to prove to a local commission before the commission could issue a waiver. The elements were:

- (1) special circumstances, unique to that development justify the grant of the waiver;
- (2) the development would not be feasible without the waiver;
- (3) a specific and substantial financial hardship would occur if the waiver were not granted, *and*
- (4) no

alternative means of compliance are available which would be more effective in attaining the purposes of [the ordinance] than the relief granted.

Building Industry Ass'n of San Diego County, Inc. v. City of San Diego, 2006 WL 1666822, * 1 (Cal. Superior, May 26, 2006). The court invalidated this ordinance because it did not empower the commission to waive the inclusionary requirement in the event that the requirement did not satisfy the *Nollan/Dolan* standard.

Thus, a valid inclusionary zoning ordinance **should contain a waiver provision that allows a commission to exempt a development from inclusionary requirements in the event the residential proposal will not have an impact that justifies the imposition of price restrictions.**

Additionally, there are procedural issues when a waiver provision is included in an ordinance. In most litigation, the complaining party bears the burden of proving to a court that the defendant has violated its rights. However, when the government attaches conditions to land development permits, under the protection offered by the Fifth Amendment of the U.S. Constitution, the government assumes the burden to show that the condition meets the *Nollan-Dolan* essential nexus and rough proportionality tests.

The U.S. Supreme Court's *Dolan* case states that a government agency imposing a condition on development must make an "individualized determination" that the condition is related in nature and extent to the impact of the proposed development.

Every case will depend on its facts, but in general, it is important to scrutinize every inclusionary ordinance to ensure that the approval conditions it authorizes will meet the *Nollan-Dolan* criteria. For example, if an inclusionary ordinance required a builder, in addition to setting aside units at below-market prices or rents, to also set aside open space to mitigate the higher allowed density, any exaction imposed under this authorization would have to meet the *Nollan-Dolan* criteria.

Defining Applicability

8. Geographic applicability.

A critical issue in inclusionary ordinance drafting, of course, is where the price restrictions will apply. Possibilities include:

- the entire jurisdiction;
- one or more geographic areas, defined by streets or other definable borders;
- one or more "neighborhoods";
- one or more zoning districts;
- one or more zones or overlay zones (e.g., "the Central Business District and its adjacent Mixed Use Districts");
- blocks;
- parcel(s) (by title or assessor records); and
- building(s), especially if rehabilitation of existing structure is part of the inclusionary target.

In evaluating the geographic element of an inclusionary proposal, clarity and transparency are essential. **Builders need to know exactly where inclusionary requirements will and will not apply.**

A critical factor in evaluating the geographic applicability of an inclusionary program arises from the theory of inclusionary zoning noted earlier: inclusionary zoning will likely not be effective if builders have the option to build nearby or elsewhere without facing price controls. Thus, **the smaller the geographic area that is subject to inclusionary requirements, the more likely it is that builders will go elsewhere**, and that the effect of the ordinance will be simply to reduce housing production where inclusionary requirements are imposed.

9. "Minimum applicability" definitions.

In addition to a clear geographic applicability, an inclusionary ordinance needs to specify **a minimum development size to which its requirements will be applicable**. While this is sometimes specified based on the number of acres owned or to be developed, the most common reference is to a specified minimum number of residential units to be built as a single development.

This criterion seems simple, but there are nuances. The first is the simple reality, discussed above, that the smaller the overall development, the more difficult it is economically for a builder to absorb the required below-market rents or prices. Consider this example: an ordinance requires 25 percent of total proposed residential units to be rented to households earning 80 percent or less of the area median income. Also assume that at the 80 percent or less level, the builder will only "break even" on those units. If the development is 100 units, then 25 will be price-restricted, and the developer's profit/economic viability will depend on the remaining 75 units. But, if the overall development is only 20 units, five of which will be price restricted, the builders will have only 15 market rate units among which to divide land and construction costs and from which to make a profit.

Now, let's assume that the required set aside is ten percent of the units at 80 percent or less of median and another 10 percent at 60 percent or less of median, and that the builder will lose money on the 60 percent units. In a 100-unit development, if the "80 percent units" are break-even and the 60 percent units are money losers, then the profit from some number of market rate units will cover the losses on the 60 percent units, further reducing the units to which the builder allocates costs and bases her profit. In this example, if each 60 percent unit cancels the profit on a market rate unit, in a 100-unit proposal, the economic base for profit begins with only 70 of those units.

"Minimum development size" also becomes tricky when a development is phased, or involves mixed use or multiple parcels or buildings. The problem is analogous to the "senior

housing" exemption of the federal Fair Housing Act, 42 U.S.C. § 3607 (FHA) which states that at least 80 percent of the units in a development must have one occupant who is above a specified age to be a "bona fide" age-restricted development. There have been several FHA court cases about whether multiple buildings, or buildings constructed at the same time by the same developer and managed by the same company, but having different names and separated by a public street, are one development or two.

In any event, the term "development" needs to be defined as to whether the minimum number of units that bring inclusionary requirements to bear is based on buildings, phases, or some other criterion.

10. Type of developments included and excluded.

Inclusionary ordinances should specify what type of housing it does *not* cover. Typical exclusions are:

- redevelopment areas (because they often have their own set of detailed land use rules);
- age-restricted housing (*see* No. 9 above);
- assisted living, continuing care retirement homes ("CCRCs"), and nursing homes;
- dormitories/educational housing; and
- mobile homes and manufactured housing.

11. Type of construction covered.

An inclusionary ordinance needs to define clearly the type of construction to which it applies; the ordinance should not apply to all types of construction simply because the drafters have neglected to define it. The possibilities include:

- sale, rental, condominium, or cooperative;
- new residential construction;

- residential construction that constitutes "substantial rehabilitation" (a term with many, varied definitions, but often focusing on a project whose construction cost exceeds 50 percent of the current market value of the building);
- single-family detached;
- single-family attached (duplexes);
- “middle housing” (two-free-four unit structures);
- townhouses;
- multi-family, consisting of more than x units;
- apartments in a "stacked flat" configuration;
- mixed use; and
- multi-phase development.

The economic effect and administrative feasibility of inclusionary requirements changes with each type, so specification is important.

Resident Eligibility And Selection

12. Purchaser/tenant eligibility: local resident preferences.

Local resident preferences – a requirement that some percentage of price-restricted residential units be sold or leased to those who live in or work for the locality – present a difficult issue, for several reasons.

Builders often propose local resident preferences, and local planning boards like them, because they allow those who have lived in the particular town for years to be able to remain if they can no longer afford or no longer need a more expensive home; or those who work in the town to move closer to their employment, thereby decreasing commuting distances. There is also the appealing notion of those who have contributed to the life of the community in various ways being given a first opportunity to obtain new housing.

However, local resident preferences are inherently *exclusionary*, difficult to justify, and, where the existing municipality is predominately populated by one racial or social-economic group, can reinforce social and economic segregation and thus, violate the federal Fair Housing Act. In a predominately white, affluent suburb near a city with a large black or Latino population, a local resident preference for price-restricted units required by an inclusionary program may have a clear "disparate impact" on a class protected by the Fair Housing Act.

"Local resident" preferences may be defined in a variety of problematic ways. The potential definitions include:

- all current residents of the municipality;
- all current employees of the town;
- all current employees of the Board of Education;
- all current employees of the town and the Board of Education;
- all current residents who are employed, or volunteer as, first responders or emergency workers; or
- all past public employees with at least x years of service.

And so on.

A sample provision might look like this:

Employees of the Town who meet the eligibility criteria shall be given preference in the purchase of twenty percent (20%) of the Inclusionary Units offered for sale. "Employees of the Town" shall mean a full time employee of the Town or of the Board of Education. If a purchase and sale agreement with a Town or Board of Education employee is not executed within forty-five (45) days of the initial notice, the home may then be sold without any preference. This preference category is subject to revision as may be required by the federal Office of Fair Housing and Equal Inclusionary. This preference shall apply to initial sales, but not to subsequent resales, of Inclusionary Units.

Yet another issue is whether preference will apply only to initial sales or renting, or to resales and reletting. If the latter, the builder or whoever administers the price restrictions will need to create two permanent lists and resident selection systems and will have to deal with

inevitable perceptions of favoritism when, for example, the mayor's third cousin receives preferences over a struggling single parent and her child.

In general, while a relatively small percentage of initial sales or rental of price-restricted units might be set aside for public employees or public safety officials or volunteers, large percentage and permanent preferences create so many problems that they probably should be avoided.

13. Purchaser/tenant eligibility: families vs. age-restricted.

Whether a residential development may include age-restricted units is, of course, tightly controlled by the federal Fair Housing Act and many equivalent state laws, because age-restricted housing constitutes discrimination against households with children. Thus, it is important for an inclusionary ordinance to specify whether it applies to or allows age-restricted proposals. As noted above in No. 9, this specification is also critical because inclusionary ordinances typically require a percentage of units to be price-restricted; thus, how inclusionary program set aside rules and minimum age-restriction requirements mesh is a critical consideration.

Combining inclusionary requirements with age-restricted housing can also be problematic because it combines three limitations on resident eligibility (minimum age, maximum income, maximum unit price or rent) that may impede marketability, not to mention the administrative burden that comes with managing these criteria simultaneously, often on a yearly basis.

14. Required set aside percentages.

The core of an inclusionary program, of course, is the specification of the number or percentage of residential units that will be subject to maximum sale/resale or rent restrictions. This number is almost always expressed as a percentage rather than an actual number. It is common for percentages to vary in relation to income strata that the program seeks to serve – *e.g.*, 15 percent of the units set aside for those earning 80 percent of the area median income, and

an additional 10 percent for households earning 60 percent or less. Different percentages are also sometimes applied to units based on number of bedrooms, or even on square footage of living area. This particular issue is usually not difficult, but the ordinance should state its requirements clearly.

The economic implications of percentage set-asides are discussed under No. 9 above.

15. Duration of set aside requirements.

The duration of a set aside requirement is commonly set at 20 years, although some programs call for 30, 40, or 50 years, or that affordability be in "perpetuity."

Duration criteria raise several issues. The first is defining the starting point: will there be one period for the entire development, or will each price-restricted unit be measured separately? In other words, in a 100-unit development in which 20 units are price-restricted, does the restriction period begin with the sale or leasing of the first unit, the last unit, each individual unit or something else? If each unit has its own period, who is charged with keeping track of this? If the unit is for sale, then this information will need to be reflected on the land records, because it is a vital to resale disclosures.

The designation of the start of restriction periods is especially important for a large and/or phased development, in which it might be several years between the completion of the first units and the last.

16. Selection of purchasers/tenants.

Local resident preferences are discussed above in No. 12. Procedures also need to be established for resident selection if demand exceeds supply. Possibilities include lotteries; first come, first served waiting lists; or some form of priority criteria, in which those on a waiting list or those eligible to participate in a lottery are screened or prioritized before the selection process.

A critical issue for both lotteries and waiting lists is when a prospective resident gets on such a list; the most common practice is after the prospective person/household has demonstrated eligibility under all applicable income and other criteria.

17. Lotteries.

When the number of qualified applicants exceeds the number of available affordable housing units, developers will sometimes use a lottery to determine which applicants will receive housing. Lotteries may be employed each time a vacancy arises, or they may be used only for the initial sale or rental, with subsequent vacancies filled by the first subsequent qualified applicant. A lottery, however, may generate suspicion of municipalities or favoritism. Establishing a policy regarding the parameters of the lottery and engaging a disinterested third party (e.g., a non-profit group) to conduct the lottery itself is advisable. A sample provision:

In the event that the number of qualified applicants exceeds the number of Inclusionary Units, then the Administrator shall hold a lottery, subject to the preferences as established in this Plan. The Inclusionary Units will be offered according to the numerical listing resulting from the lottery. The development is intended to be built in phases, and thus a new lottery shall be held for each phase. A lottery shall not be held for any subsequent resale of an Inclusionary Unit.

18. Marketing and outreach requirements.

Generally speaking, the federal Fair Housing Act (42 U.S.C. §§ 3601, *et seq.*) prohibits discrimination in the sale or rental of housing. If a state or municipality requires inclusionary zoning, developers may also be required to submit and follow "affirmative fair housing marketing" rules. These plans are desegregation measures intended to apprise racial groups considered "least likely to apply" of the availability of housing. Affirmative fair housing marketing plans require targeted advertisement of the development to areas containing racial populations different from the area in which the development is located. To reach a targeted population, advertising may extend only through the municipality in which the development is located, or it may need to extend much further, to the county or the Primary/Secondary Metropolitan Statistical Areas. It is important to determine not only whether an affirmative fair housing marketing plan will be required, but also, if such a plan is required, who will be responsible for complying with its terms. A developer may be responsible for the initial advertising, or it may delegate this responsibility to another entity, such as a non-profit.

A sample provision:

The rental of all units in the Community shall be publicized using State regulations for affirmative fair housing marketing programs as guidelines. The purpose of such efforts shall be to apprise residents of municipalities of relatively high concentrations of minority populations of the availability of such units. The Developer shall have responsibility for compliance with this section. Notices of initial availability of units shall be provided, at a minimum, by advertising at least two times in a newspaper of general circulation in such identified municipalities. The Administrator shall also provide such notices to the municipal Zoning Commission and the local housing authority. Such notices shall include a description of the available homes, the eligibility criteria for potential residents, the Maximum Rental Price, and the availability of application forms and additional information.

Using the above-referenced State regulations as guidelines, dissemination of information about available units shall include:

- A. Analyzing census, town profiles, and other data to identify racial and ethnic groups least likely to apply based on representation in the municipality's population, including Asian Pacific, Black, Hispanic, and Native American populations.*
- B. Announcements/advertisements in publications and other media that will reach minority populations, including newspapers and radio stations serving the municipality's Metropolitan Statistical Area and Regional Planning Area, and advertisements or flyers likely to be viewed on public transportation or public highway areas.*
- C. Announcements to social service agencies and other community contacts serving low-income minority families (such as churches, civil rights organizations, the housing authority, and other housing authorities in towns represented in municipality's Metropolitan Statistical Area and Regional Planning Agency, legal services organizations, etc.).*
- D. Assistance to minority applicants in processing applications.*
- E. Marketing efforts in geographic areas of high minority concentrations within the housing market area and metropolitan statistical area.*
- F. Beginning affirmative marketing efforts prior to general marketing of units, and repeating again during initial marketing and at 50 percent completion.*

All notices shall comply with the federal and State Fair Housing Acts.

– OR –

Except as provided in Section IX, the Administrator shall provide notice of the initial availability for sale of each Inclusionary Unit. Such notice shall be provided, at a minimum, by advertising at least two times in a newspaper of general circulation in the Town. The Administrator shall also provide such notice to the Planning Commission, the Zoning Commission, the Town, the Housing Authority and the Board of Education. Such notice shall include a description of the available Inclusionary Unit(s), the eligibility criteria for potential purchasers, the Maximum Sale Price (as hereinafter defined), and the availability of application forms and additional information. All such notices shall comply with the federal Fair Housing Act, 42 U.S.C. §§ 3601 et seq., and the State Fair Housing Act (together, the "Fair Housing Acts").

19. Renewals and reverifications.

If an inclusionary program restricts a percentage of units to households earning below a certain income level, what happens to a household whose income qualifies at the time of initial occupancy but then goes above the limit?

The rules for what qualifies as “low income” need to be reverified, and the consequences if the income now exceeds the limit, must be clear. In general, tenants in rental units are required to reverify before the end of their lease term in order to remain in the unit. If the household does not qualify, the program may specify that they need to leave the development, unless the development employs what is known as the "next available unit" rule. This means that the tenant may remain in place, but now pay a market rent, and the landlord/administrator must put an income-qualified tenant into the next unit that comes on the market. For sale units, the most common practice is that a purchaser who qualifies may remain in the unit without annual reverification.

20. Definition of household income.

The Code of Federal Regulations contains a comprehensive definition of what is and is not income. *See* 24 C.F.R. § 5.609. This regulation is fairly lengthy, but as a rule of thumb, what counts as income is any regular and reasonably-guaranteed payment or set of payments to a member of the household. Thus, for example, alimony is income, as are regular payments from an annuity or trust.

The other key component of income – a consideration most applicable to senior citizens – is the imputation of income based on assets. Thus, if a household's annual income is \$25,000 per year but the household has \$500,000 in a savings account, income calculation rules require attribution of income to that asset, usually based on a percentage (for example, three percent).

Calculating the income of a household to determine if it meets maximum income requirements for restricted housing is the most complicated task of an administrator of an affordability program. The work requires some training and experience and should not be left to or handled by an inexperienced person or agency.

21. Family size adjustments.

While it may be obvious, it is important to remember that maximum household income rules require adjustment based on household size. A five-person household is presumed to have more income sources and income than a one-person household. All HUD maximum income tables and most state housing programs publish income data and maximum income rules across a range of household sizes, from one to eight people.

22. Down payment assumptions.

For sale units, a critical component of a maximum price formula will be the assumption on a down payment. Reliable data on down payments in the relevant market is important in determining this number. A common belief is that low-income buyers can never assemble a significant down payment, but this may not be true in every market for every level of affordability. Also, down payment assistance programs for first-time buyers are common.

23. Minimum occupancy requirements.

In an effort to make sure that household size and number of bedrooms are appropriately matched, to avoid discrimination against families with children, and to avoid wasted bedroom space, inclusionary zoning and affordable housing programs typically have guidelines, if not regulations, on placement. For example: a three-bedroom unit may not be occupied by less than

three or four people. Federal Fair Housing Act regulations contain guidelines for minimum occupancy. 24 C.F.R. §§ 100.1 *et seq.*

Construction Issues

24. Sequencing of construction set aside vs. market-rate units.

When an ordinance requires a certain percentage of price-restricted units within a market-rate development, an issue arises about when the price-restricted units need to be built, offered for sale or rental, and occupied **relative** to the market rate units.

It is important for builders to avoid a commitment that price-restricted units be *occupied* on a schedule relative to market-rate units. For a variety of reasons, it may be harder to locate, qualify and close the sale or lease with an income-limited occupant than a market rate occupant.

A builder should only be required to commit to build and offer the restricted units for sale or lease at proportional rate a so-called "best efforts" commitment.

A typical "*pro rata*" provision for a 20 percent set aside is as follows:

The Inclusionary Units shall be built and offered for sale on a pro rata basis as construction proceeds. The proposed dispersion of Inclusionary Units shall be identified on site development and subdivision plans. "Dispersion" as used in this Plan does not require distribution or location of Inclusionary Units in all areas of an inclusionary development, or identical percentages in each sub-area of the development. It is the intent of this Plan, therefore, that one (1) Inclusionary Unit will be built and offered for sale within the time that four (4) market-rate units are built and offered for sale. The Town, acting through its Zoning Enforcement Officer or building official as appropriate, may withhold issuance of a certificate of occupancy for a market-rate unit within an inclusionary development until such time as a sufficient number of certificates of occupancy for Inclusionary Units have been issued to maintain the ratio required by this Plan.

25. Administration of limitations.

An inclusionary ordinance should specify what it will require for the qualifications, commitment identification, and turnover of the entity or person who will administer the price and income limitations. The details are usually provided as part of an "affordability plan" filed with a development application. For example:

This Affordability Plan will be administered by XYZ Corporation, a regional nonprofit housing development corporation with extensive experience in the administration of and compliance with affordable housing plans and regulations, or its successors and assigns ("Administrator"). XYZ shall commence the role of Administrator as agent of the owner. The Administrator shall submit a written status report to the town in compliance with this Affordability Plan annually on or before January 31. The role of Administrator may be transferred or assigned to another entity, provided that such entity has the experience and qualifications to administer this Plan. In the event of any assignment of the role of Administrator, the developer or its successors will provide prior written notice to the town.

Financial Information And Management

26. Comparability of market vs. affordable units.

Because inclusionary zoning ordinances require builders to provide residential units at below-market prices or rents, a question arises as to whether the price or rent restricted units need to be "comparable" to the market-rate units. There are three critical considerations. First, builders should insist on "comparable" as a standard, as opposed to identical. If a builder proposes luxury interior amenities for market rate units, there is no basis for an inclusionary ordinance to require exactly the same amenities in a restricted unit. Second, the government's greater interest in specifying comparability is in the exterior appearance of the units. In general, when one drives through a development with price-restricted and market-rate units, the two should be indistinguishable. This prevents the residents of price-restricted units from being stigmatized, and it also helps the builder with marketing the market-rate units. Third, the best way to handle comparability is for the builder to prepare and file with his or her land use application a specification of minimum interior amenities, finishes, and quality, and intended exterior appearance (siding, lighting, etc.) of the market-rate and restricted units.

27. Compliance reporting.

As with most governmental programs, some form of compliance reporting will likely be required. The key questions are: who will prepare and provide the report? To whom? When? And what information will it contain? Further, if a local entity or commission may request

information at any time, having a process in place to respond to those requests is imperative. *See also* No. 28, below.

In housing, annual reporting is more than adequate. In rentals, of course, one year leases are most common.

Typically, the person or entity responsible for conducting the resident income qualification process and maximum price on rent-setting prepares the report, and provides it to the agency that approved the inclusionary program, or its agent. The zoning enforcement officer and/or housing authority are typical recipients.

Reports should be limited to verification that an inclusionary/price or rent restricted unit is occupied by a qualified household. **A report of this type should not be a surrogate for other information that potentially invades the privacy of the household or the residents' right of quiet enjoyment.**

28. Confidentiality of income data.

A local government that has established an inclusionary program that limits a percentage of units to households earning below a certain income level will want, at some point, compliance reports. Such a report will typically involve the affordability plan administrator reporting the annual income of residents or tenants. This leads to the question of confidentiality. Tenants and residents obviously do not want their income disclosed publicly, and an owner/administrator could violate the resident's or tenant's rights to confidentiality by reporting such information in a public forum.

In general, an inclusionary ordinance or its regulations should make it clear that if incomes are to be reported, names and other identifying information should be redacted or otherwise kept confidential.

29. Sale/resale process and documentation.

Whenever sales prices are restricted by a formula, an administrator needs to calculate the sale or resale price and provide that information to sellers, buyers and lenders. Procedural rules for this task may look like this:

An Owner may sell an Inclusionary Unit at any time, provided the Owner complies with the restrictions concerning the sale of homes as set forth in this Affordability Plan and in the deed restrictions attached hereto as Schedule E (the "Deed Restrictions"). If the Owner wishes to sell, the Owner shall notify the Administrator in writing. The Administrator shall then work with the Owner to calculate a Maximum Sale Price, as set forth in Section X above. The Administrator shall publish notice in the same manner as was followed for the initial sale, as set forth in Section VI above. The Administrator shall bring any purchase offers received to the attention of the Owner.

The Owner may hire a real estate broker or otherwise individually solicit offers, independent of the Administrator's action, from potential purchasers. The Owner shall inform any potential purchaser of the affordability restrictions before any purchase and sale agreement is executed by furnishing the potential purchaser with a copy of this Affordability Plan. The purchase and sale agreement shall contain a provision to the effect that the sale is contingent upon a determination by the Administrator that the potential purchaser meets the eligibility criteria set forth in this Plan. Once the purchase and sale agreement is executed by the Owner and potential purchaser, the potential purchaser shall immediately notify the Administrator in writing. The Administrator shall have thirty (30) days from such notice to determine the eligibility of the potential purchaser in accordance with the application process set forth above. The Administrator shall notify the Owner and the potential purchaser of its determination of eligibility in writing within said thirty (30) day period. If the Administrator determines that the potential purchaser is not eligible, the purchase and sale agreement shall be void, and the Owner may solicit other potential purchasers. If the Administrator determines that the potential purchaser is eligible, the Administrator shall provide the potential purchaser and the Owner with a signed certification to the effect that the sale of the particular Inclusionary Unit has complied with the provisions of this Affordability Plan. In the event of any sale or transfer of a Inclusionary Unit by the Owner pursuant to this Paragraph, then, upon the closing of title with respect to such sale or transfer, the Owner shall pay to the Administrator, its successors or assigns, a transfer fee as established between the developer and Administrator.

30. Lender documentation.

The responsibility to prepare documentation that mortgage lenders and other financial institutions may require should be clearly assigned. This is usually the job of the affordability plan Administrator.

31. Required vs. optional resident fees.

Monthly fees are, of course, part of housing costs, and thus need to be accounted for in any formula for maximum monthly or yearly payments by a household that meets a maximum income requirement. In general, in calculating what fees are regarded as a cost of housing, administrators take any fee that is required of all residents in the development as a housing cost. Any fee that is optional (a pet fee, or an indoor parking fee) is a personal choice. Also, it is important to remember that many inclusionary zoning programs calculate and limit the total dollar amount that a household pays on a monthly or yearly basis. **If so, this will limit what the unit owners' association or the landlord may charge the resident of a price or rent restricted unit, and may result in a differential in fees paid by residents of same-sized units within the same complex.**

A sample provision on fees:

As set forth in the preceding sample calculation of steps for the maximum sales price for Inclusionary Units, and elsewhere in this Plan, all owners of Inclusionary Units within the development must be members of a common interest ownership association. All owners and occupants of Inclusionary Units shall have the same rights and privileges in such association as owners of market-rate units within the development, including access to and use of recreational and community amenities owned or operated by the association. However, common interest ownership fees charged to owners of Inclusionary Units shall not be set by the association or any subassociation so as to cause such owners to pay more than the maximum monthly payment as determined in Step 5 of the preceding sample calculation. It is recognized that monthly requirements for the other items referenced in Step 5 may reduce what an Inclusionary Unit owner may pay to a minimal amount. This limitation on such fees shall be incorporated into common interest ownership documents for the development.

32. Utility allowances.

Formulas setting maximum sale prices on rents typically include reference to utility allowance, because, after rent or mortgage payments and taxes, this is typically the biggest, recurring monthly expense. Several issues lurk here. First, allowances vary by the size of the residential unit. Typically, allowances vary by number of bedrooms, but they can also be based on square footage (which is, in actuality, is probably a more accurate basis). Utility costs also

may be different in communities developed with energy-efficient/sustainable features – e.g., solar-powered communities with reduced-size Energy Star appliances. Next of course, costs vary substantially by region of the country and available fuel sources, and in today's volatile energy markets, they can vary enormously within several months, *i.e.*, within the term of a typical residential lease.

"Utilities" typically refers to heat and hot water, and excludes all forms of electronic communication, telephone, television, internet, and satellite dish services, but this should be specified. Variations also are possible where each unit is separately metered for water, heat, sewer, or other essential services.

It is important to remember that because many inclusionary and affordable housing programs specify maximum dollars that can be devoted to housing costs on a monthly basis, utility allowances are a deduction from rent or the amount available for mortgage payments and thus can have a significant impact on maximum price or rent formulas.

33. Government enforcement.

An inclusionary ordinance should specify what enforcement remedies government may employ if the ordinance's requirements are violated. A sample provision:

A violation of this Affordability Plan shall not result in a forfeiture of title, but the Planning and Zoning Commission shall otherwise retain all enforcement powers granted by the General Statutes, which powers include, but are not limited to, the authority, at any reasonable time, to inspect the property and to examine the books and records of the Administrator to determine compliance of Inclusionary Units with the affordable housing regulations.

34. Real property taxation.

Case law and state statutes around the country vary on the valuation and real property taxation of residential developments in which some percentage of the units are subject to maximum sale prices or rents. The variation among state laws prevents a comprehensive treatment of this topic here, but the critical point is to be kept in mind: **how a development that will be subject to inclusionary requirements will be taxed should be specified in the**

ordinance or should be a permit condition, because it will be a substantial operating cost.

It should be clear that price or rent restricted units will be valued based on the restriction, and the method of valuation (comparable sales, income, or replacement cost) should also be known in advance.

35. Use of "percentage of income" in price formulas.

Maximum household income requirements are typically written as restricting occupancy to something like "households earning 80 percent or less of the area median income, assuming that the household pays 30 percent of its income for housing." But does this mean that the inclusionary program sets a generic maximum price for each type of unit, or that the price or rent is set based on the income of the actual household that shows up to buy or rent?

In subsidized housing programs such as Section 8, the household typically pays 30 percent of its *actual* income, and the Section 8 certificate or voucher program pays the rest, up to the "Fair Market Rent" for the area as published by HUD. In this way, the landlord still knows what amount can be charged for the unit.

But in a non-subsidy situation, the calculation of maximum price or rent needs to be done on a generic basis, *i.e.*, using the area median income and applying a specified percentage, such as 80 percent, then multiplying by the assumed 30-percent-of-income-on-housing, to reach a generic dollar amount the resident household will spend on housing. In other words, **in non-subsidy situations, the amount of rent that the builder can charge on the sales price cannot depend on the actual income of the household.** If it did, the builder would not know how much revenue his sales or rentals would generate until actual buyers showed up, and the builder would be forced to incur a price further reduction if the buyer earned, for example, 68 percent of the area median.

To ensure a match between household income and restricted rents, some owners of rental housing impose, in addition to maximum households income limits, minimum annual or monthly income requirements.

36. Consumer price index/escalation formulas.

If a unit is sold at a restricted price, how will the price at the time of resale be calculated, and will that price be adjusted for inflation or changes in the Consumer Price Index? Obviously, buyers will want their resale price indexed upon resale. There is no single way to structure the formula, but the point is that it be spelled out.

37. Capital improvements to price restricted units.

If a buyer of a price-restricted unit makes an authorized capital improvement to the unit (a new kitchen, for example), may that improvement be reflected at the time of resale? The issue should be addressed in an inclusionary program's rules. One common treatment of this issue is a regulation stating that on resale of a price-restricted unit, a seller may increase the original price by any increase in the Consumer Price Index during his or her residence, plus the actual cost of any authorized capital improvement, depreciated to the present.

38. Principal residence.

Because residents of price and rent restricted units in an inclusionary zoning program usually are required to prove that they meet maximum household income limits, it is important that residents commit in writing to occupy the unit as their principal residence.

39. Subletting.

In general, it is a best practice that subletting of units that are subject to income eligibility requirements be strictly prohibited, for the obvious reason that a household should not be able to rent on a restricted basis and then rent to someone else who has not been through the qualification process. This warning, of course, applies to both for sale and rental housing.

40. Disposition of restrictions at end of set aside period.

Another critical need regarding the duration of a set aside provision is what happens when price or rent restrictions expire. At the end of a restrictive period, possibilities include: (a) the restrictions simply expire and the current owner/occupant receives any appreciation (and perhaps a windfall); (b) the affordability plan for the set aside units allows a government agency

an opportunity to purchase the restricted units at a market or other specified price and to maintain them as restricted units beyond the expiration date; or (c) a required donation of any windfall, or portion of it, to a local government's housing trust fund. A provision allowing municipal government the opportunity to purchase and preserve the price or rent restrictions might look like this:

- (a) *After the expiration of the thirty (30) year period during which the Restrictions are in effect, in the event said owner desires to convey said property, said owner shall first offer said property to the Town (the "Town"), which shall have the right to acquire said property, free and clear of all liens and encumbrances except those existing on the date of the initial conveyance of said property by the owner(s) or its successor(s) or assign(s) to an eligible family or household (the "Original Liens").*
- (b) *Said owner shall give written notice (the "Transfer Notice") to the Town and the Administrator of its intention to convey said property. The offer price (the "Offer Price") shall be calculated promptly by the Administrator in accordance with the formula set forth in Paragraph B of the Restrictions basing the computations on then-current data for median income. The Administrator shall provide written notice of the Offer Price to said owner and the Town within fifteen (15) days of the date of the Transfer Notice. The Town shall have forty-five (45) days from the date of the Transfer Notice to give written notice (the "Election Notice") to said owner of its election to purchase said property for the Offer Price and free and clear of all liens and encumbrances except the Original Liens.*
- (c) *If the Town shall so elect to purchase said property, the closing (the "Closing") on such purchase and sale shall take place at the offices of the Town at 10:00 a.m. on the date sixty (60) days from the date of the Election Notice, or at such other place or upon such earlier date as the parties may mutually agree. At the Closing, any closing adjustments and allocation of closing costs which are then usual and customary in the Town for real estate closings shall be made between seller and purchaser. Following the Closing, the Town may sell said property to any party at any time for any price, free and clear of the Restrictions, including this right of first offer.*
- (d) *In the event the Town (i) notifies said owner that it elects not to purchase said property, (ii) does not provide the Election Notice within said forty-five (45) day period, or (iii) fails to consummate its purchase of said property, said owner shall file an affidavit on the Land Records evidencing such event, following which said owner may sell said property to any party at any time for any price, free and clear of the Restrictions, including this right of first offer.*

Procedural And Substantive Legal Challenges

41. Procedural compliance.

The first question to ask when challenging an ordinance that has been adopted is whether all required procedures were followed. Such items include the timing, content and accuracy of notices published in a newspaper or mailed to abutting or neighboring property owners; compliance with open meeting laws; following agency bylaws; and voting requirements, such as whether a negative vote by a coordinating agency requires a supermajority vote by the adopting agency. These requirements vary from state to state, county to county, and town to town, but they are in every case the starting point.

42. Authority to enact.

The 50 state survey of authority to adopt inclusionary zoning programs, set forth below provides a starting point for reviewing whether inclusionary zoning is authorized by state law in any particular jurisdiction.

43. Preemption.

Preemption is a legal doctrine that prohibits county and municipal governments from adopting ordinances or regulations that conflict with state law. In general, a county or municipal ordinance or regulation will be invalid if it conflicts directly with a state law or regulation, that is, it either prohibits what state law allows or promotes, or allows what state law prohibits. An exception – and one often difficult to discuss – is where state law prohibits some type of conduct, but allows county or municipal laws to be more restrictive. For example, a state law might prohibit local laws from imposing an open space dedication of more than ten percent of the land in a subdivision. A local ordinance requiring 20 percent would be in conflict or invalid. Conversely, state law might authorize a 10 percent dedication but leave open whether localities could require more. The second form of preemption involves "matters of statewide concern," issues that the state government has reserved solely for itself. Utility rate regulation is a common example.

44. Rent control.

Challenges to inclusionary zoning ordinances or policies based on violations of anti-rent control statutes have had varying success. For example, New York City’s Rent Stabilization Law (RSL) was recently challenged in *Community Housing Improvement Program v. City of New York*, 59 F.4th 540 (2nd Cir. 2023) on the basis of the Takings Clause, Contracts Clause, and Equal Protection Clause of the Constitution. *Id.* at 547. Specifically, the plaintiffs, a group of property owners, argue that the RSL has a direct and substantial negative economic impact on rent-stabilized properties in New York City where stabilized rents are, on average, 25 percent lower than market rents. The plaintiffs also argue that permissible rent increases under the RSL are outpaced by increases in operating costs, resulting in property owners being forced to choose between making losing investments or letting their properties deteriorate. *Id.* at 554.

In upholding the RSL in February 2023, the Second Circuit acknowledged:

The RSL may well have an appreciable economic impact on the profitability of some buildings subject to its provisions. When permissible rent increases are outpaced by operating cost increases, the result may be a reduction or, in some cases, the elimination of net operating income. We acknowledge that some property owners may be legitimately aggrieved by the diminished value of their rent-stabilized properties as compared with their market-rate units. Furthermore, *we understand that many economists argue that rent control laws are an inefficient way of ensuring a supply of affordable housing.*

(Emphasis added.) *Id.* The Court reasoned, however, that the property owners had not, “[p]lausibly alleged that every owner of a rent-stabilized property has suffered an adverse economic impact that would support their facial regulatory takings claims,” and, as such, upheld the law. *Id.* As of the writing of this document, the property owners who brought this suit are planning to seek certification to appeal the Court’s decision to the U.S. Supreme Court.

In *Palmer/Sixth St. Properties, L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396 (2009), the California Court of Appeals agreed with a developer’s claim that the 2001 Costa-Hawkins Rental Housing Act, which preempted and prohibited certain forms of rent control, prohibited the imposition of mandatory inclusionary policies in rental housing. But in 2015, the

California Supreme Court in *California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal. 4th 435, 474 (2015) clarified that the validity of an inclusionary housing ordinance should be judged by the traditional standard applicable to a locality's exercise of its police powers: whether they are "reasonably related to the broad general welfare purposes for which the ordinance was enacted." The *California Bldg. Indus. Assn.* case, together with recent legislation, confirmed the availability of inclusionary zoning measures for *rental* housing in-state.

Contrast these decisions with the 2008 Idaho case of *Mt. Cent. Bd. of Realtors v. City of McCall*, Case No. CV 2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008), where the plaintiff challenged an inclusionary zoning ordinance which required developers to permanently deed-restrict rental or sale prices for a portion of any multifamily development. Pursuant to the ordinance, the City had the ultimate authority on price or rent restrictions. *Id.*

The plaintiff argued that this ordinance violated Idaho Code Section 55-307(2), which stated, "A local government shall not enact, maintain, or enforce an ordinance or resolution that would have the effect of controlling the amount of rent charged for leasing private residential property. *This provision does not impair the right of any local governmental unit to manage and control residential property in which the local governmental unit has a property interest.*" (Emphasis added). *Id.* In invalidating the ordinance, the Court held that the "regulatory or administrative interest" the City of McCall had in the project did not amount to a property interest, stating that holding such would essentially eviscerate the anti-rent control statute. *Id.*

In 2006, the Wisconsin Court of Appeals also invalidated an inclusionary zoning ordinance in the City of Madison, finding that it was preempted by a state statute prohibiting municipalities from enacting rent-control ordinances. *Apartment Assoc. of South Central Wisconsin, Inc. v. City of Madison*, 2006 WI App. 192 (2006). The inclusionary ordinance required developments of ten or more residential units to set aside at least 15 percent of the units as affordable housing if the application required "a zoning map amendment, subdivision or land division." *Id.* at *P4. The ordinance specified that the rental price of the affordable units "shall

include rent and utility costs and shall be no more than thirty percent (30%) of the monthly income for the applicable [Area Median Income]." *Id.*

Plaintiffs challenged the ordinance under a state statute prohibiting rent control, which stated that "[n]o city, village, town or county may regulate the amount of rent or fees charged for the use of a residential dwelling unit." *Id.* at *P7, quoting Wis. Stat. § 66.1015. The statute allowed municipalities to enter into certain rent control "agreements," but prohibited them from imposing mandatory rent control laws. *Id.* at *P22. The court dismissed the City's argument that the inclusionary ordinance was really an agreement between the developer and the City because developers could "choose not to develop their land in ways that need a zoning map amendment, subdivision or land division." *Id.* at *P26. The ordinance was, in fact, an exercise of the City's regulatory authority. It also rejected the idea that developers were willingly entering into rent control contracts because they received "incentive points." The court noted that "it is not reasonable to say that an applicant is agreeing to provide the required number of inclusionary dwelling units in exchange for incentive points when an applicant does not have the option of declining the related incentive points." *Id.* at *P29.

45. Illegal exaction/regulatory taking.

Illegal exaction/regulatory takings claims are another common challenge to inclusionary zoning efforts – again, with varying success rates. This is perhaps best illustrated with the takings cases arising from the State of California. In *Home Builders Ass'n of Northern California v. City of Napa*, 90 Cal. App. 4th 188 (2001), the City passed an ordinance requiring ten percent of all newly constructed units to be "affordable." Developers of single-family units could fulfill their requirement by dedicating land or by constructing affordable units on another site, but multifamily developers only had this option if the city council determined that the alternative proposal would result in "affordable housing opportunities equal to or greater than those created by the basic inclusionary requirement." Alternatively, developers could pay a fee in lieu of constructing affordable housing. Developers of single-family units could choose this

alternative by right, but developers of multi-family units had to request permission from the city council. Developers who constructed affordable housing were eligible to receive several benefits, such as loans, expedited processing, and density bonuses. The inclusionary requirement could be waived "based upon the absence of any reasonable relationship or nexus between the impact of the development and the inclusionary requirement." *Id.* at 192.

In *Building Industry Ass'n of San Diego County, Inc. v. City of San Diego*, 2006 WL 1666822 (Cal. Superior, May 24, 2006), San Diego required developers to set aside units for affordable housing, or to pay an in lieu fee to the City. Waivers could only be issued if:

- (1) Special circumstances, unique to that development justify the grant of the waiver;
- (2) The development would not be feasible without the waiver; (3) A specific and substantial financial hardship would occur if the waiver were not granted; and (4) No alternative means of compliance are available which would be more effective in attaining the purposes of [the ordinance] than the relief granted.

Id. at *1.

In both of these cases, challengers brought a facial takings claim. However, in *City of San Diego*, the court held that the above-quoted provision did not provide for the granting of a waiver solely because of an absence of any reasonable relationship or nexus between the impact of the development and the inclusionary requirement. As such, the court held that the ordinance, on its face, resulted in an unconstitutional taking. *Id.* at *2.

The court in *City of Napa*, however, determined that the Home Builders' facial takings challenge failed because the ordinance permitted the City, in its discretion, to waive the inclusionary requirements. 90 Cal. App. 4th at 194. It further found that the ordinance substantially advanced a legitimate state interest by providing affordable housing for low and moderate income families, and rejected the notion that the ordinance violated the due process clause by preventing developers from making a "fair return" on their investment. *Id.* at 195-96, 198-99.

More recently, in *California Building Industry Assn. v. City of San Jose*, 61 Cal. 4th 435 (2015), the City of San Jose enacted an inclusionary zoning ordinance requiring that all new residential developments over 20 units sell at least 15 percent of for sale units at a price that is affordable to low or moderate-income households. *Id.* at 442. The CBIA challenged this ordinance as an illegal exaction under the Takings Clause. The court upheld the ordinance, citing stating, “There can be no valid unconstitutional conditions takings claim without a government exaction of property, and the ordinance in the present case does not effect an exaction.” *Id.* at 457.

Takings challenges have been brought in other states as well. For example, in *Fair Share Housing Center, Inc. v. The Zoning Bd. of the City of Hoboken*, 2022 WL 2103899 (N.J. Super. Ct. App. Div. June 9, 2022), the developer-plaintiffs argued that the City’s required 10 percent set-aside for affordable housing units constituted an unconstitutional taking because the City did not provide an adequate compensatory benefit in return. *Id.* at *15. The court disagreed, stating that the granting of a use variance and density bonuses constituted a benefit. *Id.*

In the Massachusetts case of *Brown v. Dennison*, 21 LCR 479 (2021), the plaintiffs challenged a zoning board of appeals’ approval condition imposing an affordability limit on a four-unit development based on a zoning bylaw that placed affordability limits on developments of at least six housing units. The Land Court held that the statute did not apply to projects with less than six units, and recognizing the extreme shortage of rental housing of any sort in Duxbury, the Court ordered the ZBA to reissue the special permit without the affordable housing condition. *Id.* at 486.

46. Conclusion.

In summary, inclusionary zoning is a complicated undertaking, one with many more moving parts and practical considerations than drafters realize. Thus, inclusionary zoning should first be carefully scrutinized and challenged as to whether it constitutes sensible policy. If

government proceeds with implementation, it is essential that all of the critical details be identified, addressed, and molded into a workable program for that particular area.

***50 STATE SURVEY OF STATUTORY AND CASE LAW AUTHORITY FOR
INCLUSIONARY ZONING***

Summary of State Authority

STATE	INCLUSIONARY ZONING STATUTE	HOME RULE STATUS	INCLUSIONARY ZONING CASE LAW
Alabama	None	Dillon's Rule	None
Alaska	None, but broad zoning enabling statute, liberal house rule	By state statute, liberally construed	None
Arizona	None, and 2006 property rights measure/2015 legislation makes program unlikely	Structural home rule	None
Arkansas	None	Home rule (functional, fiscal and structural powers)	None
California	Cal. Gov. Code § 65850 (re: rental units only)	Broad functional and structural home rule	<i>Home Builders Ass'n v. City of Napa</i> , 90 Cal. App. 4th 188 (2001)
Colorado	C.R.S. 38-12-301 (allowing voluntary agreements only); Denver and Boulder have enacted ordinances	Broad functional and structural home rule	<i>Meyerstein v. City of Aspen</i> , 282 P.3d 456, 466 (Colo. App. 2011)
Connecticut	Yes, <i>see p. 55</i>	Structural home rule, but Dillon's Rule with respect to municipal powers	None
Delaware	None	Functional home rule	None

STATE	INCLUSIONARY ZONING STATUTE	HOME RULE STATUS	INCLUSIONARY ZONING CASE LAW
Florida	Yes, <i>see</i> p. 56. Ordinances in Tallahassee and Palm Beach County.	Functional and structural home rule	None
Georgia	None, but ordinance adopted in Fulton County	Functional and structural home rule	None
Hawaii	None, but proposed bill is before legislature	Functional and structural home rule	None
Idaho	None. Voluntary program in Ketchum, potentially Boise	Dillon's Rule, but home rule police powers	<i>Mt. Cent. Bd. of Realtors</i> , Case No. CV 2006-490-C (2008).
Illinois	Yes, <i>see</i> p. 60	Structural and broad functional home rule	None
Indiana	None	Functional home rule	None
Iowa	None	Structural and limited functional home rule	None
Kansas	None	Functional, structural and fiscal home rule	None
Kentucky	None	Functional and structural home rule	None
Louisiana	Yes, <i>see</i> p. 65	Broad functional, structural, and fiscal home rule	None
Maine	None, but Portland has voluntary ordinances	Functional and structural home rule	None
Maryland	Yes, <i>see</i> p. 67	Structural and functional home rule	<i>Montgomery Cnty v. May Dept. Stores, Co.</i> , 721 A.2d 249 (Md. 1998)

STATE	INCLUSIONARY ZONING STATUTE	HOME RULE STATUS	INCLUSIONARY ZONING CASE LAW
Massachusetts	Yes, <i>see</i> p. 68	Limited functional, structural, and fiscal home rule	<i>Dacey v. Town of Barnstable</i> (2000)
Michigan	None, but ordinances in Detroit, Grand Rapids, and Ann Arbor	Functional, structural, and fiscal home rule (liberally construed)	None
Minnesota	Yes, <i>see</i> p. 73	Functional and structural home rule	None
Mississippi	None	Functional and structural home rule	None
Missouri	None, but ordinance in Kansas City	Functional, structural, and fiscal home rule	None
Montana	Yes, <i>see</i> p. 75	Functional and structural self-government powers (not home rule)	None
Nebraska	Yes, <i>see</i> p. 76	Dillon's Rule	None
Nevada	Yes, <i>see</i> p. 76	Dillon's Rule	None
New Hampshire	Yes, <i>see</i> p. 78	No powers beyond authority to adopt and amend local charter and establish form of government	None
New Jersey	Inclusionary Zoning Statute expired in 2016, currently none	Functional, limited structural, and limited fiscal home rule (but home-rule provisions must be broadly construed)	<i>S. Burlington Cnty NAACP v. Mount Laurel T'ship</i> , 92 N.J. 158, 456 A.2d 390 (1983) (" <i>Mount Laurel I</i> "); <i>Holmdel Bldrs. Assoc. v. T'ship of Holmdel</i> , 121 N.J. 550, 583 A.2d 277 (1990)

STATE	INCLUSIONARY ZONING STATUTE	HOME RULE STATUS	INCLUSIONARY ZONING CASE LAW
New Mexico	None, but Santa Fe and Albuquerque have adopted ordinances	Liberally construed structural and functional powers, but no fiscal authority	None
New York	None, but New York City has adopted an ordinance	Functional/structural, but limited fiscal authority	None
North Carolina	None, but several municipalities have ordinances spanning from voluntary to mandatory	Modified Dillon's Rule; structural home rule	None
North Dakota	None	Strong home rule, maximum self-government	None
Ohio	None	Strong home rule, full structural, functional, and fiscal powers	None
Oklahoma	None	Structural home rule	None
Oregon	Yes, <i>see</i> p. 83 (inclusionary prohibited)	Structural home rule	None
Pennsylvania	None, but ordinances in Pittsburgh and Philadelphia	Structural home rule	<i>Builders Assoc. of Metropolitan Pittsburgh v. City of Pittsburgh</i> , 2023 WL 2758931
Rhode Island	Yes, <i>see</i> p. 85	Structural home rule	None
South Carolina	None	Strong home rule, full structural, functional, and fiscal powers that must be liberally construed	None
South Dakota	None	Very broad home rule	None

STATE	INCLUSIONARY ZONING STATUTE	HOME RULE STATUS	INCLUSIONARY ZONING CASE LAW
Tennessee	Yes, <i>see</i> p. 87 (mandatory inclusionary prohibited)	Structural home rule	<i>Home Builders Ass'n of Mid. Tenn. v. Metro. Gov. of Nashville and Davidson County</i> , 2019 WL 369271
Texas	Yes, <i>see</i> p. 88 (inclusionary prohibited)	Functional and structural home rule	None
Utah	Yes, <i>see</i> p. 89	Functional, structural, and limited fiscal home rule	None
Vermont	Yes, <i>see</i> p. 90	None	None
Virginia	Yes, <i>see</i> p. 91	Dillon's Rule; functional home rule	<i>The Bd. of Supervisors of Fairfax County v. DeGroff Enterprises, Inc.</i> , 214 Va. 235, 198 S.E.2d 600 (1973)
Washington	None, but ordinances in Vancouver, Tacoma, and Seattle	Limited structural home rule	None
West Virginia	None	Limited structural home rule	None
Wisconsin	None	Functional and limited structural home rule	<i>Apartment Assoc. of South Central Wisconsin, Inc. v. City of Madison</i> , 2006 WI App 192, 722 N.W.2d 614, review denied, 727 N.W.2d 35 (Wis. 2006)
Wyoming	None	Functional and structural home rule	None

Alabama

Inclusionary Zoning Statute: None

Case Law: None

Home Rule Provision: Alabama is a Dillon's Rule state. The Constitution grants limited home rule by restricting the legislature from enacting local laws in a number of enumerated categories. Alabama Const. Art. IV, § 104. (2006) (housing is not listed as an area in which the legislature is prohibited from enacting local laws). However, the Constitution contains an amendment that grants limited home rule powers to Shelby County (amended in 2001) and Baldwin County (amended in 2006). See Ala. Const. Amend. Shelby Cty., §§ 3, 5.01.

Alaska

Inclusionary Zoning Statute: Alaska has a broad statute, § 29.40.040, that authorizes zoning regulations that further the goals of a comprehensive land use plan, and it is a liberal home rule state, but there is no specific mention of or authorization for inclusionary zoning.

Case Law: None

Home Rule Provision: Alaska is a home rule state where the powers granted to local government units are liberally construed, and cities are granted all of the powers conferred by charter or law. Alaska Const. Art. X, §§ 1, 2, 7, 11 (2006). "[W]here a home rule city is concerned, the charter and not a legislative act is looked to in order to determine whether a particular power has been conferred upon the city. It would be incongruous to recognize the constitutional provision stating that a home rule city may exercise all legislative powers not prohibited by law or by charter (Alaska Const., art. X, § 11)." *Lien v. City of Ketchikan*, 383 P.2d 721 (Alaska 1963).

Arizona

Inclusionary Zoning Statute: In 2006, the legislature approved Senate Bill 1479, which would have prohibited the use of inclusionary zoning, but the Bill was later vetoed by the governor. See <https://www.azleg.gov/alispdfs/47leg/2R/Senate/BillStats.pdf> (last visited on March 7, 2023).

Also in 2006, Arizona voters passed the Private Property Rights Protection Act. A.R.S. §§ 12-1131 et seq. (also known as "Proposition 207"). This Act, in addition to restricting eminent domain, entitles landowners to just compensation if, after the date of transfer, a land use law is enacted that diminishes the fair market value of the property.

In 2015, the Arizona legislature approved A.R.S. § 11-819, which prohibits counties from adopting regulations that have the effect of establishing housing sales or lease prices, or which would require housing to be designated for sale or lease to any particular class or group of residents. The law does not limit counties from adopting ordinances or development plan conditions that create or implement incentives designed to increase the supply of lower cost housing. 2023 House Bill 2390 proposes the repeal of A.R.S. § 11-819. *See* <https://apps.azleg.gov/BillStatus/BillOverview/78520> (last visited on March 22, 2023).

Case Law: None

Discussion: As noted above, Arizona voters passed, in November 2006, the Private Property Rights Protection Act. A.R.S. §§ 12-1131 *et seq.* (the “Act”).

The Act, together with A.R.S. § 11-819, acts as a deterrent to inclusionary zoning measures at the local level. In other words, although it may still be possible for municipalities to pass inclusionary zoning regulations under their general authority to enact zoning regulations, *see* A.R.S. § 9-462.01 (2021), doing so could draw a challenge under the Act or A.R.S. § 11-819, if not drafted carefully. If the proposed repeal of A.R.S. § 11-819 is successful, one potential impediment to inclusionary zoning will have been lifted.

Home Rule Provision: Arizona has structural home rule. The Arizona Constitution grants municipal corporations the power to incorporate and organize themselves through special laws. A.R.S. Const. XIII, § 1 (2006).

Arkansas

Inclusionary Zoning Statute: In 2007, House Bill 2247, which would have allowed municipalities with populations of 50,000 or more to enact certain inclusionary zoning ordinances, failed to pass. *See* <https://www.arkleg.state.ar.us/Bills/Detail?id=HB2247&ddBienniumSession=2007%2FR> (last visited March 22, 2023).

Case Law: None

Home Rule Provision: Arkansas is a home rule state; municipalities have structural, fiscal, and functional powers, including the power to adopt their own charters, and have the authority to exercise all powers relating to municipal affairs. Ark. Code Ann. §§ 14-42-307; 14-43-602 (2022).

California

Inclusionary Zoning Statute: California has enacted a number of incentives to encourage the development of affordable housing. *See generally* Cal. Gov. Code § 65582.1 (2022) (listing

“reforms and incentives to facilitate and expedite the construction of affordable housing.”). Relevant provisions of three statutes are provided below.

Cal. Gov. Code § 65850. Scope of power to regulate by ordinance (subsection (g) added in 2017) (2022)

The legislative body of any county or city may, pursuant to this chapter, adopt ordinances that do any of the following: ...

(g) Require, as a condition of the development of residential rental units, that the development include a certain percentage of residential rental units affordable to, and occupied by, households with incomes that do not exceed the limits for moderate-income, lower income, very low income, or extremely low income households specified in Sections 50079.5, 50093, 50105, and 50106 of the Health and Safety Code. The ordinance shall provide alternative means of compliance that may include, but are not limited to, in-lieu fees, land dedication, off-site construction, or acquisition and rehabilitation of existing units.

Cal. Gov. Code § 65913.1. Zoning sufficient vacant land for residential use with appropriate standards (the “least cost zoning law”) (2022)

(a) In exercising its authority to zone for land uses and in revising its housing element pursuant to Article 10.6 (commencing with Section 65580) of Chapter 3, a city, county, or city and county shall designate and zone sufficient vacant land for residential use with appropriate standards, in relation to zoning for nonresidential use, and in relation to growth projections of the general plan to meet housing needs for all income categories as identified in the housing element of the general plan. For the purposes of this section:

(1) "Appropriate standards" means densities and requirements with respect to minimum floor areas, building setbacks, rear and side yards, parking, the percentage of a lot that may be occupied by a structure, amenities, and other requirements imposed on residential lots pursuant to the zoning authority which contribute significantly to the economic feasibility of producing housing at the lowest possible cost given economic and environmental factors, the public health and safety, and the need to facilitate the development of housing affordable to persons and families of low or moderate income, as defined in Section 50093 of the Health and Safety Code, and to persons and families of lower income, as defined in Section 50079.5 of the Health and Safety Code. However, nothing in this section shall be construed to enlarge or diminish the authority of a city, county, or city and county to require a developer to construct this housing....

(b) Nothing in this section shall be construed to require a city, county, or city and county in which less than 5 percent of the total land area is undeveloped to zone a site within an urbanized area of that city, county, or city and county for residential uses at densities that exceed those on adjoining residential parcels by 100 percent....

Cal. Gov. Code § 65915. Applicants seeking density bonus; concessions or incentives; conditions, agreements and submission requirements; duties of local officials; legislative findings, declarations, and intent (2022)

(a)(1) When an applicant seeks a density bonus for a housing development within, or for the donation of land for housing within, the jurisdiction of a city, county, or city and county, that local government shall comply with this section. A city, county, or city and county shall adopt an ordinance that specifies how compliance with this section will be implemented. Except as otherwise provided in subdivision (s), failure to adopt an ordinance shall not relieve a city, county, or city and county from complying with this section....

(b)(1) A city, county, or city and county shall grant one density bonus, the amount of which shall be as specified in subdivision (f), and, if requested by the applicant and consistent with the applicable requirements of this section, incentives or concessions, as described in subdivision (d), waivers or reductions of development standards, as described in subdivision (e), and parking ratios, as described in subdivision (p), if an applicant for a housing development seeks and agrees to construct a housing development, excluding any units permitted by the density bonus awarded pursuant to this section, that will contain at least any one of the following:

(A) Ten percent of the total units of a housing development, including a shared housing building development, for rental or sale to lower income households, as defined in Section 50079.5 of the Health and Safety Code.

(B) Five percent of the total units of a housing development, including a shared housing building development, for rental or sale to very low income households, as defined in Section 50105 of the Health and Safety Code.

(C) A senior citizen housing development, as defined in Sections 51.3 and 51.12 of the Civil Code, or a mobilehome park that limits residency based on age requirements for housing for older persons pursuant to Section 798.76 or 799.5 of the Civil Code. For purposes of this subparagraph, “development” includes a shared housing building development.

(D) Ten percent of the total dwelling units of a housing development are sold to persons and families of moderate income, as defined in Section 50093 of the Health and Safety Code, provided that all units in the development are offered to the public for purchase.

(E) Ten percent of the total units of a housing development for transitional foster youth, as defined in Section 66025.9 of the Education Code, disabled veterans, as defined in Section 18541, or homeless persons, as defined in the federal McKinney-Vento Homeless Assistance Act (42 U.S.C. Sec. 11301 et seq.). The units described in this subparagraph shall be subject to a recorded affordability restriction of 55 years and shall

be provided at the same affordability level as very low income units.

(F)(i) Twenty percent of the total units for lower income students in a student housing development

(G) One hundred percent of all units in the development, including total units and density bonus units, but exclusive of a manager's unit or units, are for lower income households, as defined by Section 50079.5 of the Health and Safety Code, except that up to 20 percent of the units in the development, including total units and density bonus units, may be for moderate-income households, as defined in Section 50053 of the Health and Safety Code. For purposes of this subparagraph, "development" includes a shared housing building development.

(2) For purposes of calculating the amount of the density bonus pursuant to subdivision (f), an applicant who requests a density bonus pursuant to this subdivision shall elect whether the bonus shall be awarded on the basis of subparagraph (A), (B), (C), (D), (E), (F), or (G) of paragraph (1).

(c)(1)(A) An applicant shall agree to, and the city, county, or city and county shall ensure, the continued affordability of all very low and low-income rental units that qualified the applicant for the award of the density bonus for 55 years or a longer period of time if required by the construction or mortgage financing assistance program, mortgage insurance program, or rental subsidy program.

(B)(i) Except as otherwise provided in clause (ii), rents for the lower income density bonus units shall be set at an affordable rent, as defined in Section 50053 of the Health and Safety Code.

(ii) For housing developments meeting the criteria of subparagraph (G) of paragraph (1) of subdivision (b), rents for all units in the development, including both base density and density bonus units, shall be as follows:

(I) The rent for at least 20 percent of the units in the development shall be set at an affordable rent, as defined in Section 50053 of the Health and Safety Code.

(II) The rent for the remaining units in the development shall be set at an amount consistent with the maximum rent levels for lower income households, as those rents and incomes are determined by the California Tax Credit Allocation Committee.

(2)(A) An applicant shall agree to ensure, and the city, county, or city and county shall ensure, that a for-sale unit that qualified the applicant for the award of the density bonus meets either of the following conditions:

(i) The unit is initially occupied by a person or family of very low, low, or moderate

income, as required, and it is offered at an affordable housing cost, as that cost is defined in Section 50052.5 of the Health and Safety Code and is subject to an equity sharing agreement.

(ii) The unit is purchased by a qualified nonprofit housing corporation pursuant to a recorded contract that satisfies all of the requirements specified in paragraph (10) of subdivision (a) of Section 402.1 of the Revenue and Taxation Code and that includes all of the following:

(I) A repurchase option that requires a subsequent purchaser of the property that desires to resell or convey the property to offer the qualified nonprofit corporation the right to repurchase the property prior to selling or conveying that property to any other purchaser.

(II) An equity sharing agreement.

(III) Affordability restrictions on the sale and conveyance of the property that ensure that the property will be preserved for lower income housing for at least 45 years for owner-occupied housing units and will be sold or resold only to persons or families of very low, low, or moderate income, as defined in Section 50052.5 of the Health and Safety Code.

Case Law: *Home Builders Ass'n v. City of Napa*, 90 Cal. App. 4th 188 (2001); *California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal. 4th 435 (2015).

Discussion: With the exception of Cal. Gov. Code § 65850 (copied above, discussed below), which applies only to rental units, there is no broad statutory authority explicitly authorizing municipalities to enact inclusionary zoning ordinances or regulations. However, dozens of municipalities have enacted such ordinances, and the state's intermediate court affirmed their validity in 2001 in *Home Builders Ass'n v. City of Napa*, 108 Cal. Rptr. 2d 60 (Cal. Ct. App. 2001). In that case, the Court of Appeals rejected a takings challenge to an inclusionary zoning ordinance that required a specific percentage of newly-constructed housing units be "affordable," reasoning that creating affordable housing for low- and moderate-income families was a legitimate state interest and that this ordinance would substantially advance the important governmental interest of providing affordable housing.

California law is generally very supportive of affordable housing, as is seen as a national leader in inclusionary zoning. For example, Cal. Gov Code § 65915 (2022) specifically authorizes incentive zoning, and requires cities and/or counties to grant density bonuses, incentives and concessions to applicants seeking to build houses for low income or elderly populations.

Indeed, in 2001, California enacted the Costa-Hawkins Rental Housing Act, which preempts and prohibits certain forms of rent control. Cal. Civ. Code 1954.50-1954.535 (2001). In *Palmer/Sixth St. Properties, L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396 (2009), the

Court of Appeal agreed with a developer’s claim that the Costa-Hawkins Rental Housing Act prohibited the imposition of mandatory inclusionary policies in rental housing. In 2015, however, the California Supreme Court clarified in *California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal. 4th 435, 474 (2015) that the validity of inclusionary housing ordinances should be judged by the traditional standard applicable to a locality’s exercise of its police powers: whether they are “reasonably related to the broad general welfare purposes for which the ordinance was enacted.” That case, combined with AB 1505, codified at Cal. Gov. Code § 65850 (copied above) confirmed a municipality’s authority to apply inclusionary zoning to *rental* housing.

Home Rule Provision: California has broad structural and functional home rule. Local governments have the authority to make and enforce all ordinances and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their charters and in the general laws. Cal. Const, Art. XI §§ 5, 7 (2022). Local governments also have the ability to make their own charters. Cal. Const, Art. XI § 3 (2022). For rules on county charters, *see* Cal. Const, Art. XI § 4.

Colorado

Inclusionary Zoning Statute: None, although *see* C.R.S. 38-12-301, discussed below.

Case Law: *Meyerstein v. City of Aspen*, 282 P.3d 456, 466 (Colo. App. 2011).

Discussion: C.R.S. 38-12-301 (2022) prohibits rent control on residential housing units, noting rent control “as a matter of statewide concern.” The statute provides, however, that this prohibition does not include *voluntary* agreements between a county or municipality and an applicant to limit rent on a unit “otherwise designed to provide affordable housing.”

This exclusion to the rent control prohibition was passed in 2010 in light of the Supreme Court’s decision in *Town of Telluride, Colo. v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30 (Colo. 2000), in which the Supreme Court found that an inclusionary zoning ordinance was a form of rent control and thus, prohibited by state law. In enacting the exclusion, Senator Boyd explained: “[T]he bill also clarifies that nothing in the rent control statute shall prohibit or restrict the right of a property owner and a state agency, county, municipality, or housing authority (public entity) from voluntarily entering into and enforcing an agreement that controls rent on a private residential housing unit, whether the agreement is entered into before, on, or after the effective date of the bill.” Bill Summary, Preamended H.B. 10–1017, 67th Gen. Assem., 2d Sess. In *Meyerstein v. City of Aspen*, the Court of Appeals clarified that the 2010 amendments to C.R.S. 38-12-301 clarified, but did not change, the existing law. This exclusion opens the door to *voluntary* inclusionary zoning ordinances or regulations.

Effective July 1, 2022, Denver has a new "Expanding Housing Affordability Ordinance," which amended Chapter 27 of the Denver Municipal Code to, among other things, require that all new residential developments of 10 units or more designate eight to 12 percent of the units as affordable for 99 years, regardless of whether the unit is for rent or for sale. *See* <https://www.denvergov.org/Government/Agencies-Departments-Offices/Agencies-Departments-Offices-Directory/Community-Planning-and-Development/Denver-Zoning-Code/Text-Amendments/Affordable-Housing-Project> for more information (last visited March 28, 2023) Boulder revised its inclusionary zoning program, which applies to all residential developments. *See* https://library.municode.com/co/boulder/codes/municipal_code?nodeId=TIT9LAUSCO_CH13INHO (last visited March 28, 2023).

Home Rule Provision: Colorado has a broad structural and functional form of home rule, whereby the people of each city or town are vested with the power to create a city or town charter, and such charters govern all local and municipal affairs. While the Colorado Constitution enumerates certain powers which are granted to towns and cities, it also states that such towns and cities are granted the full right of self-government in both local and municipal matters and that its enumeration of powers should not be interpreted as limiting home rule authority. Colorado also grants its cities and towns with fiscal authority, such as the right to borrow money and issue debt, as well as to set tax rates. Colo. Const. Art. XX, § 6. (2022).

Connecticut

Inclusionary Zoning Statute: Conn. Gen. Stat. § 8-2i, copied below.

Conn. Gen. Stat. § 8-2i. Inclusionary zoning.

(a) As used in this section, "inclusionary zoning" means any zoning regulation, requirement or condition of development imposed by ordinance, regulation or pursuant to any special permit, special exception or subdivision plan which promotes the development of housing affordable to persons and families of low and moderate income, including, but not limited to, (1) the setting aside of a reasonable number of housing units for long-term retention as affordable housing through deed restrictions or other means; (2) the use of density bonuses; or (3) in lieu of or in addition to such other requirements or conditions, the making of payments into a housing trust fund to be used for constructing, rehabilitating or repairing housing affordable to persons and families of low and moderate income.

(b) Notwithstanding the provisions of any special act, any municipality having zoning authority pursuant to this chapter or any special act or having planning authority pursuant to chapter 126 may, by regulation of the body exercising such zoning authority, implement inclusionary zoning regulations, requirements or conditions.

Case Law: None.

Discussion: Several Connecticut municipalities have adopted inclusionary zoning ordinances pursuant to Conn. Gen. Stat. § 8-2i. In 2022, the City of New Haven enacted an inclusionary zoning ordinance for certain new developments or redevelopments greater than fifty percent of the assessed value of the property. *See* <https://cityplancommission.newhavenct.gov/documents/4ab1b08887f14262958761b9d11bb9e6/explore> (last visited May 2, 2023).

Stamford's inclusionary zoning regulation is at Section 7.4 of its zoning regulations. The provision, which requires a certain number of "BMR" units in all new or renovated residential communities of 10 or more units, is detailed and, amid the City's thriving downtown area, has been applied to several recent multi-family developments. *See* <https://www.stamfordct.gov/home/showpublisheddocument/2415/638060307349970000> (last visited March 28, 2023).

Home Rule Provision: Connecticut allows structural home rule, but is a Dillon's' Rule state with respect to municipal powers.

Delaware

Inclusionary Zoning Statute: None

Case Law: None

Discussion: Although we found no inclusionary zoning statute, some jurisdictions have passed inclusionary zoning programs or ordinances. For example, in 2022, Sussex County (population of approximately 237,000) revised its 2006 Rental Program to provide expedited planning and zoning review and a 20% density bonus in exchange for reserving 12.5% of all units as affordable in perpetuity. *See* Ordinance No. 2889 available at <https://sussexcountyde.gov/sites/default/files/ordinances/o2889.pdf> (last visited March 28, 2023).

Home Rule Provision: Delaware has functional home rule whereby municipalities have the authority to exercise powers of local self government. The Delaware legislature has granted each municipality the power to "amend its charter so as to have and assume all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute." Del. Code Ann. Tit. 22, § 802 (2022). *See also* Constitution Article II, § 25 (for county-specific zoning authority for Sussex, New Castle, and Kent Counties).

Florida

Inclusionary Zoning Statutes: Excerpts of several relevant statutes are copied below.

Fla. Stat. Ann. § 125.01055. Affordable Housing (2022)

(1) Notwithstanding any other provision of law, a county may adopt and maintain in effect any law, ordinance, rule, or other measure that is adopted for the purpose of increasing the supply of affordable housing using land use mechanisms such as inclusionary housing or linkage fee ordinances.

(2) An inclusionary housing ordinance may require a developer to provide a specified number or percentage of affordable housing units to be included in a development or allow a developer to contribute to a housing fund or other alternatives in lieu of building the affordable housing units....

See also Fla. Stat. Ann. § 166.04151. Affordable Housing (2022) (similar to § 125.01055, but for municipalities)

Fla. Stat. Ann. § 125.0103. Ordinances and rules imposing price controls; findings required; procedures (2022)

(1) (a) Except as hereinafter provided, no county, municipality, or other entity of local government shall adopt or maintain in effect an ordinance or a rule which has the effect of imposing price controls upon a lawful business activity which is not franchised by, owned by, or under contract with, the governmental agency, unless specifically provided by general law....

(7) Notwithstanding any other provisions of this section, municipalities, counties, or other entities of local government may adopt and maintain in effect any law, ordinance, rule, or other measure which is adopted for the purposes of increasing the supply of affordable housing using land use mechanisms **such as inclusionary housing ordinances**.

See also Fla. Stat. Ann. § 166.043. Ordinances and rules imposing price controls; findings required; procedures (similar to § 125.0103, but for municipalities)

Fla. Stat. Ann. § 163.3202. Land development regulations (2022)

(1) Within 1 year after submission of its revised comprehensive plan for review pursuant to s. 163.3167(2), each county and each municipality shall adopt or amend and enforce land development regulations that are consistent with and implement their adopted comprehensive plan....

(3) This section shall be construed to encourage the use of innovative land development

regulations which include provisions such as transfer of development rights, incentive and inclusionary zoning, planned unit development, impact fees, and performance zoning. These and all other such regulations shall be combined and compiled into a single land development code for the jurisdiction. A general zoning code shall not be required if a local government's adopted land development regulations meet the requirements of this section.

Case Law: None

Discussion: House Bill 7103 became law on July 1, 2019 and in part, amended Florida's inclusionary zoning statutes (§§ 125.01055 and 166.04151, copied above) to explicitly allow counties and municipalities to implement mandatory inclusionary zoning ordinances. In exchange, HB 7103 required local governments to provide incentives to “fully offset all costs” to the owner or developer as a result of the inclusionary zoning/affordable housing requirement. For more information, *see* <https://flhousing.org/inclusionary-zoning/> (last visited March 28, 2023).

Tallahassee has enacted an inclusionary zoning ordinance that requires 10 percent of new homes in developments of 50 or more units to be sold or rented at a designated price, with an applicable density bonus in exchange. *See* City Commission Policy 1103, available at <https://www.talgov.com/uploads/public/documents/commission/policy/1103.pdf> (revised through August 20, 2008, and last visited March 28, 2023). Although this ordinance was challenged by the Florida Home Builders Association and other industry groups, the Florida Circuit Court upheld the ordinance in *Florida Home Builders Ass'n, Inc. v. City of Tallahassee*, 2007 WL 5033524 (Fla.Cir.Ct. Nov. 20, 2007).

Palm Beach County adopted a mandatory Workforce Housing Program that applies to any residential development of more than 10 units in a certain portions of the County. The details are available at <https://discover.pbcgov.org/pzb/planning/Projects-Programs/WorkforceHousingProgram.aspx> (last visited April 5, 2023).

Home Rule Provision: Florida has structural and functional home rule, whereby municipalities have the authority to enact and revise charters, and are given the authority to perform municipal functions. Fla. Stat. §§ 125.64, 125.82; Fla. Const. Art. VIII, § 2 (2022).

Georgia

Inclusionary Zoning Statute: None

Case Law: None

Discussion: Fulton County amended Section 4.26 of its Zoning Resolution in April 2006 to include a voluntary inclusionary zoning program. *See* <https://www.fultoncountyga.gov/inside->

[fulton-county/fulton-county-departments/public-works/planning-zoning-and-permitting/zoning-resolution](#) (last visited April 4, 2023). In return for developing affordable housing, Fulton County offers developers incentives such as density bonuses, a streamlined approval process, and modifications of development standards. While this ordinance was passed with a sunset provision that expired in 2008, it does not appear to have been removed or extended from Fulton County’s ordinances.

Home Rule Provision: Georgia has functional home rule, whereby municipal corporations, as well as the governing authority of each county, have the authority to exercise powers of local self government. Ga. Const. Art. IX, § II, Para. I, II (2022); Ga. Const. Art. IX, § II, Para. III (2022). In addition, Georgia has structural home rule, as municipal corporations have the authority to amend their charters. O.C.G.A. § 36-35-3 (2006); *see also* Chapter 35 of the Official Code of Georgia Annotated, “The Municipal Home Rule Act of 1965,” *e.g.*, O.C.G.A. § 36-34-1 (2022).

Hawaii

Inclusionary Zoning Statute: None

Case Law: None

Discussion: Maui has an inclusionary zoning ordinance that requires developers to provide 25 percent of the total number of market rate units for “residential workforce housing.” Maui County Code Title 2.96, available at [Chapter 2.96 - RESIDENTIAL WORKFORCE HOUSING POLICY | Code of Ordinances | County of Maui, HI | Municode Library](#) (last visited March 30, 2023).

In its 2023 session, Hawaii legislators are evaluating S.B. No. 867, which “Prohibits any ordinance, or rule from imposing an inclusionary zoning requirement on housing offered exclusively for sale in perpetuity to buyers who are residents of the State, are owner-occupants, and do not own any other real property. Requires each county to submit a report on its inclusionary zoning requirements to the Legislature every year until the Regular Session of 2028.”

Home Rule Provision: Hawaii has functional and structural home rule. The legislature has the power to create county governments and each county can exercise the powers conferred to it by the general laws of the state. Hawaii Const. Art. VIII, § 1 (2022). Political subdivisions have the power to frame and adopt charters for their own self-government within such limits and under such procedures as may be provided by general law. Hawaii Const. Art. VIII, § 2 (2022).

Idaho

Inclusionary Zoning Statute: None

Case Law: In *Mt. Cent. Bd. of Realtors v. City of McCall*, (Fourth Judicial District Court of Idaho, Valley County, 2008), the constitutionality of two affordable housing ordinances in McCall, Idaho was challenged. The court held that the, “Legislature had not impliedly preempted the entire field of affordable housing, and there is nothing in these statutes which appears to prevent a city from enacting a zoning ordinance with respect to affordable housing.” See No. 44 above.

Discussion: The City of Ketchum, Idaho has a voluntary inclusionary zoning program that permits a modification of certain zoning requirements if a developer is constructing affordable housing. Boise, Idaho is attempting to pass an inclusionary zoning ordinance of their own, but has not yet passed any such ordinance.

Home Rule Provision: Idaho is a Dillon's Rule state, where the only home rule powers granted to counties or incorporated cities or towns are police powers (*i.e.*, the power to exert local policy powers as well as enact sanitary regulations). Idaho Const. Art. 12, §2 (2022).

Illinois

Inclusionary Zoning Statute: § 55 ILCS 5/5-12001 (powers of county boards); § 65 ILCS 5/11-13-1 (powers of municipal corporations). Both statutes appear to permit at least voluntary inclusionary zoning. The relevant portions are below. In addition, the Affordable Housing Planning and Appeal Act, 310 ILCS 67/1, contains a broadly-worded provision granting powers to promote affordable housing that appears to encompass inclusionary zoning.

§ 55 ILCS 5/5-12001. Authority to regulate and restrict location and use of structures (2022)

For the purpose of promoting the public health, safety, morals, comfort and general welfare, conserving the values of property throughout the county, lessening or avoiding congestion in the public streets and highways, and lessening or avoiding the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters, the county board or board of county commissioners, as the case may be, of each county, shall have the power to regulate and restrict the location and use of buildings, structures and land for trade, industry, residence and other uses which may be specified by such board, to regulate and restrict the intensity of such uses, to establish building or setback lines on or along any street, trafficway, drive, parkway or storm or floodwater runoff channel or basin outside the limits of cities, villages and incorporated towns which have in effect municipal zoning ordinances; to divide the entire county outside the limits of such cities, villages and incorporated towns into districts of such number, shape, area and of such different classes, according to the use of land and buildings, the intensity of such use (including height of buildings and structures and surrounding open space) and other classification as may be deemed best suited to carry out the purposes of this Division; to prohibit uses, buildings or structures incompatible with the character of such districts respectively; and to prevent additions to and alteration or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed

hereunder: Provided, that permits with respect to the erection, maintenance, repair, alteration, remodeling or extension of buildings or structures used or to be used for agricultural purposes shall be issued free of any charge. The corporate authorities of the county may by ordinance require the construction of fences around or protective covers over previously constructed artificial basins of water dug in the ground and used for swimming or wading, which are located on private residential property and intended for the use of the owner and guests. In all ordinances or resolutions passed under the authority of this Division, due allowance shall be made for existing conditions, the conservation of property values, the directions of building development to the best advantage of the entire county, and the uses to which property is devoted at the time of the enactment of any such ordinance or resolution....

The powers granted by this Division may be used to require the creation and preservation of affordable housing, including the power to provide increased density or other zoning incentives to developers who are creating, establishing, or preserving affordable housing.

§ 65 ILCS 5/11-13-1. Corporate authorities; powers (2022)

Sec. 11-13-1. To the end that adequate light, pure air, and safety from fire and other dangers may be secured, that the taxable value of land and buildings throughout the municipality may be conserved, that congestion in the public streets may be lessened or avoided, that the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters may be lessened or avoided, and that the public health, safety, comfort, morals, and welfare may otherwise be promoted, and to insure and facilitate the preservation of sites, areas, and structures of historical, architectural and aesthetic importance; the corporate authorities in each municipality have the following powers:

(1) To regulate and limit the height and bulk of buildings hereafter to be erected; (2) to establish, regulate and limit, subject to the provisions of Division 14 of this Article 11 [65 ILCS 5/11-14-1 *et seq.*], the building or set-back lines on or along any street, traffic-way, drive, parkway or storm or floodwater runoff channel or basin; (3) to regulate and limit the intensity of the use of lot areas, and to regulate and determine the area of open spaces, within and surrounding such buildings; (4) to classify, regulate and restrict the location of trades and industries and the location of buildings designed for specified industrial, business, residential, and other uses; (5) to divide the entire municipality into districts of such number, shape, area, and of such different classes (according to use of land and buildings, height and bulk of buildings, intensity of the use of lot area, area of open spaces, or other classification) as may be deemed best suited to carry out the purposes of this Division 13; (6) to fix standards to which buildings or structures therein shall conform; (7) to prohibit uses, buildings, or structures incompatible with the character of such districts; (8) to prevent additions to and alteration or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed under this Division 13; (9) to classify, to regulate and restrict the use of property on the basis of family relationship, which family relationship may be defined as one or more persons each related to the other by blood, marriage or adoption and maintaining a common household; and (10) to regulate or forbid any structure or activity which may hinder access to solar energy necessary for the proper functioning of a solar energy system, as defined in Section 1.2 of The Comprehensive

Solar Energy Act of 1977 [30 ILCS 725/1.2]; (11) **to require the creation and preservation of affordable housing, including the power to provide increased density or other zoning incentives to developers who are creating, establishing, or preserving affordable housing;** and (12) to establish local standards solely for the review of the exterior design of buildings and structures, excluding utility facilities and outdoor off-premises advertising signs, and designate a board or commission to implement the review process; except that, other than reasonable restrictions as to size, no home rule or non-home rule municipality may prohibit the display of outdoor political campaign signs on residential property during any period of time, the regulation of these signs being a power and function of the State and, therefor, this item (12) is a denial and limitation of concurrent home rule powers and functions under subsection (i) of Section 6 of Article VII of the Illinois Constitution.

§ 310 ILCS 67/. Affordable Housing Planning and Appeal Act (2022)

..(d) In order to promote the goals of this Act and to maximize the creation, establishment, or preservation of affordable housing throughout the State of Illinois, a local government, whether exempt or non-exempt under this Act, may adopt the following measures to address the need for affordable housing:

(1) Local governments may individually or jointly create or participate in a housing trust fund or otherwise provide funding or support for the purpose of supporting affordable housing, including, without limitation, to support the following affordable housing activities:

(A) Housing production, including, without limitation, new construction, rehabilitation, and adaptive re-use.

(B) Acquisition, including, without limitation, land, single-family homes, multi-unit buildings, and other existing structures that may be used in whole or in part for residential use.

(C) Rental payment assistance.

(D) Home-ownership purchase assistance.

(E) Preservation of existing affordable housing.

(F) Weatherization.

(G) Emergency repairs.

(H) Housing related support services, including homeownership education and financial counseling.

(I) Grants or loans to not-for-profit organizations engaged in addressing the affordable housing needs of low-income and moderate-income households.

(J) Local governments may authorize housing trust funds to accept and utilize funds, property, and other resources from all proper and lawful public and private sources so long as those funds are used solely for addressing the affordable housing needs of individuals or households that may occupy low-income or moderate-income housing.

(2) A local government may create a community land trust, which may: acquire developed or undeveloped interests in real property and hold them for affordable housing purposes; convey such interests under long-term leases, including ground leases; convey such interests for affordable housing purposes; and retain an option to reacquire any such real property interests at a price determined by a formula ensuring that such interests may be utilized for affordable housing purposes.

(3) A local government may use its zoning powers to require the creation and preservation of affordable housing as authorized under Section 5-12001 of the Counties Code and Section 11-13-1 of the Illinois Municipal Code....

Case Law: None

Discussion: The Affordable Housing Planning and Appeal Act, 310 ILCS 167/1, *et seq.*, establishes a 10 percent affordable housing goal for all municipalities. Highland Park has an inclusionary zoning ordinance that requires that 20 percent of units in residential developments of 5 or more dwellings be affordable. See [Article 21 Oct 28. 2019.pdf \(revize.com\)](#) (last visited on March 30, 2023).

Home Rule Provision: Illinois has structural and broad functional home rule. Home rule units have the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt, as well as the ability to alter the specific forms of government and officers. The powers and functions of home rule units are liberally construed. Ill. Const. Art. VII, § 6 (2022).

Indiana

Inclusionary Zoning Statute: None

Case Law: None

Discussion: Indiana enacted IC § 32-31-1-20 (“Regulation of rent for private real property – Act of general assembly required – exception for low or moderate income housing”) in 2017. This statute states that a unit (as defined in IC 36-1-2-23) may not regulate rental rates for privately-owned real property, through a zoning ordinance or otherwise, without an act of the general assembly. In 2015, § 36-1-3-8.5 (“Limitations on ordinances affecting landlords”) was enacted, which stated that a unit may not adopt or enforce an ordinance that requires a landlord to participate in Section 8 housing or a similar program.

Home Rule Provision: Indiana has functional home rule whereby government units have all of the powers expressly granted or necessarily implied in order to perform municipal functions. Ind. Code Ann. § 36-1-3-4, 5, 6 (2022).

Iowa

Inclusionary Zoning Statute: None

Case Law: None

Home Rule Provision: Iowa has a structural and limited functional home rule. Iowa grants the powers necessary to conduct local government affairs to its municipal corporations, as well as to counties or joint county-municipal corporation governments. Iowa Const. Art. III, §§ 38A, 39A (2022).

Kansas

Inclusionary Zoning Statute: None

Case Law: None

Discussion: In 2016, Kansas enacted K.S.A § 12-16, 120 (“Rent control by political subdivisions precluded”). This statute banned political subdivisions from enforcing resolutions that would have the effect of controlling the purchase price or rent of privately owned residential or commercial property. This statute still allows for voluntary affordable housing.

Home Rule Provision: Kansas has functional, structural and fiscal home rule. In Kansas, cities are granted the authority and power to determine their local affairs and government, including taxing powers, as well as the power to enact their own charters. Kan. Const. Art. 12, § 5. Counties in Kansas are granted similar rights, as they have the authority to enact county charters and have the authority to govern county affairs. County rights are also liberally construed. K.S.A. §§ 19-101, 101a, 101b, 101c (2022).

Kentucky

Inclusionary Zoning Statute: None

Case Law: None

Home Rule Provision: Kentucky has structural and functional home rule, whereby cities are granted the power to perform any function within its boundaries, including the power to levy

taxes, and are also granted the authority to govern themselves to the full extent required by local government. KRS §§ 83.410, 83.520 (2022). This home rule authority is broadly construed. KRS § 83.410 (2022).

Louisiana

Inclusionary Zoning Statute: Yes, see two relevant provisions copied below.

La. R.S. 33:5002. Findings and purpose (2022)

A. The legislature finds that:

- (1) In many municipalities and parishes, there is a serious shortage of decent, safe, and sanitary residential housing available at prices or rents that are affordable to low and moderate income families.
- (2) The affordable housing shortage constitutes a danger to the health, safety, and welfare of all residents of the state and is a barrier to sound growth and sustainable economic development for the state's municipalities and parishes.
- (3) These conditions have been exacerbated by the damage to the state's housing stock caused by Hurricane Rita and Hurricane Katrina.
- (4) The state will undergo an unprecedented residential construction boom over the next decade to restore housing for hurricane victims and new residents to the state in both damaged parishes and receiving parishes.
- (5) While pre-hurricane concentrated poverty contributed to social isolation and its concurrent ills, mixed income communities have proven to hold better social outcomes for all residents, including better education, workforce, and health outcomes.
- (6) Hundreds of jurisdictions and a dozen states have adopted planning and implementation policies to deliver economically integrated housing development through inclusionary zoning to ensure all sectors of housing need are securely met.
- (7) Inclusionary zoning, which requires all residential developments of a certain scale to include the development of affordable housing along with market rate housing, has proven a highly effective strategy to build on the expertise of private developers, while compensating them for their contributions.

B. (1) The legislature recognizes the following provisions of the Constitution of Louisiana:

(a) Article VI, Section 17 of the Constitution of Louisiana provides that, subject to uniform procedures established by law, a local governmental subdivision may adopt regulations for land use and zoning.

(b) Article I, Section 4 provides that the right to property is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

(c) Article VI, Section 9 provides that the police power of the state shall never be abridged.

(2) In the exercise of the police power of the state to protect the public health and welfare and pursuant to the authority of the legislature to establish uniform procedures for land use and zoning by law, this **Part is enacted to provide authority for and to permit municipalities and parishes to use inclusionary zoning to promote the development of affordable housing for low and moderate income families.**

La. R.S. 33:5003. Inclusionary Zoning (2022)

Any municipality or parish in the state that adopts land use or zoning ordinances...may adopt ordinances to provide for inclusionary zoning to increase the availability of affordable dwelling units within the jurisdiction of the respective municipality or parish.

Case Law: None

Discussion: On the local level, the City of New Orleans has adopted “inclusionary zoning subdistricts” and requires “inclusionary zoning permits” for the development of multifamily or mixed use located within these subdistricts, or any development which is subject to an affordable housing planned development. (§ 26-632, New Orleans Code of Ordinances) (2022)

Home Rule Provision: Louisiana grants broad structural, functional and fiscal home rule authority to local governments. Local governments are granted the power to adopt their own charters and may exercise any power necessary, requisite or proper for the management of its affairs (subject only to a conflict with the general laws and the constitution). La. Const. Art. VI, §§ 4-8.

Maine

Inclusionary Zoning Statute: None. However, the state legislature has set a 10 percent affordable housing goal for local governments. *See* 30-A M.R.S. § 4326, copied below. Inclusionary zoning is not specifically addressed by this statute, or in the statute that enables municipalities to enact zoning regulations. 30-A M.R.S. § 4352 (2022).

30-A M.R.S. § 4326. Growth management program elements (2022)

...G. Ensure that the municipality's or multimunicipal region's land use policies and ordinances encourage the siting and construction of affordable housing within the community and comply with the requirements of section 4358 pertaining to individual mobile home and mobile home park siting and design requirements. The municipality or multimunicipal region shall seek to achieve a level of at least 10% of new residential development, based on a 5-year historical average of residential development in the municipality or multimunicipal region, that meets the definition of affordable housing, including, but not limited to:

- (1) Cluster housing;
- (2) Reduced minimum lot and frontage sizes;
- (3) Increased residential densities;
- (4) Use of municipally owned land;
- (5) Establishment of policies that:
 - (a) Assess community needs and environmental effects of municipal regulations;
 - (b) Lessen the effect of excessive parking requirements for buildings in downtowns and on main streets;
 - (c) Provide for alternative approaches for compliance relating to the reuse of upper floors of buildings in downtowns and on main streets;
 - (d) Promote housing choice and economic diversity in housing; and
 - (e) Address disparities in access to educational and occupational opportunities related to housing;
- (6) Provisions for accessory dwelling units and greater density where such density is consistent with other laws governing health and safety;
- (7) Promotion of housing options for older adults that address issues of special concern, including the adaptation, rehabilitation and construction of housing that helps older adults age in place with adequate transportation and accessibility to services necessary for them to do so in a safe and convenient manner; and
- (8) Establishment of policies that affirmatively advance and implement the federal Fair Housing Act, 42 United States Code, Chapter 45

Case Law: None

Discussion: Portland enacted a voluntary inclusionary zoning program in late 2006. *See* [fa833947-79d0-4a1e-99ad-c15dd4d60e82 \(civicplus.com\)](https://www.civicplus.com/faq/833947-79d0-4a1e-99ad-c15dd4d60e82) (last visited on March 30, 2023).

Home Rule Provision: Maine has structural and functional home rule, whereby municipalities are given the power to amend their charters on all matters that are local and municipal in character. ME Const. Art. VIII, Pt 2, § 1 (2022). Maine's Home Rule provisions are liberally construed. 30-A.M.R.S. § 2109 (2022); *James v. West Bath*, 437 A.2d 863, 1981 Me. LEXIS 1028 (Me. 1981).

Maryland

Inclusionary Zoning Statute: Md. Code, Land Use, § 7-401. Affordable Housing (2022)

Powers: (a) To promote the creation of housing that is affordable by individuals and families with low or moderate incomes, a legislative body that exercises authority under this division may enact local laws:

- (1) imposing inclusionary zoning, and awarding density bonuses, to create affordable housing units; and
- (2) restricting the use, cost, and resale of housing that is created under this subtitle to ensure that the purposes of this subtitle are carried out.

Power additional: (b) The authority granted under this subtitle is in addition to any other zoning and planning powers.

Case Law: *Montgomery County v. May Dept. Stores, Co.*, 721 A.2d 249 (Md. 1998).

Discussion: Maryland's affordable housing statute authorizes municipalities to enact inclusionary zoning measures. Montgomery County, of course, has had an inclusionary zoning ordinance in place since the 1970's. Baltimore enacted an Inclusionary Zoning Ordinance in 2007, but it has since expired. While there has been discussion on Baltimore reviving the Inclusionary Zoning Ordinance, nothing has been passed as of March 2023.

Home Rule Provision: In Maryland, counties are granted structural and functional home rule, whereby they have the power to form a charter under the provisions of Article XI-A of the Maryland Constitution. They have the express power to regulate a number of areas, as well as all other areas which "may be deemed expedient in maintaining the peace, good government, health and welfare of the county." Md. Code, Local Gov't, § 9-306 (2022).

Massachusetts

Inclusionary Zoning Statute: In 2005, Massachusetts adopted a statewide, smart-growth affordable housing strategy, which exists in addition to its long-established "Section 40B" program. Section 40B allows developers who agree to set aside 20 percent of proposed residential units for low and moderate income households to appeal local permit denials to a statewide agency which has the power to override the local denial. The newly-adopted program, chapters 40R and 40S, provides that if a municipality voluntarily amends its zoning regulations to permit relatively high residential densities in specified "smart growth" locations, and those regulations require 20 percent of the proposed residential units to be set aside for low and moderate income families, the municipality receives a series of financial incentive payments from the state. Thus, this is a voluntary inclusionary program.

However, as noted below, notwithstanding the lack of express state statutory authority, prior to 2005, dozens of Massachusetts cities and towns have adopted inclusionary programs.

ALM GL ch. 40R, § 6. Smart Growth Zoning District-Minimum Requirement (2022)

(a) A proposed smart growth zoning district shall satisfy the following minimum requirements:

- (1) Each proposed district shall be located in an eligible location.
- (2) The zoning for each proposed smart growth zoning district shall provide for residential use to permit a mix of housing for families, individuals, persons with special needs and the elderly.
- (3) Housing density in a proposed smart growth district shall be at least: 20 units per acre for multi-family housing on the developable land area, 8 units per acre for single-family homes on the developable land area, and 12 units per acre for 2 and 3 family buildings on the developable land area.
- (4) The zoning ordinance or by-law for each proposed smart growth zoning district shall provide that not less than 20 per cent of the residential units constructed in projects of more than 12 units shall be affordable housing and shall contain mechanisms to ensure that not less than 20 per cent of the total residential units constructed in each proposed district shall be affordable housing.
- (5) A proposed smart growth zoning district shall permit infill housing on existing vacant lots and shall allow the provision of additional housing units in existing buildings, consistent with neighborhood building and use patterns, building codes and fire and safety codes.
- (6) A proposed smart growth zoning district shall not be subject to limitation of the issuance of building permits for residential uses or a local moratorium on the issuance of such permits.
- (7) A proposed smart growth zoning district shall not impose restrictions on age or any other occupancy restrictions on the district as a whole or any portion thereof or project therein. Applicants may pursue the development of specific projects within a smart growth zoning district that are exclusively for the elderly, the disabled or for assisted living; provided, that the department shall adopt regulations limiting the percentage of units in the district that qualify the city or town for density bonus payments under section 9 that may be subject to such restrictions that limit occupancy exclusively for the elderly, the disabled or for assisted living. Not less than 25 per cent of the housing units in a project that limits occupancy exclusively for the elderly, the disabled or for assisted living within a smart growth zoning district shall be affordable housing, as defined in section 2.
- (8) Housing in a smart growth zoning district shall comply with federal, state and local fair housing laws.
- (9) A proposed smart growth zoning district may not exceed 15 per cent of the total land area in the city or town. Upon request, the department may approve a larger land area if such approval serves the goals and objectives of this chapter.
- (10) The aggregate land area of all approved smart growth zoning districts in the city or town may not exceed 25 per cent of the total land area in the city or town. The department may

approve a larger combined land area if the department determines that such approval serves the goals and objectives of this chapter.

(11) Housing density in any proposed district shall not over burden infrastructure as it exists or may be practicably upgraded in light of anticipated density and other uses to be retained in the district.

(12) A proposed smart growth zoning district ordinance or by-law shall define the manner of review by the plan approval authority in accordance with section 11 and shall specify the procedure for such review in accordance with regulations of the department.

(b) A smart growth zoning district ordinance or by-law may modify or eliminate the city or town's dimensional standards in order to support desired densities, mix of uses and physical character. The standards that are subject to modification or waiver may include, but shall not be limited to; height, setbacks, lot coverage, parking ratios and locations and roadway design standards. Modified requirements may be applied as of right throughout all or a portion of the smart growth zoning district, or on a project specific basis through the smart growth zoning district plan review process as provided in the ordinance or by-law. A city or town may designate certain areas within a smart growth zoning district as dedicated perpetual open space through the use of a conservation restriction as defined in section 31 of chapter 184 or such other means as may be created by state law. The amount of such open space shall not be included as developable land area within the smart growth zoning district. Open space may include an amount of land equal to up to 10 per cent of what would otherwise be the developable land area if the developable land would be less than 50 acres, and 20 per cent of what would otherwise be the developable land area if the developable land area would be 50 acres or more.

(c) The zoning for a proposed smart growth zoning district may provide for mixed use development subject to any limitations that may be imposed by regulations of the department.

(d) A smart growth zoning district may encompass an existing historic district or districts. A city or town, with the approval of the department, may establish a historic district in an approved smart growth zoning district in accordance with chapter 40C, so long as the establishment of the historic district meets the requirements for such a historic district and does not render the city or town noncompliant with this chapter, as determined by the department. The historic districts may be coterminous or non-coterminous with the smart growth zoning district. Within any such historic district, the provisions and requirements of the historic district may apply to existing and proposed buildings.

(e) A city or town may require more affordability than required by this chapter, both in the percentage of units that must be affordable, and in the levels of income for which the affordable units must be accessible, provided, however, that affordability thresholds shall not unduly restrict opportunities for development.

(f) With respect to a city or town with a population of fewer than 10,000 persons, as determined by the most recent federal decennial census, for hardship shown, the department may, pursuant

to regulations adopted under this chapter, approve zoning for a smart growth zoning district with lower densities than provided in this chapter, if the city or town satisfies the other requirements set forth in this section; provided, however, that such approval shall not be withdrawn solely because, in a future census, the population of the city or town exceeds 10,000 persons.

(g) Any amendment or repeal of a zoning ordinance or by-law affecting an approved smart growth zoning district shall not be effective without the written approval by the department. No such amendment or repeal shall be effective until the city or town has made the payment required under subsection (b) of section 14. Each amendment or repeal shall be submitted to the department with an evaluation of the effect on the number of projected units that will remain developable, if any, in relation to the number of units that have been built and the number of units that determined any corresponding zoning incentive payment paid to the city or town. Amendments shall be approved only to the extent that the district remains in compliance with this chapter. If the department does not respond to a complete request for approval of an amendment or repeal within 60 days of receipt, the request shall be deemed approved.

(h) Nothing in this chapter shall affect a city or town's authority to amend its zoning ordinances or by-laws under chapter 40A, so long as the changes do not affect the smart growth zoning district.

ALM GL ch. 40R, § 9. Payments from trust fund or other funds; density bonus payment; use of discretionary funds (2022)

Each city or town with an approved smart growth zoning district shall be entitled to payments pursuant to this section.

(a) The commonwealth shall pay from the trust fund or other funds from appropriations or other money authorized by the general court a zoning incentive payment, according to the following schedule:

Projected Units of New Construction	Payment
Up to 20	\$10,000
21 to 100	\$75,000
101 to 200	\$200,000
201 to 500	\$350,000
501 or more	\$600,000

Subject to any conditions imposed by the department as a condition of approving a smart growth zoning district, the zoning incentive payment shall be payable upon confirmation of approval of the district by the department. The projected number of units shall be based upon the zoning adopted in the smart growth zoning district.

(b) The commonwealth shall pay from the trust fund or other funds from appropriations or other money authorized by the general court a one-time density bonus payment to each city or town with an approved smart growth zoning district. This payment shall be \$3,000 for each housing unit of new construction created in the smart growth zoning district and \$3,000 for each housing

unit of new construction created in the starter home zoning district. The amount due shall be paid on a unit-by-unit basis in accordance with department regulations, upon submission by a city or town of proof of issuance of a building permit for a particular housing unit or units within the district.

(c) The executive office of environmental affairs, the executive office of transportation, the department of housing and community development and the secretary of administration and finance shall, when awarding discretionary funds, use a methodology of awarding such funds that **favours cities or towns with approved smart growth zoning districts and other approved zoning policies or initiatives that encourage increased affordable housing production in the commonwealth including, but not limited to, inclusionary zoning.**

Case Law: A superior court invalidated a Barnstable ordinance requiring developers of subdivisions of less than 10 acres or of developments of fewer than 10 units to pay a fee into a municipal housing fund. *Dacey v. Town of Barnstable*, Superior Court, Civil Action No. 00-53 (October 18, 2000) (unpublished).

Discussion: More than 100 towns or cities in Massachusetts have passed an inclusionary zoning ordinance. Brian Blaesser et al., *Inclusionary Zoning: Lessons Learned in Massachusetts*, 2 NHC Affordable Hous. Policy Review 1, 3 (January 2002). These towns or cities include Boston, Cambridge, Barnstable, Newton, Dennis, and Northampton.

Home Rule Provision: Home rule powers in Massachusetts are limited. Local governments have structural powers, but must choose their form of government based on their population. They only have functional powers granted by the legislature, and fiscal powers are very limited. ALM Constitution Amend. Art. II, §§ 1-9 (2022); ALM GL ch. 43B, § 13 (2022).

Michigan

Inclusionary Zoning Statute: None.

Discussion: In 2019, MI SB1239 was introduced as an inclusionary zoning bill, but did not pass. The City of Detroit passed an inclusionary zoning ordinance in 2017, available at <https://detroitmi.gov/document/inclusionary-housing-ordinance-0#:~:text=%E2%80%9CInclusionary%20housing%E2%80%9D%20means%20with%20respect, Metropolitan%20Statistical%20Area%20median%20income> (Last visited April 7, 2023). The cities of Ann Arbor and Grand Rapids have also adopted measures with respect to inclusionary zoning.

Case Law: None

Home Rule Provision: Michigan has structural, functional and fiscal home rule, whereby cities, which are organized as bodies corporate, are given the power to amend their charters, and the power to exercise powers of local government, including the power to levy and collect taxes.

MCLS prec §§ 117.1-117.2 (2022). Provisions of home rule cities act must be liberally construed in favor of municipalities. *Inch Memorials v. Pontiac*, 93 Mich. App. 532, 286 N.W.2d 903 (1979).

Minnesota

Inclusionary Zoning Statute: Minnesota authorizes voluntary inclusionary housing programs.

Minn. Stat. § 473.255. Inclusionary housing account (2022)

Subdivision 1. Definitions. (a) “Inclusionary housing development” means a new construction development, including owner-occupied or rental housing, or a combination of both, with a variety of prices and designs which serve families with a range of incomes and housing needs.

(b) “Municipality” means a statutory or home rule charter city or town participating in the local housing incentives program under section 473.254.

(c) “Development authority” means a housing and redevelopment authority, economic development authority, or port authority.

Subd. 2. Application criteria. The Metropolitan Council must give preference to economically viable proposals to the degree that they: (1) use innovative building techniques or materials to lower construction costs while maintaining high quality construction and livability; (2) are located in communities that have demonstrated a willingness to waive local restrictions which otherwise would increase costs of construction; and (3) include units affordable to households with incomes at or below 80 percent of area median income.

Priority shall be given to proposals where at least 15 percent of the owner-occupied units are affordable to households at or below 60 percent of the area annual median income and at least ten percent of the rental units are affordable to households at or below 30 percent of area annual median income.

An inclusionary housing development may include resale limitations on its affordable units. The limitations may include a minimum ownership period before a purchaser may profit on the sale of an affordable unit.

Cost savings from regulatory incentives must be reflected in the sale of all residences in an inclusionary development.

Subd. 3. Inclusionary housing incentives. The Metropolitan Council may work with municipalities and developers to provide incentives to inclusionary housing developments such as waiver of service availability charges and other regulatory incentives that would result in identifiable cost avoidance or reductions for an inclusionary housing development.

Subd. 4. Inclusionary housing grants. The council shall use funds in the inclusionary housing account to make grants or loans to municipalities or development authorities to fund the production of inclusionary housing developments that are located in municipalities that offer incentives to assist in the production of inclusionary housing. Such incentives include but are not limited to: density bonuses, reduced setbacks and parking requirements, decreased road widths, flexibility in site development standards and zoning code requirements, waiver of permit or impact fees, fast-track permitting and approvals, or any other regulatory incentives that would result in identifiable cost avoidance or reductions that contribute to the economic feasibility of inclusionary housing.

Subd. 5. Grant application. A grant application must at a minimum include the location of the inclusionary development, the type of housing to be produced, the number of affordable units to be produced, the monthly rent, or purchase price of the affordable units, and the incentives provided by the municipality to achieve development of the affordable units.

Case Law: None

Discussion: While Minnesota does not have an inclusionary zoning statute, metropolitan areas must have a comprehensive plan for low and moderate income housing (Minn. Stat. § 473.859) (2022).

Home Rule Provision: Minnesota has structural and functional home rule, whereby local government units may adopt a home rule charter when authorized by law. Minn. Const. Art XII, § 4 (2022); *see also*, Minn. Stat. Chapter 410 (2022) (charter provisions) and Minn. Stat. Chapter 471 (municipal rights, powers and duties).

Mississippi

Inclusionary Zoning Statute: None

Discussion: In 2021 and 2022, two affordable housing bills were proposed, but both failed. The City of Jackson has attempted to promote affordable housing through their five-year consolidated plan.

Case Law: None

Home Rule Provision: Mississippi has structural and functional home rule. Municipalities have the power to further all proper municipal purposes. Miss. Code Ann. §§ 21-17-1, 21-17-5 (2022). Municipalities have the authority to choose their form of government, and enact and revise their charters. Miss. Code Ann. §§ (2022) 21-3-1, 21-5-1, 21-7-1, 21-8-1, 21-9-1, 21-17-9,11. The board of supervisors of any county have the power to adopt any orders, resolutions or ordinances with respect to county affairs, property and finances, not inconsistent with the law. Miss. Code Ann. § 19-3-40 (2022).

Missouri

Inclusionary Zoning Statute: None

Discussion: As of 2021, the Kansas City adopted an inclusionary zoning ordinance known as Ordinance 201038. Under this ordinance, developers were required to set aside 10% of units at 70% AMI, and another 10% of units at 30% AMI. In 2022, these requirements were eased by Ordinance 220700, to require 20% of units at 60% AMI.

Case Law: None

Home Rule Provision: Missouri has structural, functional and fiscal home rule. Cities having more than 5,000 inhabitants or any other incorporated city have the authority to frame and adopt a charter for its own government, in addition to home rule powers and any additional powers conferred by law. Mo. Const. Art. VI, § 19, 19(a) (2022). Counties may also adopt charters. Mo. Const. Art. VI, § 18(a)-(d) (2022).

Montana

Inclusionary Zoning Statute: MT ST § 76-2-114. **Housing fees and dedication of real property prohibited (2022)**

- (1) A local governing body may not adopt a resolution under this part that includes a requirement to:
 - (a) pay a fee for the purpose of providing housing for specified income levels or at specified sale prices; or
 - (b) dedicate real property for the purpose of providing housing for specified income levels or at specified sale prices.
- (2) A dedication of real property as prohibited in subsection (1)(b) includes a payment or other contribution to a local housing authority or the reservation of real property for future development of housing for specified income levels or specified sale prices.

Discussion: In recent years, a few municipalities in Montana such as Bozeman and Whitefish had adopted inclusionary zoning ordinances. However, in 2021, HB 259 was signed into law, which banned inclusionary zoning practices in the state. This amended MCA § 7-2-4203, 76-2-203, and 76-2-302.

Case Law: None

Home Rule: Montana is not a "home rule" state but a self-government state. Local governments have self-government powers and may exercise any powers not expressly denied by

constitution, law, or charter. Mont. Const., Art. XI § 6. Their authority is both structural and functional. Mont. Const., Art. XI.

Nebraska

Inclusionary Zoning Statute: Neb. Rev. St. § 19-5501 through § 19-5506, the Municipal Density and Missing Middle Housing Act (2022)

Discussion: In 2020, LB 866 was enacted, requiring cities to submit annual reports detailing its efforts to address the availability of affordable housing “through its zoning codes, ordinances, and regulations.” The Act also requires cities to submit an affordable housing action plan, which, among other things, must include the city’s “[g]oals for the construction of new affordable housing units, including multifamily housing and middle housing, with specific types and numbers of units, geographic locations, and specific actions to encourage the development of affordable housing, middle housing, and workforce housing” and “[u]pdates to the city’s zoning codes, ordinances, and regulations to incentivize affordable housing.”

While the Act does not mandate inclusionary zoning measures (e.g., a requirement that a certain number of percentage of units be reserved for low or moderate income households), the Act may serve as the foundation for future inclusionary zoning efforts, particularly at the local level. Indeed, some cities, including the City of Omaha, have enacted voluntary density bonuses to incentivize affordable housing. *See* Omaha, Nebraska Code of Ordinances Sec. 55-785.

Case Law: None

Home Rule: Nebraska is a Dillon's Rule state. Although cities with a population of 5,000 or more may enact a charter, local governments are only authorized to legislate in areas "of purely municipal concern." *City of Millard v. City of Omaha*, 185 Neb. 617, 620, 177 N.W.2d 576 (1970); Neb. Const. Art. XI, § 2 (2022).

Nevada

Inclusionary Zoning Statute: Nev. Rev. Stat. § 278.250. Zoning districts and regulations (2022)

1. For the purposes of [NRS 278.010](#) to [278.630](#), inclusive, the governing body may divide the city, county or region into zoning districts of such number, shape and area as are best suited to carry out the purposes of [NRS 278.010](#) to [278.630](#), inclusive. Within the zoning district, it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land.

2. The zoning regulations must be adopted in accordance with the master plan for land use and be designed:

- (a) To preserve the quality of air and water resources.
- (b) To promote the conservation of open space and the protection of other natural and scenic resources from unreasonable impairment.
- (c) To consider existing views and access to solar resources by studying the height of new buildings which will cast shadows on surrounding residential and commercial developments.
- (d) To reduce the consumption of energy by encouraging the use of products and materials which maximize energy efficiency in the construction of buildings.
- (e) To provide for recreational needs.
- (f) To protect life and property in areas subject to floods, landslides and other natural disasters.
- (g) To conform to the adopted population plan, if required by [NRS 278.170](#).
- (h) To develop a timely, orderly and efficient arrangement of transportation and public facilities and services, including public access and sidewalks for pedestrians, and facilities and services for bicycles.
- (i) To ensure that the development on land is commensurate with the character and the physical limitations of the land.
- (j) To take into account the immediate and long-range financial impact of the application of particular land to particular kinds of development, and the relative suitability of the land for development.
- (k) To promote health and the general welfare.
- (l) To ensure the development of an adequate supply of housing for the community, including the development of affordable housing.
- (m) To ensure the protection of existing neighborhoods and communities, including the protection of rural preservation neighborhoods and, in counties whose population is 700,000 or more, the protection of historic neighborhoods.
- (n) To promote systems which use solar or wind energy.
- (o) To foster the coordination and compatibility of land uses with any military installation in the city, county or region, taking into account the location, purpose and stated mission

of the military installation.

3. The zoning regulations must be adopted with reasonable consideration, among other things, to the character of the area and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the city, county or region.

4. In exercising the powers granted in this section, the governing body may use any controls relating to land use or principles of zoning that the governing body determines to be appropriate, including, without limitation, density bonuses, inclusionary zoning and minimum density zoning.

5. As used in this section:

(a) “Density bonus” means an incentive granted by a governing body to a developer of real property that authorizes the developer to build at a greater density than would otherwise be allowed under the master plan, in exchange for an agreement by the developer to perform certain functions that the governing body determines to be socially desirable, including, without limitation, developing an area to include a certain proportion of affordable housing.

(b) “**Inclusionary zoning**” means a type of zoning pursuant to which a governing body requires or provides incentives to a developer who builds residential dwellings to build a certain percentage of those dwellings as affordable housing.

(c) “Minimum density zoning” means a type of zoning pursuant to which development must be carried out at or above a certain density to maintain conformance with the master plan.

Discussion: Nev. Rev. Stat. § 278.250, quoted above, explicitly permits inclusionary zoning.

Case Law: None

Home Rule: Nevada is a Dillon's Rule state. Nev. Const. Art. 8, § 8 (2022).

New Hampshire

Inclusionary Zoning Statute: New Hampshire permits inclusionary zoning, but defines it as a voluntary program.

RSA 674:21. Innovative Land Use Controls (2022)

I. Innovative land use controls may include, but are not limited to:

(a) Timing incentives.

- (b) Phased development.
- (c) Intensity and use incentive.
- (d) Transfer of density and development rights.
- (e) Planned unit development.
- (f) Cluster development.
- (g) Impact zoning.
- (h) Performance standards.
- (i) Flexible and discretionary zoning.
- (j) Environmental characteristics zoning.
- (k) Inclusionary zoning.**
- (l) Accessory dwelling unit standards.
- (m) Impact fees.
- (n) Village plan alternative subdivision....

IV. As used in this section:

(a) "Inclusionary zoning" means land use control regulations which provide a voluntary incentive or benefit to a property owner in order to induce the property owner to produce housing units which are affordable to persons or families of low and moderate income. Inclusionary zoning includes, but is not limited to, density bonuses, growth control exemptions, and a streamlined application process.

Case Law: None

Home Rule: Municipalities may adopt charters to address local needs, but local governments do not have any powers beyond the authority to amend the charter or establish a form of government. RSA Title III, Ch. 49-B (2022).

New Jersey

Inclusionary Zoning Statute: None, but see New Jersey Administrative Code (N.J.A.C.) § 5:94-4.4, discussed below.

Case Law: *Southern Burlington County NAACP v. Mount Laurel Township*, 92 N.J. 158, 456 A.2d 390 (1983); *Holmdel Builders Assoc. v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990).

Discussion: *Southern Burlington*, also known as "*Mount Laurel II*," established New Jersey's mandatory "fair share" requirement for low and moderate income housing, and specifically identified inclusionary zoning as one technique to promote development. Subsequently, the New Jersey Legislature codified the *Mt. Laurel* doctrine, including its available compliance measures, by enacting the Fair Housing Act, L.1985, c. 222; N.J.S.A. 52:27D-301 to -329 (FHA). The Council on Affordable Housing ("COAH"), established as part of the FHA, authorized municipalities to promulgate inclusionary zoning ordinances as part of their "Fair Share Plan." See N.J.A.C. § 5:94-4.4 ("Municipal zoning options").

Since then, a number of parties have challenged the various municipal ordinances passed in response to *Mount Laurel II*. In the well-known case of *Holmdel Builders* (1990), the plaintiffs challenged the inclusionary zoning ordinances in five townships, each of which required developers to pay a fee as a condition of obtaining development approval. The fees were then deposited with an affordable housing trust fund, which would be used to meet each township's *Mount Laurel* obligation. The plaintiffs challenged these ordinances on the grounds that they were an unconstitutional taking, a violation of substantive due process and equal protection, and an unconstitutional tax. The New Jersey Supreme Court determined that the fees were a valid exercise of each township's police powers. Nevertheless, the Court recognized that the New Jersey Legislature had granted authority to the COAH to determine what types of inclusionary zoning measures were appropriate. Because COAH had not yet spoken on this issue, the Court set aside the ordinances and declined to consider the constitutional questions.

More recently, N.J.A.C. § 5:94-4.4 expired on September 11, 2016, and has not been formally replaced. Although there were two attempts to pass a new, similar bill in 2016 and 2018, both failed. Despite the expiration of N.J.A.C. § 5:94-4.4, a number of townships and cities have continued to pass inclusionary zoning ordinances, including Jersey City, South Brunswick, Freehold, Glen Ridge Borough, and Tewksbury.

Home Rule: The home-rule provisions must be construed so as to give municipalities "the fullest and most complete powers possible over . . . self-government." N.J. Stat. § 40:42-4 (2006); see also N.J. Const., Art. IV, Sec. VII, Para. 11 (2022). Municipalities have limited structural, limited fiscal, and functional powers. N.J. Stat. § 40, 69A-29 (2022).

New Mexico

Inclusionary Zoning Statute: None

Case Law: None

Discussion: New Mexico does not explicitly authorize inclusionary zoning. However, Santa Fe has a detailed inclusionary zoning program under its "Santa Fe Homes Program," (Article 14-8.11 of its zoning code), which was enacted pursuant to its general police powers. Santa Fe Homes Ordinance Program, Chapter XXVI of the City Code. The Program applies to most "development[s] which propose dwelling units or buildings or portions of buildings which may be used for both nonresidential and residential purposes and manufactured home lots." If the Program applies, developers must set aside 30 percent of the dwelling units or manufactured home lots for residents who meet certain income requirements. Albuquerque has also adopted "workforce housing" provisions.

Home Rule: Municipalities that have adopted a charter have the authority to exercise legislative powers and to perform all functions not expressly prohibited by law. N.M. Const. art. X, § 6 (2022). They have structural and functional powers, but no fiscal authority – any new taxes must be approved by a majority vote in the municipality. *Id.* All powers are to be liberally construed. *Id.* Incorporated counties and urban counties have the same powers as municipalities. N.M. Const. art. X, §§ 5 and 10 (2022).

New York

Inclusionary Zoning Statute: None

Case Law: None

Discussion: New York has an "incentive zoning" statute that enables local planning and zoning commissions to provide incentives and bonuses to developers for the purpose of advancing the local government's "physical, cultural, and social policies." NY CLS Gen City § 81-d (2006). Before adopting an incentive zoning ordinance, local governments must consider the ordinance's impact on affordable housing.

On March 22, 2016, New York City adopted the Mandatory Inclusionary Housing ("MIH") Program, discussed in § 23-90 of the New York City Code of Ordinances. The MIH has differing set-asides that the City Planning Commission may choose to enact, including 25% at 60% AMI, with 10% required at 40% AMI; or 30% required at 80% AMI. More information can be found in this brief explanation of the MIH: <https://www.nyc.gov/assets/planning/download/pdf/plans-studies/mih/mih-summanry-adopted.pdf?r=0719> (Last visited April 27, 2023).

Home Rule: New York is a limited home rule state, with structural and functional powers, but only limited fiscal powers, granted to local governments. N.Y. Const. art. IX, § 2 (2022). In the

same provision, the New York Constitution provides an enumerated list of powers granted to local governments and limits the legislature's power to interfere with local affairs. *Id.*

North Carolina

Inclusionary Zoning Statute: None

Case Law: None

Discussion: Since 2007, several municipalities have enacted Inclusionary Zoning Ordinances, such as Chapel Hill, Manteo, and Charlotte. These Inclusionary Zoning Ordinances span the spectrum from voluntary to mandatory.

Home Rule: North Carolina is a modified Dillon's Rule state because municipalities have structural powers. N.C. Const. art. VII, § 1 (2022); N.C. Gen. Stat. § 160A-101 (2022). Municipal powers granted by the legislature are to be broadly construed to include supplementary powers that are not contrary to state or federal law or policy. N.C. Gen. Stat. § 160A-4 (2022).

North Dakota

Inclusionary Zoning Statute: None

Case Law: None

Home Rule: North Dakota is a strong home rule state and provides for "maximum local self-government." N.D. Const. Art VII, § 1 (2022). Local governments have full structural, functional, and fiscal powers. *See* N.D. Cent. Code, §§ 11-09.1-05, 40-05.1-06 (2022).

Ohio

Inclusionary Zoning Statute: None

Case Law: None

Home Rule: Ohio is a strong home rule state, and municipalities are authorized to "exercise all powers of local self-government." Oh. Const. Art. XVIII, § 3 (2022). Municipalities have full structural, functional, and fiscal powers. *See* ORC Ann. 715.01 (2022) (general powers) and 717.01 (2022) (specific powers).

Oklahoma

Inclusionary Zoning Statute: None

Case Law: None

Discussion: Rent control is prohibited under 11 Okl. St. § 14-101.1 (2022). Cities such as Norman, Oklahoma City, and Tulsa have attempted affordable housing and inclusionary zoning strategies, but these do not rise to the level of mandatory ordinances.

Home Rule: Oklahoma is not a strong home rule state, and municipalities only have structural powers. Okl. Const. Art. XVIII, § 1 (2022). Counties do not have any home rule powers.

Oregon

Inclusionary Zoning Statute: ORS § 197.309. Designation of housing unit or residential building lot or parcel for sale or rent as affordable housing (2022)

(2) Except as provided in subsection (3) of this section, a metropolitan service district may not adopt a land use regulation or functional plan provision, or impose as a condition for approving a permit under ORS 215.427 or 227.178 a requirement, that has the effect of establishing the sales or rental price for a housing unit or residential building lot or parcel, or that requires a housing unit or residential building lot or parcel to be designated for sale or rent to a particular class or group of purchasers or renters.

(3) The provisions of subsection (2) of this section do not limit the authority of a metropolitan service district to:

- (a) Adopt or enforce a use regulation, provision or requirement creating or implementing an incentive, contract commitment, density bonus or other voluntary regulation, provision or requirement designed to increase the supply of moderate or lower cost housing units; or
- (b) Enter into an affordable housing covenant as provided in ORS 456.270 to 456.295.

See also ORS § 91.225 (2022) (rent control restrictions). Oregon, of course, adopted property rights legislation in 2004, known as "Measure 37." This law provides that if government action devalues property, the government must either compensate the landowner or waive the regulation. Oregon continues to sort out the particulars of how to implement this policy, but in the meantime, Oregon attorney and LANDS member Jon Chandler agreed that even if the statutory prohibition on inclusionary ordinance were repealed, Measure 37 would likely deter a county or municipality from enacting an inclusionary ordinance.

Case Law: None

Discussion: Notwithstanding the above, it is noteworthy that on February 28, 2023, H.B. 3503 was introduced, attempting to repeal § 91.225. This bill is still in its early stages and there is not a lot of information on its likelihood of passage.

Home Rule: Oregon is not a strong home rule state. Municipalities and counties only have structural powers. Ore. Const. Art. VI, § 10 (2022); Ore. Const. Art. XI, § 2 (2022).

Pennsylvania

Inclusionary Zoning Statute: None

Case Law: *Builders Association of Metropolitan Pittsburgh v. City of Pittsburgh*, 2023 WL 2758931. In this case, decided in April of 2023, the Builder's Association of Metropolitan Pittsburgh (BAMP) challenged the Inclusionary Zoning Ordinance (IZO) in the City of Pittsburgh (*see* discussion section below). The BAMP argued four specific counts against the IZO, 1) that the IZO violates the Takings Clause; 2) that the IZO violates the Due process Clause; 3) that the IZO violates the Home Rules law and Article IX, section 2 of the Pennsylvania Constitution; and 4) that the IZO violates Article VIII, section 1 of the Pennsylvania Constitution, specifically alleging that the IZO is a *de facto* tax ordinance which violates the Uniformity Clause. In this case, the United States District Court denied the Cities' motion to dismiss on counts I and III, and granted the Cities' motion to dismiss on counts II and IV. *Id.* at 14. This case will be very important to watch going forward in the state of Pennsylvania.

Discussion: In 2022, the City of Pittsburgh adopted an Inclusionary Zoning ordinance that requires new developments of twenty or more units to designate, "at least 10 percent for low-income residents," within Lawrenceville. This was accomplished through the creation of an Inclusionary Housing Overlay District, and was almost immediately challenged in court by the Builders Association of Metropolitan Pittsburgh. *See* case law section above for status of case as of April, 2023.

Philadelphia has used a similar strategy of overlay districts to require any development with 10 or more units to set aside 20% of the units as affordable.

Home Rule: Pennsylvania is not a strong home rule state. Municipalities and counties only have structural powers. Pa. Const. Art. 9, § 2 (2022).

Rhode Island

Inclusionary Zoning Statute: R.I. Gen. Laws § 45-24-46.1. Inclusionary zoning (2022)

- (a) A zoning ordinance requiring the inclusion of affordable housing as part of a development shall provide that the housing will be affordable housing, as defined in § 42-128-8.1(d)(1); that the affordable housing will constitute not less than ten percent (10%) of the total units in the development; and that the units will remain affordable for a period of not less than thirty-years (30) from initial occupancy enforced through a land lease and/or deed restriction enforceable by the municipality and the state of Rhode Island.
- (b) A zoning ordinance that includes inclusionary zoning may provide that the affordable housing must be built on-site or utilize one or more alternative methods of production, including, but not limited to, off-site construction or rehabilitation, donation of land suitable for development of the required affordable units, and/or the payment of a fee in lieu of the construction or provision of affordable housing units. For all projects subject to inclusionary zoning, density bonuses and other incentives shall be established by the community and shall apply to offset differential costs of below-market units.
- (c) This fee in lieu of the construction or provision of affordable housing shall be the choice of the developer or builder applied on a per-unit basis and may be used for new developments, purchasing property and/or homes, rehabilitating properties, or any other manner that creates additional low-or-moderate income housing as defined in § 45-53-3(9).
 - (1) For affordable single-family homes and condominium units, the per-unit fee shall be the difference between the maximum affordable sales price for a family of four (4) earning eighty percent (80%) of the area median income as determined annually by the U.S. Department of Housing and Urban Development and the average cost of developing a single unit of affordable housing. The average cost of developing a single unit of affordable housing shall be determined annually based on the average, per-unit development cost of affordable homes financed by Rhode Island housing over the previous three (3) years, excluding existing units that received preservation financing.
 - (2) Notwithstanding subsection (c)(1) of this section, in no case shall the per-unit fee for affordable single family homes and condominium units be less than forty thousand dollars (\$40,000).
- (d) The municipality shall deposit all in-lieu payments into restricted accounts that shall be allocated and spent only for the creation and development of affordable housing within the municipality serving individuals or families at or below eighty percent (80%) of the area median income. The municipality shall maintain a local affordable housing board to oversee the funds in the restricted accounts and shall allocate the funds within two (2) years. The municipality shall include in the housing element of their local comprehensive plan, if applicable, the process it will use to allocate the funds.

- (e) As an alternative to the provisions of subsection (d), the municipality may elect to transfer in-lieu payments promptly upon receipt or within the two-year (2) period after receipt to the housing resources commission or Rhode Island housing for the purpose of developing affordable housing within that community.
- (f) Rhode Island housing shall report to the general assembly and the housing resources commission the amount of fees in lieu collected by community; the projects that were provided funding with the fees, the dollar amounts allocated to the projects and the number of units created.

It is noteworthy that as of March 2023, there are three proposed amendments to this statute, all in the extremely early stages of passage. These proposed amendments would set a minimum density bonus by statute, and would provide a calculation for determining the allowed dwelling units per acre.

Case Law: None

Discussion: The "Low-Moderate Income Housing Act," R.I. Gen. Laws §§ 45-53-1 (2022) *et seq.*, establishes a ten percent affordable housing goal for each municipality in the state. We have identified East Providence, Tiverton, Barrington, Lincoln, North Kingstown, and South Kingstown as municipalities that have inclusionary zoning ordinances. *See* https://library.municode.com/ri/east_providence/codes/code_of_ordinances?nodeId=PTIIREOR_CH19ZO_ARTIXWASPDEDI_S19-485AFINHO (last visited on April 12, 2023); https://library.municode.com/ri/tiverton/codes/code_of_ordinances?nodeId=PTIICOOR_APXAZO_ARTXXILOMOINHO_S10AFHOPR (last visited on April 12, 2023). Other towns, have enacted inclusionary zoning ordinances in order to meet their housing goal.

Home Rule: Rhode Island is not a strong home rule state, and local governments only have structural powers. R.I. Const. art. XIII, § 1 (2022).

South Carolina

Inclusionary Zoning Statute: None

Case Law: None

Discussion: Under the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, local governments must pass zoning regulations that provide for adequate affordable housing. S.C. Code Ann. § 6-29-710 (2022). The South Carolina General Assembly considered the "Inclusionary Zoning Act" during its 116th Session (2005-2006) (H. 4228), but the bill did not pass. Since then, South Carolina has proposed a similar bill in 2007, 2009, 2017, 2019, and 2021, all of which failed to pass. As of January 10, 2023, the "South Carolina Inclusionary Zoning Act" is currently pending before the legislature. On the local level, cities such as Columbia, Greenville, and Charleston have adopted Task Forces to address affordable housing concerns.

Home Rule: South Carolina is a strong home rule state. S.C. Const. Ann. Art. VIII, § 7 (2022). Municipalities have full structural, functional, and fiscal powers that must be "liberally construed" in favor of the municipality. *See* S.C. Code Ann. §§ 5-7-10 (2022), 5-7-30 (2022). Counties have full structural and functional powers, as well as limited fiscal powers. *See* S.C. Code Ann. § 4-9-25 (2022). Their powers must also be liberally construed. *Id.*

South Dakota

Inclusionary Zoning Statute: None

Case Law: None

Home Rule: Local governments have extremely broad authority. They may enact a charter and "exercise any legislative power or government function" that is not denied by the charter, the state constitution, or the general state laws. S.D. Const. Article IX, § 2 (2022).

Tennessee

Inclusionary Zoning Statute: T.C.A. § 66-35-102. Local governmental units, prohibition of rent control (2022)

(a) A local governmental unit shall not enact, maintain or enforce an ordinance or resolution that would have the effect of controlling the amount of rent charged for leasing private residential or commercial property.

(b)(1) Notwithstanding any provision of law to the contrary, a local government unit, or any subdivision or instrumentality thereof, shall not enact, maintain, or enforce any ordinance, resolution, regulation, rule, or other requirement of any type that:

(A) Requires the direct or indirect allocation of existing or newly constructed private residential or commercial rental units to be sold or rented at below market rates;

(B) Conditions any zoning change, variance, building permit, development entitlements through amendment to the zoning map, or any change in land use restrictions or requirements, on the allocation of existing or newly constructed private residential or commercial rental units to be sold or rented at below market rates; or

(C) Requires a person to waive the person's constitutionally protected rights related to real property in order that the local government unit can increase the number of existing or newly constructed private residential or commercial rental units that would be available for purchase or lease at below market rates within the jurisdiction of the local government unit.

(2) This subsection (b) does not prohibit a local government unit from creating or implementing a purely voluntary incentive-based program designed to increase the construction or rehabilitation of workforce or affordable private residential or commercial rental units, which may include providing local tax incentives, subsidization, real property or infrastructure assistance, or any other incentive that makes construction of affordable housing more economical, so long as no power or authority granted to the local government unit to regulate zoning or land use planning is used to incentivize or leverage a person to develop, build, sell, or rent housing at below market value.

(3) Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the practices prohibited by this section, may bring an action individually to recover actual damages.

Case Law: In *Home Builders Association of Middle Tennessee v. Metropolitan Government of Nashville and Davidson County*, 2019 WL 369271, affordable housing provisions of the municipalities' affordable housing and inclusionary zoning practices within their ordinance were challenged. The court dismissed the claim for mootness, but clearly stated that the municipality was preempted from enforcing their rent control and "inclusionary housing" ordinance by § 66-35-102.

Discussion: While there is no expressed authority for inclusionary zoning, Tenn. Code Ann. § 13-7-20 grants municipalities very broad police powers. Despite the statute referenced above, voluntary programs are allowed, and as a result, there are several county and municipal ordinances in Tennessee which provide for voluntary programs (Metro Govt. of Nashville and Davidson County, TN Code of Ordinances 17.36.090); Code of Memphis Ordinances, TN Ch. 2-22-8.

Home Rule: Tennessee is a limited home rule state, and cities and counties are granted only structural powers. Tenn. Const. art. XI, § 9 (2006).

Texas

Inclusionary Zoning Statute: Tex. Loc. Gov't § 214.905. Prohibition of Certain Municipal Requirements Regarding Sales of Housing Units or Residential Lots (2022)

(a) A municipality may not adopt a requirement in any form, including through an ordinance or regulation or as a condition for granting a building permit, that establishes a maximum sales price for a privately produced housing unit or residential building lot.

(b) This section does not affect any authority of a municipality to:

(1) create or implement an incentive, contract commitment, density bonus, or other voluntary program designed to increase the supply of moderate or lower-cost housing units; or

(2) adopt a requirement applicable to an area served under the provisions of Chapter 373A, Local Government Code, which authorizes homestead preservation districts, if such chapter is created by an act of the legislature.

(c) This section does not apply to a requirement adopted by a municipality for an area as a part of a development agreement entered into before September 1, 2005.

(d) This section does not apply to property that is part of an urban land bank program.

Case Law: None.

Discussion: On March 3, 2023 TX H.B. 3383 was proposed, which attempts to amend § 214.905 to allow municipalities to establish homestead preservation districts and reinvestment zones.

Cities such as Austin and San Antonio have adopted voluntary inclusionary zoning ordinances. Houston, which does not have a formal zoning code, has attempted to follow suit by creating a “community land trust”.

Home Rule: Texas is a limited home rule state. Cities and towns have structural and functional powers, but no fiscal powers. Tex. Const. art. XI, §§ 4, 5 (2022).

Utah

Inclusionary Zoning Statute: U.C.A. 1953 § 10-9a-535. Moderate Income Housing (2022)

(1) A municipality may only require the development of a certain number of moderate income housing units as a condition of approval of a land use application if:

(a) the municipality and the applicant enter into a written agreement regarding the number of moderate income housing units; or

(b) the municipality provides incentives for an applicant who agrees to include moderate income housing units in a development.

(2) If an applicant does not agree to participate in the development of moderate income housing units under Subsection (1)(a) or (b), a municipality may not take into consideration the applicant's decision in the municipality's determination of whether to approve or deny a land use application.

(3) Notwithstanding Subsections (1) and (2), a municipality that imposes a resort community sales and use tax as described in Section 59-12-401, may require the development of a certain number of moderate income housing units as a condition of approval of a land use application if

the requirement is in accordance with an ordinance enacted by the municipality before January 1, 2022.

Case Law: None

Discussion: West Valley City has adopted a Moderate Income Housing Plan, and Salt Lake City has discussed implementation of a similar plan under the statute.

Home Rule: Utah is a fairly strong home rule state, and local governments have structural, functional, and limited fiscal powers. Utah Const. Art. XI, §§ 1, 5 (2022).

Vermont

Inclusionary Zoning Statute: 24 V.S.A. § 4414. Zoning; permissible types of regulations (2022)

(7) Inclusionary zoning. In order to provide for affordable housing, bylaws may require that a certain percentage of housing units in a proposed subdivision, planned unit development, or multi-unit development meets defined affordability standards, which may include lower income limits than contained in the definition of “affordable housing” in subdivision 4303(1) of this title and may contain different affordability percentages than contained in the definition of “affordable housing development” in subdivision 4303(2) of this title. These provisions, at a minimum, shall comply with all the following:

(A) Be in conformance with specific policies of the housing element of the municipal plan.

(B) Be determined from an analysis of the need for affordable rental and sale housing units in the community.

(C) Include development incentives that contribute to the economic feasibility of providing affordable housing units, such as density bonuses, reductions or waivers of minimum lot, dimensional or parking requirements, reductions or waivers of applicable fees, or reductions or waivers of required public or nonpublic improvements.

(D) Require, through conditions of approval, that once affordable housing is built, its availability will be maintained through measures that establish income qualifications for renters or purchasers, promote affirmative marketing, and regulate the price, rent, and resale price of affordable units for a time period specified in the bylaws.

Case Law: None

Discussion: Burlington has enacted an inclusionary zoning ordinance. *See* Zoning Ordinance Article 9, Part 1: <https://www.burlingtonvt.gov/sites/default/files/20230412%20ART09-Housing.pdf> (last visited April 27, 2023).

Home Rule: Municipalities are extremely limited in their powers, and may only incorporate with permission from the General Assembly. V.S.A. Const. §§ 6, 69 (2022). The General Assembly cannot grant a charter to a county, so they do not have any home rule powers. *See* V.S.A. Const. § 69 (2022).

Virginia

Inclusionary Zoning Statute: Va. Code Ann. § 15.2-735.1. Affordable dwelling unit ordinance; permitting certain densities in the comprehensive plan (2022)

A. In a county that provides in its comprehensive plan for the physical development within the county, adopted pursuant to § 15.2-2223, for densities of development ranging between a floor area ratio (FAR) of 1.0 FAR and 10.0 FAR, or greater, the governing body may adopt as part of its zoning ordinance requirements for the provision of (i) on-site or off-site "*Affordable Dwelling Units*," as defined herein, or (ii) a cash contribution to the county's affordable housing fund, in lieu of such units, in such amounts as set out herein, as a condition of the governing body's approval of a special exception application for residential, commercial, or mixed-use projects with a density equal to or greater than 1.0 FAR, or an equivalent density based on units per acre. Residential, commercial, or mixed-use projects with a density less than 1.0 FAR, or an equivalent density based on units per acre, shall be exempt from the requirements of this section and the county's zoning ordinance adopted pursuant to this section. The county's zoning ordinance requirements shall provide as follows:

1. Upon approval of a special exception application approving a residential, commercial, or mixed-use project with a density equal to or greater than 1.0 FAR, or an equivalent density based on units per acre, the applicant shall provide on-site Affordable Dwelling Units as part of the project the total gross square footage of which units shall be 5% of the amount of the gross floor area of the project that exceeds 1.0 FAR or an equivalent density based on units per acre. For purposes of this section, "*applicant*" shall mean the person or entity submitting a special exception application for approval of a residential, commercial or mixed-use project in the county and shall include the successors or assigns of the applicant.

2. As an alternative, upon approval of a special exception application approving a residential, commercial, or mixed-use project with a density equal to or greater than 1.0 FAR, or an equivalent density based on units per acre, the applicant may elect to provide any one of the following:

a. Affordable Dwelling Units shall be provided off-site at a location within one-half mile of any Metrorail Station for projects within a Metro Station Area as defined in the county's comprehensive plan, or within one-half mile of the residential, commercial, or mixed-use project

for projects not within a Metro Station Area, as provided in the county's zoning ordinance, the total gross square footage of which units shall be 7.5% of the amount of the gross floor area of the project that is over 1.0 FAR or an equivalent density based on units per acre, or

b. Affordable Dwelling Units shall be provided off-site at any other locations in the county other than those provided in the county's zoning ordinance in accordance with subdivision a, the total gross square footage of which units shall be 10% of the amount of the gross floor area of the project that is over 1.0 FAR, or an equivalent density based on units per acre, or

c. A cash contribution to the county's affordable housing fund, which contribution shall be calculated as follows for each of the below-described density tiers:

(1) One and one-half dollars per square foot of gross floor area for the first tier of density between zero and 1.0 FAR, or an equivalent density based on units per acre.

(2) Four dollars per square foot of gross floor area for the tier of density in residential projects between 1.0 FAR and 3.0 FAR, or an equivalent density based on units per acre, and \$ 4 per square foot of gross floor area for the tier of density in commercial projects above 1.0 FAR.

(3) Eight dollars per square foot of gross floor area for the tier of density in residential projects above 3.0 FAR, or an equivalent density based on units per acre.

(4) For mixed-use projects, cash contributions shall be calculated by applying the proportionate amount of commercial and residential gross floor area to each tier.

The cash contribution shall be indexed to the Consumer Price Index for Housing in the Washington-Baltimore MSA as published by the Bureau of Labor Statistics and shall be adjusted annually based upon the January changes to such index for that year.

3. The applicant shall provide the county manager or his designee, prior to the issuance of the first certificate of occupancy for the residential, commercial, or mixed-use project, a written plan of how the applicant proposes to address the provision of Affordable Dwelling Units or cash contribution as provided in this section and the provisions of the zoning ordinance adopted pursuant to this section. The county manager or his designee shall approve or disapprove the applicant's plan in writing within 30 days of receipt of the written proposal from the applicant. If the county manager or his designee disapproves of the applicant's plan, specific reasons for such disapproval shall be provided.

4. An applicant may submit a written plan to be considered by the governing body or its designee to address the provision of Affordable Dwelling Units or cash contribution as provided in this section and the provisions of the zoning ordinance adopted pursuant to this section that deviate from the requirements of this section and the ordinance. Any such deviations may be approved in accordance with the procedures established in the county's zoning ordinance, which procedures shall include a provision for an appeal to the governing body of any administrative decision relative to the written plan submitted by the applicant.

5. The ordinance adopted by the county pursuant to this section may provide that, in the discretion of the governing body and with the agreement of the applicant, at the time of consideration of the special exception application, the above requirements may be totally or partially substituted for other compelling public priorities established in plans, studies, policies, or other documents of the county.

6. Applications for a special exception approval of a residential, commercial, or mixed-use project that results in the demolition and rebuilding of an existing project shall be subject to the requirements of this section and the zoning ordinance adopted pursuant to this section at the time of redevelopment; however, only density that is replaced or rebuilt and any increased density shall be subject to the requirements. This section and the county's zoning ordinance adopted pursuant to this section shall not apply to rehabilitation or renovation of existing residential, commercial, or mixed-use projects.

7. For purposes of this section "*Affordable Dwelling Unit*" means units committed for a 30 year term as affordable to households with incomes at 60% of the area median income.

B. This section shall apply to an application for a special exception approval for a residential, commercial, or mixed-use project with a density provided for by the County's comprehensive plan designation for the property that is the subject matter of the application. This section shall further apply to such an application that requires rezoning of the property that is the subject matter of the application to permit a use provided for by the county's comprehensive plan designation for the subject property.

C. The ordinance adopted by the county pursuant to this section may provide that an application for approval of a special exception for a residential, commercial, or mixed-use project that requests an increase in density that exceeds the density provided for by the county's comprehensive plan designation for the property that is the subject matter of the application shall be subject to an affordable housing requirement in addition to the requirements of this section and the zoning ordinance adopted pursuant to this section.

D. The ordinance adopted by the county pursuant to this section or other provisions of law may provide that an application that requests to amend the county's comprehensive plan designation for the subject property to a higher density designation may be subject to an affordable housing requirement in addition to the requirements of this section and the zoning ordinance adopted pursuant to this section.

E. The ordinance adopted by the county pursuant to this section may provide that applications for a special exception approval for residential, commercial, or mixed-use projects that result in the elimination of existing units affordable to households with incomes equal to or below 80% of the area median income address replacement of the eliminated units as a condition of the governing body's approval of the special exception application.

F. With the exception of the authority under § 15.2-2304, this section establishes the legislative authority for the county to obtain Affordable Dwelling Units in exchange for the approval of a special exception application for a residential, commercial, or mixed-use project in the county, and a special exception may not be used in combination with any other provision of law in Chapter 22 (§§ 15.2-2200 *et seq.*) of Title 15.2 to obtain Affordable Dwelling Units from an applicant. Nothing in this section shall be construed to repeal the county's authority under any other provision of law.

Case Law: *The Bd. of Supervisors of Fairfax County v. DeGroff Enterprises, Inc.*, 214 Va. 235, 198 S.E.2d 600 (1973).

Discussion: At issue in *Bd. of Supervisors* was an amendment to the Fairfax County Zoning Ordinance that required a developer of fifty or more dwelling units to commit to build at least 15% of those dwelling units as low and moderate income housing. The trial court held that the amendment constituted an improper delegation of legislative authority, and that the amendment was arbitrary and capricious. On appeal, the Supreme Court of Virginia affirmed, adding that the 15% requirement violated the takings clause in the state constitution. According to Virginia attorney and LANDS member John Farrell, *DeGroff* was a "Dillon's rule" decision that was effectively superseded by amendments to the Commonwealth's municipal powers act, *see* Va. Code Ann. §§ 15.2-2304 and 2305.

Home Rule: Virginia is a Dillon's Rule state, but municipalities have functional powers. Va. Const. Art. VII, § 3 (2006); *see also* Va. Code Ann. §§ 15.2-1100 (2022) *et seq.* Counties do not have any powers. Va. Code Ann. §§ 15.2-1200 (2022) *et seq.*

Washington

Inclusionary Zoning Statute: None

Case Law: None

Discussion: While there is no express authority for inclusionary zoning, Rev. Code Wash. § 35A.63.100 grants municipalities broad authority to address local land use matters. As a result, voluntary inclusionary programs have been adopted in Seattle (Municipal Code § 23.49.015); Vancouver (Municipal Code § 20.250.020); and Tacoma

Home Rule: Municipalities and counties in Washington only have limited structural powers, and do not have any functional or fiscal powers. Wash. Const. Art. XI, § 4. (2022)

West Virginia

Inclusionary Zoning Statute: None

Case Law: None

Home Rule: Local governments have only very limited structural powers. The legislature classifies municipalities determines their type of government. W. Va. Const. Art. VI, § 39a (2022). However, municipalities with a population over 2,000 may "frame, adopt, and amend a charter" to regulate municipal affairs. *Id.*

Wisconsin

Inclusionary Zoning Statute: None

Case Law: *Apartment Assoc. of South Central Wisconsin, Inc. v. City of Madison*, 2006 WI App 192, 722 N.W.2d 614 (Wis. 2006), *review denied*, 2007 WI 16, 727 N.W.2d 35 (Wis. 2006).

Discussion: In *Apartment Assoc. of South Central Wisconsin, Inc.*, appellants challenged the City of Madison's inclusionary housing ordinance, which required developments with 10 or more rental units to set-aside at least 15% of the units for low and moderate housing if the application required an amendment to the zoning map, a subdivision, or land division. The ordinance provided incentives for developers based on a formula that considered a number of factors, including the number of units offered to families with area median incomes at certain levels. Appellants alleged that the ordinance was pre-empted by a state statute prohibiting municipal rent control.

The Wisconsin Court of Appeals agreed with the appellants. Under the state rent control statute, local governments are authorized to enter a rent control agreement with developers. Wis. Stat. § 66.1015 (2006). However, the Court determined that despite the use of "incentives," the ordinance was mandatory in nature, and therefore prohibited under state law. It is interesting to note that the *Apartment Assoc.* case only challenged the part of Madison's ordinance applicable to *rental* units, even though the ordinance also covers *sale* units.

Home Rule: Local governments have functional and limited structural authority. Wis. Const. art. XI, § 3 (2022). The legislature determines how municipalities are organized, but they have functional powers.

Wyoming

Inclusionary Zoning Statute: None

Case Law: None

Home Rule: Wyoming is a home rule state, but municipalities have only structural and functional powers. Wyo. Const. art. 12, § 4 (2022); *see also* Wyo. Stat. §§ 15-1-101 (2022) *et seq.*

SELECTED ARTICLES AND RESOURCES

1. Connor Harris, *The Exclusionary Effects of Inclusionary Zoning: Economic Theory and Empirical Research*, The Manhattan Institute, August 2021 (available at: <https://media4.manhattan-institute.org/sites/default/files/exclusionary-effects-inclusionary-zoning-CH.pdf>) (recognizing that while data indicates that some inclusionary measures can reduce housing supply and render market-rate housing more expensive, there are certain “dos” and “do nots” that will mitigate “harmful market distortions”).
2. Emily Hamilton, *Inclusionary Zoning and Housing Market Outcomes*, Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, September 2019 (available at: <https://www.mercatus.org/research/working-papers/inclusionary-zoning-and-housing-market-outcomes>) (examining inclusionary zoning in Baltimore-Washington region and concluding that while housing construction rates have not decreased, housing prices have increased about one percent per year).
3. Tracey Zhang, *Making Inclusionary Zoning More Inclusive: How D.C. Should Reform its Inclusionary Zoning Policy to Account for Income, Racial, and Geographic Segregation*, *Georgetown Journal on Poverty Law and Policy*, Vol, XXVII, Number 1, Fall 2019 (highlighting issues with D.C.’s inclusionary zoning program and providing suggestions for improvement, including: creating ward-specific income requirements and providing developers with the option to build units for varying income levels at varying set-aside levels to reach the lowest income tenants).
4. Kriti Ramakrishnan, Mark Treskon, and Solomon Greene, *Inclusionary Zoning: What Does the Research Tell Us about the Effectiveness of Local Action?*, Urban Institute, January 2019 (available at: <https://www.urban.org/research/publication/inclusionary-zoning-what-does-research-tell-us-about-effectiveness-local-action>) (examining general effectiveness of inclusionary zoning, and whether it improves economic opportunity and reduces racial disparities).

5. Emily Thaden and Ruoni Wang, *Inclusionary Housing in the United States: Prevalence, Impact, and Practices*, Lincoln Institute of Land Policy, September 2017 (available at: <https://www.lincolninst.edu/publications/working-papers/inclusionary-housing-in-united-states>) (collecting quantitative data on 886 jurisdictions with inclusionary zoning programs across 25 states and the District of Columbia by the end of 2016).

6. Robert Hickey, *Inclusionary Upzoning: Tying Growth to Affordability*, Center for Housing Policy, July 2014 (available at: <https://nhc.org/wp-content/uploads/2017/10/Inclusionary-Upzoning.pdf>) (discussing efficacy of “inclusionary upzoning” – i.e., allowing greater density, height, etc... in exchange for participation in inclusionary programs – in certain markets).

7. *Inclusionary Zoning and Mixed-Income Communities*, HUD Office of Policy Development and Research, Evidence Matters, Spring 2013 (available at: <https://www.huduser.gov/portal/periodicals/em/spring13/highlight3.html>) (comparing New York and Chicago inclusionary programs, and concluding, among other things, that inclusionary zoning is most effective in markets where housing demand is already high).

8. *The Effects of Inclusionary Zoning on Local Housing Markets: Lessons from the San Francisco, Washington DC and Suburban Boston Areas*, Furman Center for Real Estate & Urban Policy, New York University School of Law, March 2008 (available at: www.furmancenter.nyu.edu) (examining inclusionary programs in three major cities and concluding, among other things, that: greater flexibility in inclusionary policies may lead to a greater production of affordable units; and policies that provide achievable density bonuses or other benefits to offset costs will be the least likely to adversely impact price and supply of market-rate housing).

9. Jay M. Zitter, *Validity, Construction, and Application of Inclusionary Zoning Ordinances and Programs*, 22 A.L.R.6th 295 (2007) (comparing various federal and state cases that considered inclusionary zoning statutes, ordinances or programs).

10. *Handbook On: Developing Inclusionary Zoning*, Harrisville Village, Burrillville, Rhode Island, Statewide Planning Program, Division of Planning, Rhode Island Department of Administration (2006) (available at www.planning.ri.gov) (listing items to consider in adopting an inclusionary zoning program, and providing best practices in developing an inclusionary zoning ordinance).

11. Brian R. Lerman, *Mandatory Inclusionary Zoning – The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383 (2006) (examining different approaches to inclusionary zoning and concluding that *mandatory* inclusionary zoning in all communities is the best option for creating affordable housing).

12. Nick Brunick, Lauren Goldberg, and Susannah Levine, *Large Cities and Inclusionary Zoning*, Business and Professional People for the Public Interest (Nov. 2003) (available at www.bpchicago.org) (case studies of inclusionary programs in Boston, MA; Denver, CO; Sacramento, CA; San Diego, CA; and San Francisco, CA).

13. Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971 (2002) (reviewing the history of inclusionary zoning and discussing, among other things, the legal standards applicable to review of inclusionary land use regulations, as opposed to exactions).

14. Dr. Robert Burchell & Catherine Galley, *Inclusionary Zoning: A Viable Solution to the Affordable Housing Crisis?* New Century Housing, Vol. 1, Issue 2 (2000) (available at: http://www.planningcommunications.com/housing/nhc_inclusionary_zoning_viable_solution.pdf) (encouraging inclusionary zoning as a way to address national affordable housing shortage).

15. Jennifer M. Morgan, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359 (1995) (examining traditional zoning and land use regulation as a barrier to affordable housing and concluding that inclusionary zoning programs are effective at encouraging development of affordable housing).

16. Robert C. Ellickson, *The Irony of 'Inclusionary Zoning'*, 54 S. CAL. L. REV. 1167 (1980-81) (concluding that inclusionary programs actually exacerbate housing shortages, *see* Section V.A.1, above).

SELECTED INCLUSIONARY ORDINANCES REVIEWED

The below municipal ordinances, resolutions, and regulations were reviewed in developing this report. The links following each were last visited on May 2, 2023.

California

Napa

City of Napa Ordinances, Chapter 15.94, available at https://library.qcode.us/lib/napa_ca/pub/municipal_code/item/city_of_napa_municipal_code-title_15-chapter_15_94

Sacramento

City Code, Chapter 17.712, available at https://library.qcode.us/lib/sacramento_ca/pub/city_code/item/title_17-division_vii-chapter_17_712

San Diego

San Diego Municipal Code, Chapter 14, Article 2, Div. 13 available at <https://docs.sandiego.gov/municode/MuniCodeChapter14/Ch14Art02Division13.pdf>

San Francisco

San Francisco Planning Code, Section 315 (amended 12/20/2019), available at https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_planning/0-0-0-51493

Colorado

Boulder

Land Use Code, Chapter 13, available at https://library.municode.com/co/boulder/codes/municipal_code?nodeId=TIT9LAUSCO_CH13I NHO

Denver

Revised Municipal Code, City and County of Denver, Chapter 27, Art. IV, V, and X, available at https://library.municode.com/co/denver/codes/code_of_ordinances?nodeId=TITIIREMUCO_CH 27HO_ARTXMAAFHO

Connecticut

Darien

Darien Zoning Regulations, Section 580, available at http://darienct.gov/filestorage/28025/28547/28935/ZONING_REGULATIONS_COMBINED_THROUGH_AMENDMENT_%2390_With_Appendix_F.pdf

Fairfield

Fairfield Zoning Regulations, Section 2.36.1, available at <https://fairfieldct.org/filestorage/10726/11028/12429/108700/ZoningRegulations9Feb2021.pdf>

Hamden

Hamden Zoning Regulations, Section 652.3, available at <https://www.hamden.com/DocumentCenter/View/359/08-07-2017-Zoning-Regulations-Effective-08-17-2017-PDF>

New Canaan

New Canaan Zoning Regulations, Section 7.6, available at <https://cms3.revize.com/revize/newcanaanct/Departments/Land%20Use/Zoning%20Regulations%20-%20EFFECTIVE%2008.16.19.pdf>

New Haven

New Haven Inclusionary Zoning Ordinance, (effective 2/18/22), available at <https://cityplancommission.newhavenct.gov/documents/4ab1b08887f14262958761b9d11bb9e6/explore>

Stamford

Stamford Zoning Regulations, Section 7.4, available at <https://www.stamfordct.gov/government/boards-commissions/zoning-board/regulations>

Florida

Palm Beach County

Work Force Housing Program, available at <https://discover.pbcbgov.org/pzb/planning/Projects-Programs/WorkforceHousingProgram.aspx>

Tallahassee

Tallahassee Land Development Code, Chapter 9, Art. VI and Chapter 10, Art. IV, Div. 4, Sec. 10-280.7 available at https://library.municode.com/fl/tallahassee/codes/land_development_code?nodeId=13907

Georgia

Fulton County

Fulton County Zoning Resolution, Section 4.26, (added 4/5/06), available at <https://www.fultoncountyga.gov/inside-fulton-county/fulton-county-departments/public-works/planning-zoning-and-permitting/zoning-resolution>

Hawaii

Maui

Maui County Code, Title 2.96-2.97, available at
https://library.municode.com/hi/county_of_maui/codes/code_of_ordinances?nodeId=TIT2ADPE

Illinois

Highland Park

Ordinance Chapter 150, Article XXI, available at
https://www.cityhpil.com/government/boards_and_commissions/chapter_150_zoning_code.php

Maine

Portland

City of Portland Land Use Code, Section 18.2.3, available at
<https://www.portlandmaine.gov/734/City-Code>

Massachusetts

Barnstable

Barnstable Code, Chapter 9, available at <https://ecode360.com/6556730>

New Mexico

Santa Fe

Santa Fe Code of Ordinances, Chapter XXVI, Section 26-1.2 (Santa Fe Homes Program) available at https://library.municode.com/nm/santa_fe/codes/code_of_ordinances

Vermont

Burlington

Burlington Zoning Ordinance, Article 9, available at
<https://www.burlingtonvt.gov/DPI/CDO=>