



Inclusionary Zoning Primer



NAHB Land Use and Design Department

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Table of Contents

I.	EXECUTIVE SUMMARY/INTRODUCTION	Pg. 3
II.	RESEARCH ON INCLUSIONARY ZONING	Pg. 7
	<ul style="list-style-type: none">• Price and Production Effects• Statutory, Implementation, and Effectiveness Issues• Latest Reports	
III.	STORIES FROM THE FIELD: Communities that have Discontinued Or Reshaped their Inclusionary Zoning Programs	Pg. 20
	<ul style="list-style-type: none">• Madison, Wisconsin• St. Cloud, Minnesota• Tallahassee, Florida• Palm Beach County, Florida• McCall, Idaho• Bozeman, Montana• Davie, Florida• Longmont, Colorado• Montgomery County, Maryland• Santa Fe, New Mexico• New York, New York• Seattle, Washington	
IV.	PROMISING STATE AND LOCAL ALTERNATIVES FOR PROVIDING AFFORDABLE HOUSING	Pg. 30
V.	CONCLUSION	Pg. 33

EXECUTIVE SUMMARY AND INTRODUCTION

Millions of American families struggle to find housing that meets their needs at a price they can afford, as the gap between family incomes and the cost of housing grows larger every year. Many families are forced to commute long distances, pay a disproportionate share of their incomes on housing, or live in housing that simply does not meet their needs.

The reasons for this gap are many. Local governments have developed plans that foster job growth but do not provide for sufficient housing for the workers filling those jobs, and some still discourage or limit multifamily housing. Ever more elaborate planning and zoning schemes, or outdated ones, make it difficult to develop land and a range and mix of housing types, especially lower-cost housing, that is needed to keep up with demand. Complex, lengthy, and uncertain development approval processes and environmental requirements constrain the availability of developable land and drive up the cost of housing, and an ever-growing number of fees imposed on new housing add to that. NIMBY groups resisting higher density development have become more sophisticated and organized over time and deter growth and development.

Thus, the housing affordability gap continues to be a multi-dimensional problem. As a result, it demands the use of many different tools and a comprehensive strategy to successfully meet the varied needs of people on different steps of the income ladder, from very low income even to above median income in many markets today. It calls for a combination of approaches that either increase income, reduce costs, or both. The reality is that different market segments may require different tools for improving affordability, from direct or indirect subsidies at the low end of the income bracket, to better planning for housing and regulatory barriers removal strategies that allow the market to work better at the upper end of the income range. The underlying causes of the affordability shortfall and the nature of the local market will dictate the strategies that will work best under various circumstances. There is no silver bullet strategy that can fundamentally address it all, and no single strategy works in every market.

However, many communities have come to rely on inclusionary zoning (IZ) as a simple, expedient requirement they can adopt to show they are addressing the affordability problem, without examining the causes of the problem locally and without having to understand the complexities and diversity of housing needs and the market. IZ involves shifting the public and community burden for the affordability problem to the private sector, by requiring developers to subsidize a certain percentage of affordable units within market-rate developments. Percentages range from 10 to 25 percent of total units, with price controls established for the subsidized units based on income levels.

There is currently renewed interest in IZ as communities are once again becoming concerned about affordability after building and development have resumed after the Great Recession. During the Recession, little land development took place as lenders tightened credit requirements, which resulted in a lot shortage and corresponding land and home price increases.

The renewed focus on IZ has also been spurred by Sustainable Communities planning grants to local communities from HUD and EPA beginning in 2009, which recommend IZ as a local tool that can be used to spur affordable housing units. All indications are that HUD's final rule on Affirmatively Furthering Fair Housing, which took effect on August 7, 2015, will apply further pressure on local communities to adopt "quick fix" strategies such as IZ to satisfy HUD's new requirements that local governments submit their plans to HUD for review, with an emphasis on actions to deconcentrate poverty.

IZ has been used for several years in California, Montgomery County, Maryland, and scattered communities across the nation, and so does have a legacy as a planning tool. Until rather recently, however, there has been anecdotal but little empirical research on its effectiveness, best practices or its effect on housing supply and prices. NAHB obtained three credentialed consultant research reports on inclusionary zoning to help fill this information gap; all are available at www.nahb.org by searching on the report titles noted in this paper.

The economic study for NAHB that examined price and production effects on IZ based on a robust data set from California did not find an increased in overall housing production from IZ and concluded that IZ acts like a tax on housing. It also found a drop in single family housing production, with a shift to multifamily. Based on NAHB's experience, this is a problem, because the building industry is still fairly specialized—it is not easy for a builder or developer to be able to do both types of products because the construction involved in horizontal versus vertical development is so different.

The legal study conducted for NAHB concluded that IZ is a complex undertaking, one with many more moving parts and practical considerations than most communities realize or are equipped to administer.

Based on NAHB's substantial experience reviewing ordinances from across the country and access to builders and developers, we also know that, while most IZ ordinances offer incentives such as density bonuses, parking reductions, expedited review procedures, and on, in an effort to avoid a takings claim and also allow the developer to recoup some of his subsidy to the lower priced units. But implementing these incentives is not always achievable in today's development approval process that includes heavy citizen input, and they don't begin to make up for the subsidized costs. It is difficult enough to obtain the density theoretically already allowed by zoning, and so the IZ density bonuses end up only restoring part of what should have been allowed originally.

Further, the workforce, service sector middle class gets squeezed out under IZ, as they are no longer able to afford the market-priced units--whose price has now increased to cover the subsidized IZ units--but they are not eligible for the subsidized ones. Thus, IZ simply shifts the problem without solving it.

Part of the appeal of IZ is that it presumably gives lower income households access to better neighborhoods and services by intermingling subsidized units with market-rate

ones. However, the effect of IZ is to put renters into homes without allowing them to gain equity in most cases, essentially making them no better off. And many neighbors still resist the mixed income/housing concept.

There has been increasing difficulty in IZ programs finding qualified buyers for it, and increasing evidence of homebuyer resistance to lengthy resale price controls. There have been challenges with property maintenance issues as well as the ability of the IZ unit families to afford HOA or condo fees.

In addition, IZ tends to work best only in hot urbanized markets, where pressure on both land and housing prices are more intense. Also, like impact fees, IZ is reliant on the pace of construction and so is not a very reliable affordable housing strategy. As the recent recession showed, when construction falls off, few affordable units are built. IZ is also not very flexible and adaptable as the market changes and can lock people into what becomes a bad deal. IZ requires ongoing administration by municipal staff who understand development economics and market conditions.

Other nationally recognized researchers have begun to release credible, empirical reviews of inclusionary zoning. This primer also discusses the findings of this research; goes on to detail communities where inclusionary zoning has been discontinued because it was too complex and did not achieve the hoped-for results; and highlights “best practices” of implementing an inclusionary zoning program.

The intent of this paper is to acknowledge the instances where inclusionary zoning may be feasible if the right incentives are built into it and pointing out the areas and circumstances where it has mostly failed as a policy tool. The “Statutory, Implementation, and Effectiveness Issues” section addresses the many details that should be included in any inclusionary zoning ordinance and operating program and the incentives necessary to make it work for the developer.

The paper concludes with a summary of alternative affordable housing solutions for state and local governments based on extensive research conducted for NAHB by Abt Associates, which showcases a comprehensive array of approaches to addressing housing affordability through a variety of innovative non-federal techniques and programs. The Abt report is extensive but user friendly, with tools organized by land use strategies, financial ones, and “other initiatives”, such as state-level affordability mandates or appeals processes. It explains how the various strategies work, how they have been funded, where they are used, and key pros and cons of each. It features thirty case studies of communities that have successfully used these tools, often in combination.

Given the mixed results on IZ, it is clear that the strategies that get the most press are not necessarily the most effective. Less flashy approaches such as planning and zoning changes to assess development capacity and encourage affordable housing, expedited permitting processes, and advocacy efforts to reduce NIMBYism can have broad effects on housing affordability. Housing trusts that are broadly funded by a percentage of the

property tax, which is paid by both existing and new residents, combined with land trusts acting as an intermediary between the private and public sectors both to assemble land and manage homes once they are built, appear to hold particular promise as an equitable and successful combination strategy.

Abt Associates recently completed a report for NAHB on development process efficiency strategies, which is a useful addition to this prior research. That report is now available on the [NAHB website](#). NAHB staff is available to work with local HBAs as well as jurisdictions looking to address their housing affordability issues, with balanced information on inclusionary zoning as well as resources on comprehensive and appropriate strategies for achieving housing affordability in ever changing economic times.

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RESEARCH ON INCLUSIONARY ZONING

Earlier studies on IZ have failed to be persuasive. One reason for the failure is that these studies did not use formal statistical methods to control for changing housing market conditions, leaving skeptics room to argue that the studies were not truly isolating the effect of Inclusionary Zoning.

Therefore, NAHB funded research into the impacts of inclusionary zoning in two key areas: Economic effects and legal and regulatory aspects. The latter research report, prepared for NAHB by attorney Tim Hollister of Shipman and Goodwin, will be discussed in the IZ Best Practices section of this paper. NAHB also retained Abt Associates to explore state and local alternatives to IZ, which is discussed in the section **“Alternatives to Providing Affordable Housing: State and Local Strategies and Solutions.”**

Price and Production Effects

Economic effects research, titled **Housing Market Impacts of Inclusionary Zoning**, was conducted in 2008 by Gerrit Knaap, Antonio Bento, and Scott Lowe at the University of Maryland (UMD) Center for Smart Growth. The report compiled considerable data on a large number of jurisdictions in California between 1988 and 2005.

“Just like other taxes, the burdens of inclusionary zoning are passed on to housing consumers, housing producers, and landowners.” - National Center for Smart Growth Research and Education

Having data for multiple jurisdictions over an extended period of time allowed UMD to investigate the impact of inclusionary zoning on housing production and prices controlling for differences in market conditions even if the conditions were not directly observed or measured. The final models showing the impact of inclusionary zoning on total housing starts and the single family/multifamily breakdown of starts controlled for:

- Recent changes in housing starts in each California jurisdiction;
- Any factor that was different about a particular jurisdiction (e.g., incomes of residents or attitudes toward growth) whether observed in the data or not; and
- Any factor that was different in a particular year (e.g., state of the overall economy or demand for housing) whether observed in the data or not.

The final models showing the impact of inclusionary zoning on the price and size of new single family homes controlled for:

- Basic characteristics of the house such as number of bedrooms and bathrooms;

- Lot size; any factor that was different about a particular block group (containing on average about 500 homes) whether observed in the data or not;
- Any factor that was different about a particular school district, whether observed in the data or not;
- Any factor that was different in a particular year whether observed in the data or not;
- Any factor that was different in a particular quarter, to control for possible seasonal effects. The effect of these controls is to reduce the estimated impacts of inclusionary zoning, but the impacts that remain after the controls are imposed are difficult to dispute.

The study concluded that, in California between 1988 and 2005, there was a failure to increase the total supply of new housing. The results of the University of Maryland study showed measurable effects of inclusionary zoning on a variety of market factors:

- Increasing a city's multifamily housing starts by 7 percent, essentially shifting production to multifamily from single family product;
- This effect increased to as much as 12 percent as inclusionary zoning requirements also increased;
- Raising the price of new homes by 2 – 3 percent, and by as much as 5 percent for more expensive homes, compared to communities without inclusionary zoning;
- Reducing the size of new homes by 48 square feet.¹

These four results all pass strong tests for statistical significance and are consistent with economic theory suggesting that such programs act like a tax on housing construction. Just as with other taxes, the burdens of inclusionary zoning are passed on to housing consumers, producers, and landowners, and so such policies do not come without a cost. Given that more of the units built are multifamily, that the new homes sold are both smaller and more costly, the impacts show that inclusionary zoning means consumers of new housing pay more to get less.

Some may argue that the price increases and size reductions seem relatively small, but to policymakers in areas where affordability is already a concern, a policy that moves at all in the direction of exacerbating a problem it is intended to solve would seem undesirable and ineffective. And there are certainly easier means of getting smaller

¹ Knaap, Bento, and Lowe, Prepared by the National Center for Smart Growth Research, University of Maryland, February 2008.

multifamily units built, if that should be a community's express goal, than by using this complex market intervention.

A policy brief released in the Journal of the American Planning Association did indicate that, while there is a wide variation in how inclusionary zoning programs are crafted and implemented, there is some correlation between programs that offer greater density bonuses and exempt smaller developments and producing greater number of units.²

However, the full study "**Silver Bullet or Trojan Horse: The Effects of Inclusionary Zoning on Local Housing Markets**", 2009, which controlled for 27 variables in the San Francisco Bay region and 24 variables in the Boston area, a detailed regression analysis indicated that in both the Boston and San Francisco areas, there is evidence that inclusionary zoning constrains new development, particularly during periods of regional price appreciation. There is also strong evidence that implantation of region-wide inclusionary zoning was put upward pressure on single-family home prices in the Boston-area suburbs between 1987 and 2008.³

Another interesting finding of this study, particularly in the San Francisco Bay region, is that older inclusionary zoning programs are associated with a decline in local home prices during times of regional price depreciation.⁴ So, while making markets more expensive during times of rapid price appreciation, there is also evidence that IZ policies can actually make home prices decline faster in periods of depreciation, as both regions have experienced in the past five years.

The study also indicated that the region-wide programs had failed to produce a substantial number of affordable housing units compared to other programs. For instance, during the control period of 24 years (1979-2003), only 9,154 units of affordable housing through inclusionary zoning were produced in the San Francisco Bay area, while 29,636 units of affordable housing units were produced through the federal Low Income Tax Credit program.⁵

There is also research about the economic effects of inclusionary zoning that has focused on the San Francisco Bay and Metropolitan Boston regions because 1) these are largely fragmented regions politically where numerous jurisdictions have adopted IZ policies, and 2) These regions have some of the least affordable area-wide housing. In the study "**Diffusion of Inclusionary Zoning Across San Francisco Bay Area Governments**", 2009, an empirical conclusion was made that the decision to adopt inclusionary zoning does not reflect a response to an identifiable need for more affordable housing. Rather, it reflects a variety of political characteristics, including the

² 31 Flavors of Inclusionary Zoning, Schuetz, Meltzer and Been, Journal of American Planning Association, Chicago, IL Autumn, 2009, Page 453

³ "Silver Bullet or Trojan Horse? The Effects of Inclusionary Zoning on Local Housing Markets in the United States," Schuetz, Meitzer, and Been, Furman Center, New York University, June 2010, Page 22

⁴ Ibid, Page 23

⁵ Ibid, Page 25

political bent of residents, a stronger regulatory culture, and places with more affordable housing non-profits.⁶

A number of examples also can be cited to show that the total number of affordable units produced by particular inclusionary zoning programs has, by some standards, not been very large, one such instance was during a brief period in the 1970s and 1980s in Montgomery County.

In this instance, a community experiencing rapid growth can provide for the sudden addition of higher density, multifamily projects in a predominantly single-family community to offset the cost of being required to provide below market rate housing. However as the community becomes denser and less land is available, and as NIMBY resistance grows to added density, growth becomes more restricted and inclusionary zoning units trail off. Therefore this model is not sustainable.

Statutory, Implementation, and Effectiveness Issues

Inclusionary zoning is a complex market intervention, and other recent research, as well as NAHB's legal research by attorney Tim Hollister with Shipman and Goodwin that is discussed later in this paper, reveal this. The most recent research on the variety and effectiveness of different programs across the country comes from the Lincoln Institute of Land Policy's report from 2014 titled "**Achieving Lasting Affordability through Inclusionary Housing**", by Robert Hickey, Lisa Sturevant, and Emily Thaden. The paper pulled data from 307 programs across the country and focused on case studies for 20 of those programs.

The case studies revealed that achieving lasting affordability requires more than simply setting long affordability periods, which has been a hallmark restriction in IZ programs. "Strong legal mechanisms, carefully designed resale restrictions, pre-purchase and post-purchase stewardship practices, and strategic partnerships are important for ensuring that inclusionary properties continue to be sold or rented at affordable prices, and are not lost due to illegal sales, foreclosure, or lax rental management practices. Despite the acknowledged importance of stewardship, most jurisdictions report having insufficient resources for comprehensive stewardship and many have not adequately planned for long-term monitoring and stewardship of inclusionary housing units."

The Lincoln Land report found that while IZ can create large numbers of affordable units in some communities, overall they have had a relatively small impact on the supply of affordable housing nationwide. While differences in retention levels can be partially explained by program stewardship, differences in the production levels can be partially explained by local housing market conditions. Strong demand for market-rate housing has produced more affordable units compared to weaker housing markets.

⁶ "The Most Popular Kid in the Class: Diffusion of Inclusionary Zoning across San Francisco Bay Area Governments", Schuetz and Meltzer, Furman Center, NYU, February 2, 2009

The results of the case study analysis suggested the following conclusions about successful and innovative strategies to help ensure lasting affordability:

- Inclusionary housing programs can only be successful in meeting affordable housing needs if they are both producing and preserving units.
- Without the upfront commitment to long-term affordability, inclusionary housing programs will not be able to meeting ongoing affordability challenges.
- Long affordability periods that reset offer a compelling alternative to “perpetual” affordability periods and go a long way towards achieving lasting affordability.
- Supplemental legal tools beyond deed restrictions will be needed to improve notification of defaults, potential illegal resales and burdens encumbered by homebuyers through second mortgages and refinancing. Inclusionary housing programs should also have in place legal mechanisms that strengthen the program’s ability to cure or purchase homes in foreclosure. The preemptive right of purchase can help strengthen a program’s control of the resale process and proactively keep inclusionary units in the affordable inventory. It can also be a helpful tool for increasing the affordability periods of units built under previous, shorter-term requirements.
- Local jurisdictions need to be responsive to local housing market conditions and household demographics when designing resale formulas and should evaluate the efficacy of their design over time to ensure affordability is being preserved.
- Inclusionary housing programs must actively monitor and steward inclusionary units, either in-house or through external partnerships. The programs highlighted in the case study analysis often made good decisions about setting up affordability periods and legal mechanisms with the goal of promoting lasting affordability. However, critical activities around monitoring and stewardship are often inadequately implemented. Successful programs should look to develop partnerships with organizations that have strong stewardship practices—including Community Land Trusts—in order to ensure that the affordable housing created through a well-designed inclusionary housing programs remains affordable to future owners and renters.
- Tapping local housing trust funds, which can be supported through in-lieu fees, is a practical way to support repair and crucial ongoing maintenance of inclusionary housing units.

Throughout its history of implementation, inclusionary zoning has generally received “good press.” Programs such as the one in Montgomery County, Maryland, have been touted, particularly in planning and community development circles, as an affordable housing panacea that can be replicated in any community that has public officials so inclined to create affordable housing. This line of thinking is naïve, however, and most

jurisdictions in the United States likely lack the financial resources, staff capacity or expertise needed to implement such complex programs. In addition to the administrative burden added to a community, the tendrils of an inclusionary zoning program reach out and affect a huge array of parties, including the construction industry, lenders, legal industry, affordable housing providers, non-profits, sales and marketing, and the homebuyer. Large and wealthy jurisdictions such as Montgomery County may have the resources to continually run these cumbersome programs, but most local jurisdictions are not Montgomery Counties.

If a community is considering inclusionary zoning despite these caveats, it must not take this on as a whim or consider it a silver bullet or a panacea.

A body of research conducted for NAHB by attorney Tim Hollister of Shipman and Goodwin in Hartford, CT, provides a national perspective on inclusionary zoning ordinances based on a review of state statutes and ordinances across the country: **National Survey of Statutory Authority and Practical Considerations for the Implementation of Inclusionary Zoning**, June 2007.

Not surprisingly, states vary in how they authorize the use of inclusionary zoning at the local level, ranging from implicit to express enabling authority. Seven states have no express authority; two states prohibit mandatory inclusionary zoning (Oregon and Texas); in two states inclusionary zoning ordinances have been invalidated as conflicting with statewide rent control laws; and 26 states have no express or implied authorization in their enabling statutes, so the authority is dependent on home rule powers.

The Resource Manual includes an extensive list of 45 components that communities should consider before adopting and implementing an inclusionary zoning ordinance. These elements fall within these broad categories:

- General practical issues;
- Defining applicability;
- Resident eligibility;
- Financial information and management

Sections 1-7 Practical Consideration and Challenges

- Factual Justification
- Voluntary vs. Mandatory
- Link to General or Housing Plan
- Construction Incentives
- Financial Incentives
- In-lieu of Fees
- Waivers and Exemptions

Sections 8-11 Defining applicability

- Geographic Applicability
- Minimum Applicability Requirements
- Type of Developments Included and Excluded
- Type of Construction Covered

Sections 12 – 23 Resident eligibility and selection

- Purchaser and Tenant Eligibility: Local Resident Preference
- Purchaser/Tenant Eligibility: Families vs. Age Restricted
- Required Set Aside Percentages
- Duration of Set Aside Requirements
- Selection of Purchasers/Tenants
- Lotteries
- Marketing and Outreach Requirements
- Renewal and Re-verifications
- Definition of Household Incomes
- Family Size Adjustments
- Down Payment Assumptions
- Minimum Occupancy Requirements

Sections 24 and 25 Construction Issues

- Sequencing of Construction Set Asides versus Market Rate Units
- Administration of Limitations

Section 26 – 40 Financial information and management

- Comparability of market versus affordable units
- Compliance Reporting
- Confidentiality of Income Data
- Sale/resale process and documentation
- Lender documentation
- Required versus Optional Fees
- Utility Allowances
- Government Enforcement
- Real Property taxation
- Use of Percentage of Income in Price Formulas
- Consumer Price Index/ Escalation Formulas
- Capital Improvements to Restricted Price Units
- Principal Residence
- Subletting
- Disposition of Restrictions at the End of Set Aside Period

Sections 41- 45 Procedural and Substantive Legal Challenges

- Procedural Compliance
- Authority to Enact
- Preemption
- Rent Control
- Illegal Exaction/Regulatory Taking

The number of considerations clearly shows that inclusionary zoning is a complex market intervention that should not be taken lightly or simply copied from another community. It must be considered carefully before adoption.

Another analysis of the complexities and challenges involved in implementing an inclusionary zoning program was conducted by Rick Jacobus of the Burlington (VT) Associates in Community Development add title of report here. This analysis includes a thorough review of the history of Inclusionary Zoning, as well as case studies from several programs across the country and the challenges these communities have faced trying to implement these complex, market intervention programs. Most critical about this report is that it addresses how the perils unleashed by the housing crash negatively impact these programs. Jacobus concedes that inclusionary zoning can work in the cases that sufficient compensation is afforded the builder for providing an inclusionary zoning unit, typically in the form of density. Also, some multifamily builder members have routinely secured multifamily building permits only on the basis that they provide some amount of Inclusionary Zoning.

However, the most intriguing part of the Jacobus report is that it reveals the “dark side” of these programs that are prevalent and present tremendous challenges yet are seldom discussed by inclusionary zoning advocates.

Such increasing problems as mortgage default bedevil many programs and challenge the notion of a clean turnover of an affordable unit from one owner to another. Also, the burdensome legal costs associated with keeping a home deed restricted can cost an agency anywhere from \$500 to \$20,000, per unit, per sale.⁷

Jacobus continues to highlight what it would take to implement an ordinance in order to produce affordable housing at a level of any significant impact. A jurisdiction implementing an ordinance would have to focus their administration logistics on eight primary areas:

1. Production

Home builders forced to produce affordable housing will try to find ways to reduce costs

⁷ “Delivering the Promise of Inclusionary Zoning: Best Practices in Administering and Monitoring, Rick Jacobus, Policy Link, 2007

when constructing a home in order to offset the cost. One builder in California even offered inclusionary zoning units without kitchen cabinets or appliances. Another way to save money on these units is to cluster them in the least desirable location of a project or to use lower cost materials on the exterior of the project. It is up to the administrator of the program to ensure that the affordable units are comparable in external appearance and that the interior size, quality of finishes and amenities are appropriate.

Figure 1



At the Capitol Quarter development in Washington, DC, by builder/developer EYA, inclusionary zoning units are offered as row houses or condominium units disguised as row houses.

In the photo, it is hard to determine which unit is the inclusionary zoning unit. In fact it is the corner unit with three affordable units disguised as a row house. In the same project, row houses were offered as an inclusionary zoning unit, but with a width of 14 feet, as opposed to a width of 16 feet for the market rate units.

2. Pricing

The definition of “affordable” will vary from program to program, but will often be based on a formula that takes into account percentage of median household/family income, household family/income, percentage of income spent on housing costs, household size and median home prices. Depending on income levels of a certain region, the percentage of median income thresholds to qualify for these programs may vary.

For instance, in a jurisdiction with very high median incomes, such as San Francisco County, Montgomery County, MD; or Fairfield County, CT, income levels up to 120 percent of median income may still qualify persons to participate in an inclusionary zoning program. Generally, programs expect that an owner or renter of an inclusionary zoning unit will not pay more than 30 to 35 percent of their monthly gross income on associated housing costs, which almost always include mortgage, property taxes and insurance, and increasingly, homeowners association (HOA) fees.

HOA fees have received relatively scant attention. However, they are quickly becoming of paramount importance. Particularly in this extended period where homeowners face multiple challenges of falling home values, lower incomes and rising foreclosure costs, HOA fees for those who pay on time are increasing.⁸ Oftentimes these increases can be quite high. The reason is that HOAs are under increasing pressure due to defaults and

⁸ PolicyLink – Understanding the Neighborhood Stabilization Program

non-payment and therefore raise the dues on those that are paying to cover the shortfall. There is some anecdotal evidence that in some situations, taxes and HOA fees combined are now more than mortgages.⁹

These escalating fees due to the financial crises are becoming a greater concern to low and moderate income homeowners who may not have the resources or the pay increases to adjust to increasing HOA fees. Whether or not jurisdictions and non-profits are going to be able to access additional funds to help residents offset these increases or to pay fees in arrears has yet to be seen. However, it appears to be increasingly difficult in these times where funds are scarce within all sectors.

3. Marketing

Some communities rely on marketplace mechanisms to market inclusionary zoning programs. Fairfax County, VA relies on property owners and rental offices to staff the marketing of their portfolio of rental units. The County maintains standards and offers voluntary training to leasing staff who market the units along with market-rate units.

Generally, a jurisdiction marketing their for-sale inclusionary zoning units must engage in a myriad of activities, including performing general outreach to buyers on an ongoing basis; managing a waiting list or interest list of eligible applicants who understand the tradeoffs involved in affordable homeownership; marketing the new development projects both to the existing waiting list and the general public; marketing individual units at the time of resale; and educating the real estate community about the nature of the program and the available units.

4. Homebuyer Education

Homebuyer education is a common requirement for participants in any affordable housing program. Participants in inclusionary zoning housing programs can be included in general homebuyer education programs that may be run by the jurisdiction or run by local housing non-profits contracted to the jurisdiction. Such programs typically focus on such issues as basic household finance, the home-buying process, credit repair, understanding mortgages, and basic home maintenance and repair.

5. Selection and Screening

Selection is a labor-intensive process that requires all applicants be screened for such factors as income, age, household size and credit history, as well as level of non-household debt, the ability to qualify for a mortgage, and first-time homebuyer status. Some programs impose different income limits and household size criteria to different units, adding to the complexity.

In addition, the selection process can be time-consuming, particularly when programs have a high demand. In a situation where waiting lists occur, some communities rely on

⁹ 2010 Semi-Annual Foreclosures in Minnesota August 9, 2010

a lottery system; others use a first-come first serve system based on those who are qualified; and yet other systems give priority to municipal employees such as fire, police or schoolteachers. Because Fair Housing laws prohibit certain types of restrictions to housing, all programs should be scrutinized by municipal legal staff to ensure that Fair Housing laws are being followed.¹⁰

6. Financing and Refinancing

Given the recent problems with the mortgage industry, it has become common knowledge that the lending industry has severely tightened their underwriting standards. Although there is no empirical evidence that this has reduced the number of inclusionary zoning units the banks are willing to underwrite, what is often forgotten is that these units generally are underwritten by conventional lenders. Therefore one can assume that banks may now have more reservations about underwriting units to be sold to low and moderate income buyers who may have fewer resources in place than higher income buyers.

At the same time, these lenders must take on the additional complexities that run with an inclusionary zoning unit and understand the additional restrictions on the deed in order to preserve the unit as affordable. Staff must work with the local and national mortgage lending community to ensure that there is an adequate pool of mortgages available to service the number of units anticipated to be produced.

7. Resale Management

Jacobus points out in his report that one of the most time consuming tasks in running an inclusionary zoning program is re-sale management. Resale management consists of a number of complex tasks and functions, including responding to homeowner's questions, maintaining regular communication with all homeowners in the program, as well as brokers, and title companies. Staff must also coordinate and review home inspections for every sale and re-sale, and work with outgoing homeowners to determine any credits for improvements or deductions for damage and deferred maintenance.

8. Enforcement and Monitoring

To underscore the problem with enforcing these equity-restricted units, Jacobus points out that in Santa Barbara County, several commissioners called for the end of the 25-year-old inclusionary zoning program after an unscheduled audit found that as many of a quarter of the 400 units were being used illegally for rental income; 9 homes had been lost to foreclosure, and several owners were able to take out second mortgages on the properties far in excess of what the deed restricted value was.¹¹

¹⁰ Inclusionary Zoning: Legal Issues, California Affordable Housing Law Project and Western Center on Law and Poverty, December 2002

¹¹ "Delivering the Promise of Inclusionary Zoning: Best Practices in Administering and Monitoring, Rick Jacobus, Policy Link, Page 2

Although the Commission ultimately decided to keep the inclusionary zoning program and addressed some of the problems with a restructuring, only one staff person¹² remains in position to carry out all the required functions to maintain the County's portfolio of inclusionary zoning housing.

Jacobus points out that, while most owners of an inclusionary zoning unit will comply with the requirements of the program, inevitably some will take advantage of the program and break the rules. A 2004 survey by the City of Palo Alto found that nearly 30 percent of their 179 units of inclusionary zoning had compliance problems of one sort or another.¹³ Perhaps the greatest temptation is to rent out the units at market rate, while still paying a below-market rate mortgage payment. If gone undetected, owners can reap high monthly profits, especially in regions with high monthly rental rates. Therefore, there is additional pressure on staff to enforce the requirements to prevent this sort of abuse of the system. Affordable housing programs that do not have these kinds of deed restrictions are therefore easier to manage in the long run.

Given the recent financial crises, more and more homeowners are defaulting on their mortgages, and owners of deed-restricted, affordable units are certainly not immune. Mortgage defaults are forcing staff to divert their valuable time away from managing existing units to take action to either avoid foreclosure of the property by the lender or to take extra steps to ensure that the unit remains affordable after the lender has taken back the unit.

Further complicating the administrative processes is specific guidance from the Federal Housing Administration (FHA) found in [ML 94-2 Secondary Financing Provided by Nonprofit Agencies and Transferability Restrictions Permitted for Property with a HUD Insured Mortgage](#) which restricts the ability of potential buyers for IZ units to get a HUD-insured mortgage.

The rule states the long-standing HUD policy that a property with a HUD-insured mortgage shall be free of restrictions that prevent the borrower from freely transferring the property. The rule also prohibits a lender from approving restrictions after the loan is closed. The rule uses the term "legal restrictions on conveyance" to describe such restrictions and this term is broadly defined to include provisions in any kind of legal instrument that would cause a conveyance (including a lease) by the borrower to:

- Be void, or voidable by a third party.
- Be the basis of contractual liability of the borrower.
- Terminate, or subject to termination, the borrower's interest in the property.
- Be subject to the consent of a third party.
- Be subject to limits on the amount of sales proceeds a borrower can retain.
- Be grounds for accelerating the insured mortgage.

¹² Santa Barbara County Government, Department of Housing and Community Development, Residential Property Management Division

¹³ "Delivering the Promise of Inclusionary Zoning: Best Practices in Administering and Monitoring, Rick Jacobus, Policy Link , Page 8

- Be grounds for increasing the interest rate of the insured mortgage.

If a conveyance could cause any of these things to occur, the property is considered to be subject to legal restrictions on conveyance (referred to as "restrictions" for the remainder of this Mortgagee Letter) and is usually ineligible for HUD mortgage insurance.

This restriction proved to be an issue in Washington D.C. where builders were unable to sell units to buyers using FHA loans. Potential buyers of these units, due to their incomes, are more likely to use FHA loans. The IZ units in DC remained on the market for over 18 months and one developer sued the District after not being able to sell those units. The city has since amended the covenants clause to remove the resale restrictions on these units.¹⁴

Latest Reports

In 2015, Robert Hickey at the Center for Housing Policy published a paper called "**Making Inclusionary Housing More Flexible: Four Ideas for Urban Settings,**" which outlines best practices for working with developers in urban areas. Hickey recognizes the need for balance between addressing affordable housing needs and making the requirements feasible for developers. He says that post-recession IZ policies are most necessary in cities where rents are rising faster than incomes, impacting the middle class in addition to low income households. Middle class residents have high rent burdens but do not qualify for federal housing assistance.

Hickey says that flexible IZ policies help improve feasibility by offering developers various ways to meet affordability obligations. This is especially important in urban areas where building materials and methods are more expensive and land costs are high. All of these factors, as well as high HOA fees and NIMBY mentalities, sometimes make it hard to meet affordability requirements in same building as the market rate units. Historically, one of the most popular options in these situations was to build off-

site units or pay a fee-in-lieu. The issue municipalities' face when offering these options is they do not further the goal of creating mixed income communities.

How do you lower costs for developers in these high cost cities while still promoting mixed income neighborhoods? Hickey offers four suggestions:

1. **Permit off-site development in multiple low-income neighborhoods.** If this option is chosen, the municipality could require a greater number of affordable units and mix of bedroom sizes that may not have been available if the units were built on-site. Many municipalities require these units to be built nearby, but

¹⁴ Scruggs, S. (2013). *Inclusionary Zoning Ownership: Lessons for the District from Comparable Cities*. Washington, D.C.: Manna, Inc.

the scarcity of affordable land in urban areas makes that a problem. Hickey suggests that municipalities broaden the geographic realm of off-site locations to any low-poverty neighborhood with access to core amenities such as transit service, jobs, and above average schools.

2. **Offer options to preserve or increase the affordability of existing housing.** This is a fairly new alternative to providing on-site units and it gives developers the option to preserve existing housing that is at risk of being lost due to rent spikes. This is done by converting existing market rate housing to deed restricted housing and requires the developer to make minimum level investment in rehabilitation and energy efficiency upgrades. Some programs also allow developers the opportunity to provide direct financial assistance to low income homeowners for home renovations. This is a good option for developers that own existing market rate units in low cost buildings or are building projects with high HOA fees. It should be noted that the cities that currently offer this option haven't had much interest from developers but it may become more popular as land prices increase.
3. **Restrict Fee-Revenue Spending to Broad, Designated Areas.** The option to pay a fee-in-lieu is really good for developers, especially developers of small projects. Both San Diego and Seattle are fee first programs where units may be built in-lieu of paying a fee. In San Diego the fees are collected and distributed by community planning area.
4. **Provide flexibility on the incomes served.** Allowing a developer to select from a menu of income targets gives them greater flexibility to make sure the mix is right for the project there are building as well as their bottom line. For example, instead of requiring that 10 percent of the units be made available to 80 percent AMI, a developer could be given leeway to provide a percentage of units to 50 percent AMI and a percentage to 100 percent AMI.

Hickey points out that not all of these policies will work in all places, but in general, all cities can benefit from giving developers more pathways to affordability. He also notes that new IZ policies are showing up in locations where IZ has been historically rare, such as Nashville, Atlanta, and Pittsburgh, reminding us that housing affordability is a constant issue that policymakers are being pressured to address by both regulators and stakeholders.

STORIES FROM THE FIELD: Communities that have Discontinued or Reshaped Inclusionary Zoning

Because of its complexities and the effort required to administer it, there are a growing number of communities that have discontinued the use of IZ or reshaped it to incorporate other tools for achieving lasting affordability.

Madison, WI

Since the program's inception in February 2004, 48 developments were approved in the City of Madison with a total of 2075 homes, of which 173 (8.3 percent of total) were affordable under the inclusionary zoning guidelines, and 33 (19 percent of affordable and 1.6 percent of all homes) have been sold to date.¹⁵

An article written by Terrence Wall of Smart Growth Madison and published in the Madison Isthmus Weekly pointed out that:

"Inclusionary zoning, Madison's well-meaning program to increase the supply of affordable housing, has had a starkly perverse impact on the local housing market: Vacancy rates have declined and rental rates have increased, producing exactly the opposite effect that IZ advocates wanted."¹⁶

His article includes research that indicates that in the period 2001 to 2003, developers built 3,257 housing units (of all types) in Madison, compared to only 1,954 units from 2004 to 2006, a 40 percent decrease after the IZ ordinance was passed in early 2004.

In 2006, Madison issued only 143 permits for market-rate apartment units, down from 660 in 2003. That 143 number is incredibly low when one considers that the city has on the average issued permits for 807 units annually since 1993, the vast majority of which were market-rate units.

The dramatic downturn in new construction caused vacancy rates to decline in existing units and net rents to increase, thereby achieving the opposite effect of what the city intended, overall higher costs of housing for everyone.

Kent Disch, former Community Affairs Director of the Madison Area Home Builders Association, indicated that the ordinance was constantly under amendment due to the complex nature of the policy.

Even advocates for workforce housing had to concede that the program was not effective when only 15 inclusionary zoning homes were sold in 15 years. Disch stated that "The program just didn't make sense, our inclusionary zoning lots sat empty because the market was flooded with existing homes listed below the inclusionary zoning unit price, and prospective home buyers just were not interested in purchasing an equity restricted house with a more

¹⁵ Inclusionary Zoning Annual Report, Inclusionary Zoning Advisory Oversight Committee, September 2008

¹⁶ "How Inclusionary Zoning Backfired on Madison", Terrence Wall, Madison Isthmus Weekly, March 15, 2007

complicated financing and closing process.” Another helpful amendment was that after 270 days without selling, the inclusionary zoning lots could return to the market rate price. Disch added “Many builders simply waited out the required time period before aggressively marketing those lots.”

The City suffered additional blows to their faltering program. In 2006 the Wisconsin Supreme Court struck down the entire ordinance as a form of rent control, which is banned by Wisconsin state statute. The City therefore had to revise the ordinance to remove the rental component of the ordinance. Given the low number of units generated by the program in the four years since its inception (only 1.9 percent of all new dwelling units), and the ongoing controversy that the program had created in the community, the City Council decided not to renew the program when its sunset provision came up for renewal in 2009.

St. Cloud, MN

St. Cloud, population 66,000, is the primary city of a half-dozen cities clustered around the Mississippi River in central Minnesota, about 60 miles northwest of Minneapolis. One might think that in such a location affordable housing would hardly be a major policy issue. However, by 2001 there was a concern in the community that more and more residents of central Minnesota were being priced out of quality housing and homeownership opportunities. It was estimated that during 2001, the price of housing rose by about 16 percent in the area, due to increased demand and lack of supply.

The Central Minnesota Task Force on Affordable Housing was created to address the issue. One of the many proposals considered was recommending that the six cities in the region adopt inclusionary zoning ordinances for what was referred to as “Life-Cycle Housing.”

The premise in St. Cloud and other central Minnesota cities is that minimum lot sizes required by area zoning laws are now so large that they are impeding the ability to provide for affordable single-family homes.¹⁷ If local governments were to provide density bonuses by allowing for smaller lot sizes, in exchange for providing 15 percent below- market rate housing units, the theory goes, it would be a “win-win” for all parties involved.

However, this was not to be the case. As this case study demonstrates, inclusionary zoning is often an ill-suited fit for a community. Similar to the Madison example, there was just little interest by the home buying public in

¹⁷ “Affordable Housing and Sprawling Regulations, A View from St. Cloud,” King Bannanian, American Experiment Quarterly, Summer 2002

purchasing equity-restricted new home, when similar homes nearby could be purchased at lower prices with no restrictions. At its April 2007 meeting, the "Life Cycle Housing" Board voted to terminate the inclusionary zoning program, which was adopted in 2004, and replace it with a standing committee on affordable housing under the St. Cloud Area Joint Planning District Board. The five city councils voted to ratify that action, which means that the inclusionary zoning program no longer exists.

In 2006 and into 2007, the Life Cycle Housing Board considered reducing the percentage (15 percent to 5 percent) of inclusionary zoning housing lots because of the high number of vacant lots (several hundred in St. Cloud alone); the fact that funding sources were no longer awarding funds to proposals submitted for inclusionary zoning housing; and because the City of St. Cloud's housing efforts, through its Housing and Redevelopment Authority (HRA), directed at existing housing in existing or core neighborhoods, which appeared to be effectively addressing the affordable housing problem in the region.

Under the various funding mechanisms for lifecycle housing, including Inclusionary Zoning, there were a total of 28 homes (or 40 depending on the source) built and sold since the program's inception in 2002. During the same time, the St. Cloud HRA acted independently of the inclusionary zoning program and sold more than 83 single family detached homes and townhomes, all without the equity restrictions. (inclusionary zoning units were sold to households with annual incomes of less than 80 percent of the state median income, and resold with 50 percent equity restriction in years 1- 10, declining to no equity restriction after year 20).

The existing inclusionary zoning homes went into a 90-year community land lease. The developer/builder holding life-cycle lots will individually negotiate with the respective city.

The unintended consequence of the inclusionary zoning program and the St. Cloud HRA efforts was that first-time home buyers were not purchasing existing homes in existing neighborhoods, fixing them up, and using that equity to purchase their next home. With existing homes not selling, interest rates dropping, and being in a large college community; these homes were purchased by investors for rentals. (St. Cloud is a regional center on the Mississippi River with older neighborhoods and a 15,000 student university located in one of those neighborhoods).

As St. Cloud city leaders and citizens of the area viewed their changing neighborhoods and causes, they became adamant that existing homes be the primary focus of the housing affordability efforts, not new housing attained

through an inclusionary zoning program, and that financing assistance be available to potential buyers. This action became the reason for the termination of the inclusionary zoning program as the City of St. Cloud began to concentrate on the existing housing in its core neighborhoods, and felt it could not commit resources (funds and personnel) to a program with emphasis on new housing.

In lieu of an inclusionary zoning program, the St. Cloud HRA established the boundaries for the core neighborhoods and then pooled existing funds to launch this program – almost an “urban pioneer” program:

- revised the existing CDBG homeowner rehabilitation program to a zero interest deferred loan of up to \$15,000 for repairs to existing homes, payable at time of sale, refinance, or move-out;
- separate funds were set aside to assist households that had incomes below 70 percent of area median income, or 70 percent to 100 percent, or more than 100 percent;
- provided gap financing of zero interest, no payment deferred loan, payable at time of sale, refinance, or move-out; to households with dependents, and not exceeding 80 percent of state median income; and
- created a homestead incentive program of five year forgivable loan, prorated forgiveness each year. This funding was exhausted in a few months by providing 40 loans totaling \$200,000. This equals 40 new owner-occupied existing homes in core neighborhoods.

The St. Cloud HRA is seeking additional funding because, within a few months, the program was so successful that the HRA was able to rehabilitate 40 existing homes for low and moderate income buyers that will be owner-occupied in those core neighborhoods with no equity restrictions.

Tallahassee, FL

The City of Tallahassee is the state capital of Florida, with a population of around 250,000. The city enacted an inclusionary zoning ordinance in 2005, with a revision to the program in 2008. The basic requirements of the program are a 10 percent set aside for affordable units, with a 25 percent density bonus and a minimum threshold of 50 units to be applicable to the program.¹⁸

To date, no units of affordable housing have been created through the program.¹⁹ As stated in the City’s Consolidated Plan, the City recognizes that the recent downturn in the state’s housing market has hampered the City’s ability to generating housing using

¹⁸ City of Tallahassee Inclusionary Zoning Ordinance, Adopted April 13, 2005, Amended August 20, 2008

¹⁹ City of Tallahassee, Economic and Community Development Department

this method.

The production of new units is still a viable option for the City of Tallahassee; however the weak new construction market combined with a 12-month surplus of housing available for sale and a high foreclosure rate in the city means that in the next 2 to 3 years the City will likely focus on rehabilitation and reconstruction rather than new construction.

The fact that the City has not built one unit of affordable housing through their inclusionary zoning program underscores how susceptible these programs can be to recessionary cycles, particularly in smaller communities.

In contrast, the city also implements an affordable housing program utilizing formula grants from the U.S. Department of Housing and Urban Development's HOME and CDBG programs and the Low Income Tax Credit. Currently there are approximately 4,037 affordable rental units made available in the city by the Low Income Tax Credit. CDBG funding and the state's State Housing Initiatives Partnership Act (SHIP) program are also used to provide for 420 down-payment assistance programs as well as 50 deep subsidy loans for homeownership for households 50percent below the median household average. Additionally, the Community Housing Development Organization, a non-profit affordable housing program will use grants to rehabilitate 25 existing homes in the next four years into workforce housing home-buying opportunities.²⁰

In addition to the failure to produce even one unit of affordable housing in six years, the City also had to go through a costly lawsuit. In Florida HBA, Tallahassee BA, Hermitage Ventures and Sue Boynton vs. City of Tallahassee, the plaintiffs filed suit against the City claiming a violation of due process because the ordinance was "arbitrary and capricious," in terms of who in the public the program would benefit; that it was an unlawful taking because the ordinance targeted only a small group of the citizenry to provide a public good without just compensation; and that it was an unlawful state tax because municipalities in Florida are barred from levying real estate or personal property taxes.²¹ Although the Circuit Court ruled in favor of the City in the case, the City had to spend tax dollars and manpower to defend a program that has yet to produce any units.

Palm Beach County, FL

Similarly, in Palm Beach County, during the height of Florida's frenzied housing boom, an alarmed County Commission decided to "take action" on housing affordability and, with the reluctant collaboration of the local HBA, enacted an inclusionary zoning ordinance in early 2006. Then the bottom fell out of the market. In 2000, the median house price in Palm Beach County was \$135,200²², by the First Quarter of 2006 that

²⁰ City of Tallahassee, Consolidated Plan, 2010 – 2015

²¹ "Battle Lines Drawn", Steve Zurier, Builder Magazine, May 2006

²² United States Census Data, 2009

price had escalated to \$393,000²³, but by 2009 had plunged to \$244,500 and fallen even further by Third Quarter 2010 to \$226,600.²⁴

Chris Roog, former Executive Officer of the Gold Coast Builders Association and Government Affairs Director, indicated that since the ordinance passed in 2006, not one inclusionary zoning unit has been constructed in the county of more than 1.3 million people. "The demand simply isn't there. The industry has been so hard hit that there literally have been no projects approved in the last four years. If projects have received approval, none have broken ground." With no development projects approved there is no way to create the associated percentage of affordable housing. "Plus, with the huge number of foreclosures in the County, people can purchase a single-family home for as little as \$50,000."

Based on the formula for inclusionary zoning units set in the ordinance, which are based on average annual income for the county, inclusionary zoning units would have to be marketed at around \$150,000. Roog noted "why would anyone pay more for an "affordable" unit when the market is providing units at lower prices, with none of the equity restrictions attached. If the County were really interested in promoting affordable housing they would be scooping up the huge overhang of foreclosures we have weighing down housing prices and assisting moderate income buyers with financing and down payment assistance so they can buy these homes."

Doing so would not only provide affordable housing but also prop up home values and boost the construction industry by taking foreclosed properties off market. "The County would rather just keep the phantom IZ ordinance on the books because they don't know what else to do..."

Fortunately for Roog and the south Florida home builders, the County reviews the ordinance once a year. If the program continues to produce no units, there may be a chance for eventual repeal of the in the future.

McCall, Idaho

In 2008, the Fourth Judicial Court of Idaho struck down an ordinance enacted by the city of McCall mandating private builders and developers to build and deed-restrict properties for "workforce housing." In 2007 the local REALTORS association had filed a lawsuit against the city of McCall seeking a declaratory ruling that McCall's ordinance was an unconstitutional taking of private property rights, an illegal taxing scheme, and that the city exceeded its jurisdiction and authority in passing the ordinances. The court's overturning of the ordinance highlights the perils faced by local jurisdictions considering adoption of an inclusionary zoning ordinance.

Among other things, the ordinances required that developers and builders set aside, build and deed-restrict 20 percent of a development for "workforce housing." Under the

²³ 2010 Survey by Florida Associations of Realtors

²⁴ 2010 Florida Realtors Report

ordinances, the deed-restricted properties were reserved for people making 100percent to 160percent of the median wage in Valley County in central Idaho. The local government would award priority points to certain types of jobs that would qualify for the housing. Such homes would be permanently price-restricted. The ordinances mandated an equivalent "in lieu of" fee as an option to building such homes.

The 4th Judicial District Court included the following points in the Memorandum Decision:

- "These restrictions go much further than merely regulating the use of property; instead, they essentially regulate ownership of the property by dictating to whom a unit may be sold or rented."
- "This Court concludes such 'regulation' is arbitrary and unreasonable as a land use provision."
- "This Court is convinced that the imposition of the subsidy or fee required under Ordinance Nos. 819 and 820 are, in reality, a tax, and not a regulation."

Idaho Association of Realtors Chief Executive Kevin Price was quoted on the court's decision, stating "The City simply went too far and exceeded its authority. The imposition of this burden on the landowners or developers amounts to an unlawful tax. In addition, the ordinances go much further than the City's authority to regulate the use of property. By dictating to whom a housing unit may be sold or rented, the City has improperly attempted to regulate property ownership. We certainly agree with the Court's determination that this "regulation" is arbitrary and unreasonable. There are developments in Valley County constructed under the ordinances. When the market softened, consumers had a choice between purchasing deed-restricted lots that can't appreciate in price, or unencumbered lots for the same price. Naturally, buyers chose to purchase homes with no free-market restrictions. Some of these "affordable workforce housing units" have been lying vacant for months. The people who were forced to build them are really taking a bath.²⁵"

Bozeman, MT

In yet another example of how inclusionary zoning is very susceptible to downturns in the housing market, two years after the city of Bozeman's Workforce Housing Ordinance went into effect, no homes were built under the program. While the city points out that all home building has slowed with the economic downturn, many within the building community have called for it to be repealed.

The workforce housing program requires developers of some subdivisions to price a portion of their homes or condominiums under \$200,000 and trains Bozeman residents for homeownership. The Bozeman City Commission adopted the ordinance in July of

²⁵ February 2008 Idaho Association of REALTORS Press Release

2007 in hopes of giving working class families who makes less than \$70,000 a year wider options for owning a home in Bozeman.

In its original approval of the ordinance, the city commission stipulated that its effectiveness be reviewed in two years. They looked at an update on the program compiled by staff, but did not discuss it during their meeting. Instead, they voted to review the program again in another year, hopeful that the market will improve and give the program a chance to work.²⁶

Davie, FL

South Florida is one of the epicenters of the current housing price crash and foreclosure crisis. The Town of Davie, until recently, was a fast growing bedroom community with a population of approximately 90,000 located immediately west of Fort Lauderdale. Since 2000, the population increased by 14,609 people or by approximately 5,555 dwelling units.²⁷ In response to rapidly escalating prices during the housing bubble years, Davie finalized adoption an inclusionary zoning policy in early 2008. To date, not only have no affordable units been created through the program, hardly any residential building units have been constructed at all, relative to the boom years earlier in the decade. In 2007, 274 residential units were constructed in the city; in 2010, that number was reduced to 72 units.²⁸

The Town's Vice-Mayor stated that "I have been told that this (ordinance) is prohibiting a lot of people from building in our town."²⁹ A local realtor recently informed the Town Council that a developer who wanted to build a 50-unit housing development in the town decided not to after reading the inclusionary zoning ordinance.³⁰

In a time of budgetary crisis, stagnant home building and shrinking tax bases, communities desperate for new development do not need burdensome regulations such as inclusionary zoning hampering their ability to resolve their fiscal problems. The Town Council has subsequently voted to suspend the Ordinance for two years.

Longmont, Colorado

In August 2011, the City of Longmont, Colorado voted to end its inclusionary zoning program after a year-long debate within the community. Longmont is located about 29 miles northwest of Denver and has a population of 86,000.

Although the program managed to produce some units, the City realized that having an inclusionary zoning ordinance was an impediment to bringing jobs and businesses to

²⁶ Ricker, Amanda, Bozeman Daily Chronicle, September 1, 2009

²⁷ 2000 and 2010 U.S. Census Data

²⁸ Town of Davie, Florida Building Department

²⁹ "Davie Questions Old Push for Affordable Housing", Susannah Bryan, South Florida Sun- Sentinel, May 5, 2011

³⁰ Ibid

the community in a challenging economy. The repeal did not just take effect for future housing units, but also lifted all re-sale deed restrictions for housing built under the inclusionary zoning ordinance. This was seen as an added benefit to existing residents in the community, akin to a tax break and would provide for an added shot in the arm for the local community.

In lieu of the repealed ordinance, a stakeholder group was established by the Council to re-examine the state of housing affordability in the community given the falling real estate prices. Denver is the only other jurisdiction in the metropolitan Denver area that has an inclusionary zoning ordinance, and two council members in that city are seeking to revisit the ordinance.

Montgomery County, Md.

In Montgomery County, only 77 inclusionary zoning units were produced in 2007, an all-time low in the 36-year history of the program; this after 400 units were produced in 2005, at the height of the building boom.³¹ This reinforces the notion that inclusionary zoning programs are highly susceptible to market and economic fluctuations and cycles, and when affordable housing production is mandated on the backs of the market-price housing industry.

Santa Fe, N.M.

Santa Fe's experience with IZ is further evidence that this tool is best suited for the strongest markets during the best times. In 2005, the city started enforcing an IZ ordinance that required at least 30 percent of all new developments be affordable. However, only 27 out of 181 proposed affordable units have been built and sold over the last nine years. Meanwhile, the local housing trust says they have 200 – 300 people waiting to buy an affordable home.

The ordinance was developed during the housing boom without developer input and when the recession began, it made meeting the requirements of the ordinance impossible. The 30 percent number was modeled after similar ordinances in more expensive, higher density areas like San Francisco and Chicago, where incomes are also higher than in Santa Fe.

In order to reduce the onerous requirements, the city has reduced the required percentage from 30 percent affordable to 20 percent affordable. Santa Fe also reduced the affordability term for rental units from 20 years to 10 years. According to staff, this decision was driven primarily by the city's interest in encouraging more market-rate rental housing in the city. The city has also changed the resale requirements. For example, if a homeowner originally bought a house worth \$175,000 for \$125,000, and its value jumped to \$250,000 by the time of sale, they would owe the city \$75,000 instead of \$50,000. The new ordinance allows homeowners to repay only the dollar

³¹ Montgomery County, MD Department of Housing and Community Services

amount of subsidy they received when they first bought the house.

New York, N.Y.

In 2014, New York City's Mayor De Blasio unveiled his plan for an overhaul of the city's existing IZ program. Former Mayor Bloomberg's model allowed developers to build 20 percent bigger if they set aside 20 percent of the new apartments at below-market rates. While the program under Mayor Bloomberg remained voluntary, the new program will be mandatory when building in a targeted neighborhood that has been upzoned for higher densities. The new program will require developers in those areas to build projects that are a 20 percent low-income, 30 percent middle-income, and 50 percent market-rate split.

Opponents still do not believe the changes in the program will produce positive outcomes. IZ units only accounted for 1.7 percent of housing growth between 2005 and 2013, and the new program isn't that different from the old program. Additionally, the inclusionary rents are based on Area Median Income (AMI), which is calculated over an area that includes both the city and its wealthy suburbs. In 2013, AMI for an average household in the New York metro area was \$77,310; in the city alone, however, the average family made \$50,711.

IZ programs also receive a lot of criticism from the residents they are meant to serve due to fears of gentrification. Tom Angotti, the director of the Hunter College Center for Community Planning and Development, argues that inclusionary zoning's proponents "deal with housing as if it existed in a free market — as if it were just a matter of individual apartments combined. But it exists in a land market, where values are determined largely by location and zoning capacity. In areas with high land values, the new inclusionary development will just feed the fire of gentrification."

In New York City, inclusionary zoning could actually incentivize the destruction of existing affordable housing. Many New York City neighborhoods are filled with rent-control apartments, often at lower densities than the new inclusionary zoning rules would allow. The average income for rent-stabilized tenants is \$37,000; for rent controlled tenants it is \$29,000. Both are significantly lower than the income targets for many inclusionary apartments.

Seattle, Wash.

The city of Seattle has turned the fee-in-lieu concept on its head and instead adopted a "fee-first" ordinance that gives residential and commercial developers the option to create onsite or offsite units in lieu of paying the fee. Between 2002 and 2013, in every case where developers had the choice, they chose to pay the fee.

Cornerstone Partnership analyzed data from Seattle's Office of Housing and found that

\$27 million of fee revenue the city generated from 2000 to 2013 enabled it to bring in \$97 million in federal and state housing funds that would not have been invested in Seattle otherwise.

This allowed Seattle to produce an affordable home for each \$50,000 in fee revenue it received. A typical downtown high-rise rental project paid a fee of about \$150,000 for each home that would have been required onsite, a lower cost than actually producing the affordable unit. For these downtown projects, Seattle could use the fee revenue to produce three times more affordable homes than would have been built onsite.

PROMISING STATE AND LOCAL ALTERNATIVES TO PROVIDING AFFORDABLE HOUSING

Different markets and different income segments require different tools for improving affordability. At the lower end of the income spectrum this may be multiple direct subsidies. For families higher on the income range this may be better planning for housing and removal of some regulatory barriers to allow the market to function more efficiently.

Unfortunately, an increasing number of communities today are adopting and imposing inclusionary zoning in the belief that this approach alone will close this gap. It has become a politically expedient means for communities to show they are addressing the affordability problem instead of taking a more comprehensive approach to understanding and resolving this complex issue.

Most inclusionary zoning programs impose controls that limit the resale prices of such units for a period of 5 to as long as 20 or even 30 years. The purpose of this is to keep the housing units affordable, but the result is that owners in these units are barred from building equity. In an effort to avoid takings challenges and enhance participation in these programs, such programs also typically offer developers density bonuses and other incentives such as waivers/reduced requirements and expedited permitting, yet on-the-ground experience shows that such incentives are increasingly difficult to achieve in the development approval process today.

Inclusionary zoning should only be implemented with sufficient compensation to developers and builders and should only be considered as part of 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 sufficient number of housing units to meet projected growth, rather than relying primarily on mandatory Inclusionary Zoning.” This is language found in NAHB’s current policy on Inclusionary Zoning.

In order to focus on a more comprehensive approach to funding affordable housing, NAHB hired Abt Associates to research other non- federal approaches to housing

affordability. Abt provided a 350-page compilation of state and local affordability strategies entitled “**Research on State and Local Means of Increasing Affordable Housing**” (2008) that also includes how these programs are funded, where they’ve been used, and the advantages and disadvantages of each. Many communities have enjoyed significant success with innovative programs designed to address the housing affordability challenge, and many of the most innovative and successful approaches are detailed in this extensive but user friendly report.

The report includes 30 detailed case studies that explain how local governments used these strategies to address their housing affordability needs. These case studies represent the most comprehensive report ever compiled on the subject of non-federal solutions. Most of them highlight new examples not previously described in other reports by such organizations as HUD, the Center for Housing Policy, and the Urban Land Institute.

The Abt Associates report focuses on three types of strategies:

- Land use strategies, such as planning, zoning, and novel development strategies;
- Financial strategies, including property taxes, other taxes, state tax credits, impact fee waivers, regional financing approaches, and other sources of financing;
- Other initiatives, such as informational strategies, organizational strategies, reforms to zoning and development codes, and state legislation.

The Abt Associates study also found that the most successful places rely on an array of strategies to encourage affordable housing, and that the strategies that get the most press are not necessarily the most effective.

A good example is a case study of North Kingstown, RI, which used a variety of strategies, including state mandates and guidance for local planning and a significant density bonus and streamlined permitting program for developers.

Emeryville, CA established zoning codes and development regulations to encourage infill and brownfields development, high-density housing and mixed-use development. Among the successes is Emeryville Warehouse Lofts, which includes 140 lofts, 129 other residential units, 7,000 square feet of retail space, a 4,500 square-foot landscaped courtyard and a renovated parking structure.

Since the report was published in 2008, there have been other interesting developments. The HOME Connecticut statute, officially known as the Housing Program for Economic Growth, was created by the state in June 2007 to provide incentives to municipalities that voluntarily choose to expand their array of mixed-income housing options, as well as financing to developers of affordable housing. Under the law, municipalities may qualify for planning and technical assistance grants of up to \$50,000 to determine what housing options are needed and whether suitable locations can be

found. Municipalities that agree to create housing in responsible growth locations (near town centers, transportation facilities, or existing or planned infrastructure) must meet two criteria: (1) to create Incentive Housing overlay Zones (IHZs) with minimum densities of 6 single-family, 10 duplex or townhouse, or 20 multifamily units per acre; and (2) ensure that at least 20 percent of the units in the zone are affordable to residents earning 80 percent of the area median income or less.

In return, municipalities that meet those two criteria receive from the state (1) zoning incentive payments of \$2,000/unit that could be built in the designated IHZ (e.g. 100 units in the zone = \$200,000; payments are for both market-rate and affordable units); and (2) building incentive payments of \$2,000/multi-family unit or \$5,000/single-family unit at the time that building permits are issued in the IHZ.

The statewide funding is combined with local and federal resources to help buy down the cost of affordable housing units. Local non-profits and non-profit builders are crucial as the builders of these homes. Community banks, such as Liberty Bank, the United Way, and federal sources such as Federal Home Loan Bank of Boston provided low-interest financing to developers.

Municipalities may create as many IHZs as they want, but no single zone can be larger than 10 percent of the municipality's land area, and all zones can total no more than 20 percent of the municipality's land area. To date 55 municipalities have either received or are in the process of applying for grant funding to help implement an Inclusionary Housing Overlay Zone.

In Charlotte, North Carolina, the city and building community worked together in unprecedented fashion to establish affordable housing strategies that both worked for the building industry and addressed Charlotte's problems with concentrated low-income housing. Housing Charlotte 2007 was a combined city and community task force recommending that the city explore giving a developer conventional financial incentives to include low-income units, such as density bonuses and expedited permitting processes.

More innovative approaches suggested would be to use money from the city's Housing Trust Fund to help builders comply with regulations that increase the cost of building, such as the city's tree ordinance and Urban Street Design Guidelines; subtle re-zoning techniques, such as re-introducing duplex zoning in single family communities, to allow

for affordable higher density re-zoning in stable neighborhoods; and other locally financing sources and tax credits to assist developers building affordable housing.

The city of Boulder, Colorado has some of the most expensive housing in the state and scarce land available for new construction. In order to provide an affordable, single-family option for residents, Thistle Communities and Allison Management partnered to develop Yarmouth Way, a 25unit development featuring 10 affordable units and 15 modestly priced market-rate units.

Approximately three-quarters of the city's permanently affordable homes are one- or two-bedroom units, and less than 10 percent of these affordable properties are single-family detached units. This project includes a mix of attached townhomes, duplexes, and single-family detached homes. The non-profit and for-profit development team partnered to acquire a vacant parcel and the ratio of market-rate to affordable units allowed the sales of market-rate homes to offset the losses associated with the deed-restricted units. The project's 10 deed-restricted units constitute 40 percent of the development, double the number of affordable units required under Boulder's ordinance.

The lesson to be learned from this model is through the development of offsite units that is required by the city of units cannot be build onsite. The developers coordinated directly with another developer to meet their 5-unit obligation at Yarmouth Way, with the Yarmouth Way developers receiving a \$100,000 in-lieu payment for each additional affordable unit provided. In addition to the transfer of in-lieu fees, the project benefitted from financial assistance in the form of an interest-free loan for predevelopment costs provided by NeighborWorks America.

CONCLUSION

Households continue to struggle to find housing that meets their needs at a price they can afford. Many are still forced to commute long distances, pay a disproportionate share of their incomes on housing, or live in housing that simply does not meet their needs.

The reality is that inclusionary zoning may not work at all in some markets, and may actually worsen the shortage of affordable housing in others. In fact, as pointed out through the case studies described in this paper, inclusionary zoning often provides far less affordable housing and in a far more cumbersome way than many of the traditional affordable housing programs such as HOME, CDBG, non-profits and the low income housing tax credit have been able to provide for.

An interesting phenomenon related to the recession is the impact it had on inclusionary zoning programs. Inclusionary zoning units that are repossessed by the bank need to be resold to below market rate incomes, but often this can be difficult to ensure in the public auction process. It added yet another layer of complexity and challenge to an already tedious affordable housing program.

The research by Abt Associates demonstrates that there are successful alternatives to inclusionary zoning that can have a far greater impact in meeting the housing needs of low- and moderate-income families.