

Inclusionary Zoning 101

Rising house prices over the last decade have left even moderate-income households in many areas of the country in search of “affordable housing.” In response to the need for affordable housing, many communities have turned to inclusionary zoning. Inclusionary zoning, also called inclusionary housing, is the establishment of zoning regulations by local jurisdictions to reserve a specific percentage of residential units affordable for lower and moderate-income households in new residential developments. The principal purpose of inclusionary zoning is to increase the supply of affordable housing in conjunction with market rate housing.

The underlying assumption of inclusionary zoning is that private markets fail to provide enough affordable housing without government intervention. The extent to which this is true varies by market, and by the definition of “affordable” housing being considered. In several coastal housing markets, such as Washington, D.C., Boston, New York, and several cities in California, a moderate-income household cannot afford to buy a house. However, in the Midwest and South, a household at the median income for the area had sufficient income to qualify to purchase a median-priced house.¹ If affordable housing is intended not for moderate-income households but for low-income households (those from 51-80 percent of area median income, or AMI) or very low-income households (those with incomes at or below 50 percent of AMI), then all regions of the country have a serious shortage of affordable housing.

This paper provides an overview of inclusionary zoning for local public/private partnerships interested in considering or supporting inclusionary zoning in their area, including a discussion of the controversies surrounding inclusionary zoning, and the evidence for each side of the argument. It is not designed to be exhaustive; a great deal has been written about inclusionary zoning recently, so instead the paper is intended to summarize the debate over inclusionary zoning.

The next section of the paper provides a brief background of inclusionary zoning. Sections 2 and 3 discuss the pros and cons of inclusionary zoning. Section 4 addresses specific issues to consider when evaluating or designing an inclusionary zoning ordinance. Section 5 draws from existing research to summarize “best practices” for inclusionary zoning ordinances. A list of websites and papers on the topic is provided in the appendix.

1. Background

The first inclusionary zoning (also called inclusionary housing) ordinances were passed in Fairfax County, Va., in Montgomery County, Md., and in Palo Alto, Calif. The Fairfax County ordinance, adopted in 1970, was struck down by Virginia courts in 1973 because no state legislation authorizing local inclusionary zoning existed. Fairfax County passed

¹ National Association of Realtors® Housing Affordability Index, first quarter 2006. Downloaded from <http://www.realtor.org/research.nsf/pages/ehspage> on June 13, 2006.

a voluntary inclusionary zoning law in 1990; it became mandatory in 1997. Montgomery County's ordinance has been in effect continually since its adoption in 1974. Palo Alto, Calif., adopted an inclusionary zoning ordinance in 1973. A number of other, mostly small- and medium-size cities adopted inclusionary zoning throughout the 1970s such as Irvine, Calif. (1978), and Newton, Mass. (1977). One study estimates that there are currently about 200 communities with inclusionary zoning ordinances.²

The first large cities to adopt inclusionary zoning were San Diego and San Francisco, in 1992. Other large cities have followed suit, including Boston, Mass. (2000) and Denver, Colo. (2002). Inclusionary zoning is common in California, where local governments are obligated by the state to implement housing plans that produce affordable housing to meet local and regional needs. Currently, 107 cities and counties in California have inclusionary zoning ordinances, including Los Angeles, San Francisco, San Diego, and Davis.³

More recently, inclusionary zoning ordinances either have been or are being adopted in 26 communities in Rhode Island, in a number of communities in Florida, and are being considered in a variety of other cities around the country.

Supporters of inclusionary zoning claim that inclusionary zoning offers a number of benefits in addition to the affordable housing units produced. These include the creation of income-integrated communities, reduced sprawl, creation of the opportunity for people who work in the community to also live in the community, and the ability for a community to balance its housing supply for people of all income levels.

Inclusionary zoning is highly controversial, however, with detractors claiming that the ordinances place the burden of providing affordable housing solely on landowners and builders, can represent an illegal "taking" from builders, that it increases the price of market-rate housing units, and that it reduces residential development activity. The ultimate criticism is that inclusionary zoning is not effective in producing very many affordable units.

In addition to controversy over the concept of inclusionary zoning in general, specific features of inclusionary zoning ordinances vary widely, and there is substantial debate about the best way to design an ordinance. Many observers believe that poorly designed inclusionary zoning ordinances could result in fewer affordable units than communities expect because they either stifle building with unreasonably high demands on developers, or because they offer too lenient an alternative to building the affordable units.

2. Benefits of Inclusionary Zoning

² *Locally Initiated Inclusionary Zoning Programs: A Guide for Local Governments in North Carolina and Beyond*, Anita R. Brown-Graham, ed., School of Government, University of North Carolina at Chapel Hill, 2004.

³ As of March 2003. "Inclusionary Housing in California: 30 Years of Innovation," California Coalition for Rural Housing and Non-Profit Housing Association of Northern California, 2003.

The primary benefit of inclusionary zoning is the affordable units created with limited direct public expenditure. At a time when the federal government is taking less responsibility for providing affordable housing by cutting funds for housing vouchers and other programs, local public funds for affordable housing are in short supply. Affordable housing programs that leverage private-sector funds, such as inclusionary zoning, are seen as a way to stretch taxpayer dollars.

Proponents argue that a number of other benefits may result from inclusionary zoning as well. For example, housing that is affordable to lower- and middle-income workers such as nurses, teachers, and police officers is often located at the fringe of metropolitan areas, where the cost of land is often lower than land closer to jobs and transportation. However, workers traveling longer distances from their jobs to find affordable housing contribute to sprawl that requires expensive new infrastructure as well as road congestion.

Inclusionary zoning can result in affordable units that are closer to jobs and transportation if new development occurs in metropolitan centers that would otherwise be unaffordable. In addition, because of the density bonuses awarded for affordable units, inclusionary zoning can lead to higher-density development. The higher-density and infill development that can result from inclusionary zoning reduces demand for fringe development. This in turn reduces the need for new infrastructure, shortens commutes, and reduces congestion.

Housing that is affordable to lower- and middle-income workers may also help to ensure that cities will remain economically competitive by preventing workers from leaving the metropolitan area entirely in search of cheaper housing or forcing employers to pay higher wages. In addition, inclusionary zoning results in neighborhoods that include households from a variety of income levels, reducing racial and economic segregation.

3. Costs of Inclusionary Zoning

Proponents of inclusionary zoning often argue that it produces affordable housing with little in the way of public expenditure, and assume that developers will continue to build albeit with lower profits.⁴ Economists, however, generally agree that developers do not bear the entire cost of inclusionary zoning requirements, which acts as a tax on development. Costs are likely to be shared by developers, landowners, and homebuyers.⁵

⁴ See, for example, Andrew Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 *FORDHAM URB. L.J.* 23 (1996); and Brunick, Nick, Lauren Goldberg, and Susannah Levine, "Large cities and inclusionary zoning," *Business and Professional People for the Public Interest*, November 2003.

⁵ For research on the incidence of the costs of impact fees, which also act as a tax on development, see Yinger, John, "The Incidence of Development Fees and Special Assessments," *National Tax Journal*, Vol. 51 No. 1, March 1998; Ihlanfeldt, Keith and Timothy Shaughnessy, "An Empirical Investigation of the Effects of Impact Fees on Housing and Land Markets." Cambridge, MA: Lincoln Institute of Land Policy, 2002; Nelson, Arthur and Mitch Moody, "Paying for Prosperity: Impact Fees and Job

The extent to which each party bears the burden depends on the elasticity of supply and demand in the market, or the sensitivity of each party to changes in price. For example, if homebuyers' demand for housing is highly sensitive to an increase in price, and demand drops sharply in response to an increase, then developers will be unable to pass on the costs of inclusionary zoning and will bear much of the cost. Sensitivity to changes in price depends in part on available substitutes, such as housing in a neighboring town without an inclusionary zoning ordinance. More fundamentally, developers question why they should be responsible for meeting a societal need for affordable housing.

In addition, critics of inclusionary zoning argue that it creates a more bureaucratic and less competitive market that favors big builders – with the political connections, experience, and deep pockets to navigate a lengthy negotiation and permit process – over smaller builders.

Lessons on Inclusionary Zoning From Watsonville, California

The case of Watsonville, California, demonstrates that an overly burdensome inclusionary zoning ordinance can discourage housing construction altogether. In 1990, Watsonville enacted a law that required that 25 percent of new homes be affordable. Over the next ten years, a total of only nine affordable units were built because very little new construction occurred.

Watsonville Mayor Judy Doering-Nielsen said, “Our inclusionary housing ordinance was so onerous that developers wouldn't come in.”⁶

The ordinance was revised in 2000 to lower affordable housing requirements from 25 percent to 15 percent for developments with between 7 and 50 units and to 20 percent for larger developments. Construction approved or pending approval since then is expected to increase the city's housing stock by 12 percent.

To partially offset the cost to developers of inclusionary zoning, cities often offer benefits such as density bonuses, streamlined permitting, fee waivers, and reduced parking requirements. Some also offer direct subsidies, although these are less common.⁷ Proponents of inclusionary zoning particularly view density bonuses as a valuable contribution by the community to developers, because the ability to build at higher densities than otherwise permitted allows developers to earn more revenue per acre of land.

Growth,” *Cities and Suburbs Reports*; Washington: The Brookings Institution, 2003; Watkins, W.A., “Impacts of Land Development Charges.” *Land Economics*. 75(3):415-424, 1999; and Rosen, David, “Inclusionary Housing and Its Impact on Housing and Land Markets,” *NHC Affordable Housing Policy Review*, Vol. 3, No. 1, February 2004.

⁶ Morgan, Terri, “Loosened Rules Lure Developers to Watsonville,” *San Jose Mercury News*, Sat Oct. 18, 2003.

⁷ A few cities, such as San Francisco and Boston, offer little in the way of cost offsets, and believe that development continues unabated because of the strength of the housing market. (*Locally Initiated Inclusionary Zoning Programs: A Guide for Local Governments in North Carolina and Beyond*, Anita R. Brown-Graham, ed., School of Government, University of North Carolina at Chapel Hill, 2004.)

Critics disagree, arguing that density bonuses have limited usefulness for a variety of reasons. Among others, the developed land may already be at the maximum economically feasible density; consumers may prefer larger lot sizes; environmental factors may be the limiting factor in development, not zoning; and higher density development may meet increased opposition from neighboring property owners.⁸

Critics also argue that the cost to the government is undercounted, because the loss of property tax revenue is ignored. The artificially low prices on affordable units constructed under inclusionary zoning carry lower assessed values, thereby costing local governments lost property tax revenue each year.⁹ In addition, inclusionary zoning creates an administrative burden for local governments, which must review development proposals, track eligibility for affordable housing units, and monitor long-term affordability agreements that often require the house price appreciation be restricted or shared between the city and the seller.

Perhaps most importantly, critics argue that inclusionary zoning may stifle residential development, thereby raising the costs of housing generally.¹⁰ Powell and Stringham (2004), in a study for the Reason Public Policy Institute, examined the impact of inclusionary zoning on residential development in the Bay Area. They compared housing production in 33 cities with data for seven years prior and seven years following inclusionary zoning, and found that 10,662 fewer homes were produced during the seven years after the adoption of inclusionary zoning.¹¹ Decreased housing production increases the price of housing generally, and harms households of all income levels. In a process called filtering, lower-income households purchase homes vacated by higher-income households when they move into newly constructed homes. Without new units being produced, prices of existing units are bid up by higher-income households, resulting in a decline in housing affordable to lower-income households.

⁸ Powell, Benjamin, and Stringham, Edward, "Housing Supply and Affordability: Do Affordable Housing Mandates Work?" Policy Summary No.318, Reason Foundation, April 2004.

⁹ Ibid.

¹⁰ See, for example, *ibid* and Ellickson, Robert, "The Irony of 'Inclusionary' Zoning," 54 S. CAL. L. REV. 1167, 1981, reprinted in Bruce Johnson (ed.) *Resolving the Housing Crisis*, 1982.

¹¹ Powell, Benjamin, and Stringham, Edward, "Housing Supply and Affordability: Do Affordable Housing Mandates Work?" Policy Summary No.318, Reason Foundation, April 2004.

Inclusionary Zoning Production

Jurisdiction	Units			Per capita	
	Total units produced	produced as of	Year law adopted	Annual production	annual production
Boston, MA	606	2005	2000	121 units	4,328
Boulder, CO	380	2005	2000	156 units	1,733
Cambridge, MA	131	2003	1999	33 units	3,071
Davis, CA	1,500	2003	1987	94 units	642
Denver, CO	3,395	2005	2002	1132 units	481
Fairfax Co., VA	1,735	2003	1990	133 units	7,490
Loudoun Co., VA	707	2003	1993	71 units	2,389
Montgomery Co., MD	11,210	2003	1974	387 units	2,374
Prince George's Co., MD	1,608	*1996	1991	320 units	2,579
Sacramento, CA	465	2003	2000	155 units	2,616
San Diego, CA	1,200	2003	1992	109 units	11,199
San Francisco, CA	90	2003	2002	90 units	8,133
Somerville, MA	45	2005	1991	3 units	25,826

*Law was repealed in 1996.

Source: Massachusetts Association of Community Development Corporations May 2006.

Other authors point out that Powell and Stringham's study may indicate a *correlation* between adoption of inclusionary zoning and a drop in building activity, but does nothing to establish *causation* – that is, that inclusionary zoning and not some other factor caused the decline.¹² To establish causation, it is necessary to compare changes in building activity in both cities with and without inclusionary zoning ordinances. One study that did this found that adoption of inclusionary zoning was not associated with a negative effect on housing production. This study, by Rosen (2004), examined 28 cities in California with and without inclusionary zoning ordinances from 1981 to 2001. He

¹² For example, see Basolo and Calavita, "Policy Claims With Weak Evidence: A Critique of the Reason Foundation Study on Inclusionary Housing Policy in the San Francisco Bay Area," June 2004.

found that the factor most closely related to the housing production rate was the unemployment rate.¹³

Critics argue and some proponents agree that inclusionary zoning is not a complete solution to the affordable housing crisis facing many cities. It is generally acknowledged that it does not produce enough units to meet the entire need for affordable housing units – it must be used in combination with several other strategies.

Last, inclusionary zoning works best in “hot” real estate markets, where rising house prices increase developers’ willingness to make concessions in order to obtain building permits. Inclusionary zoning is likely to be less effective in “cool” housing markets, where builders may seek development opportunities in other towns rather than submit to inclusionary zoning requirements. For example, in Montgomery County, the jurisdiction with the longest experience with inclusionary zoning, the rate of production of affordable units decreased following the economic downturn of the early 1990’s. The county reports there is little that can be done to stimulate construction of affordable units during slow housing sales periods.¹⁴

4. Elements of an Inclusionary Zoning Ordinance

Once a local government decides to adopt an inclusionary zoning ordinance, there are a number of factors to consider in crafting the ordinance to ensure that it is effective.

Threshold Size

Inclusionary zoning ordinances typically establish a minimum project size to which the policies are applied. Ideally, this threshold should be large enough to contribute to the financial feasibility of the required affordable units.¹⁵ In a few cases, there is no minimum threshold established, and the ordinance applies to all residential development. Generally, however, threshold sizes for new developments range from a low of two units (e.g., Los Altos, Calif., and Santa Monica, Calif.) to a high of 50 units (e.g., Chula Vista, Calif., Montgomery County, Md., and Fairfax County, Va.). In some cases, large redevelopment projects (i.e., 10 acres or 50+ units) will also trigger an inclusionary requirement.

¹³ Rosen, David, “Inclusionary Housing and Its Impact on Housing and Land Markets,” NHC Affordable Housing Policy Review, Vol. 3, Issue 1, February 2004.

¹⁴ “Summary and History of the Moderately Priced Dwelling Unit (MPDU) Program in Montgomery County, Maryland,” Montgomery County website, accessed August 10, 2006: http://www.montgomerycountymd.gov/dhctmpl.asp?url=/content/dhca/housing/housing_P/Summary_and_History.asp#History.

¹⁵ A minimum threshold size is particularly helpful to smaller builders, who are more likely than larger development companies to undertake small projects. Smaller builders may have more difficulty obtaining the substantial financing required to cover the cost of the affordable units during construction. Smaller builders may also have more difficulty taking advantage of a density bonus.

Percentage Set-Aside

The percentage of affordable units to be included in new development should consider the financial feasibility of producing the affordable units, the incentives or cost offsets available to developers to produce the affordable units, the need for affordable units and the strength of the local housing market. Nationally, inclusionary zoning ordinances have required developers to set aside 5–35 percent of their new housing developments as affordable, although requirements of 10-25 percent are most common. The share of affordable units required often varies depending on whether the units will be for homeownership or rental, whether the income targeted is moderate, low, or very low, and even the income level targeted by the market-rate units in the development (i.e., 120 percent of area median income (AMI) versus 200 percent AMI).

Cost Offsets

One of the primary cost offsets offered to developers in exchange for producing affordable units under an inclusionary zoning ordinance is a density bonus. A density bonus allows the developer to construct a certain number of additional units beyond what is normally allowed under the current zoning ordinance in exchange for providing a specified number of affordable units.

In addition to density bonuses, there are several ways of reducing the costs of a development to enable the construction of affordable housing. For example, developers can be given waivers from development standards; receive waivers for fees including impact, demolition, water and sewer charge and utility connection fees; may be subject to reduced parking requirements; or be offered a streamlined permitting and approval process.¹⁶

Mandatory vs. Voluntary

Mandatory zoning is recommended where there is sufficient density allowed to feasibly develop mixed-income projects and where there is “safe harbor” or alternatives for sites where inclusionary zoning is not financially or physically feasible. The majority of communities, regionally and nationally, that have adopted inclusionary zoning ordinances have made them mandatory requirements, administered as an integral step in the development process. Mandatory ordinances have been shown to be more effective in producing affordable housing units than voluntary or incentive-based zoning ordinances. Most inclusionary programs are mandatory, but allow flexibility in the manner in which requirements are met. Typically, binding inclusionary commitments must be made when a developer or builder seeks sub-division plat approval or issuance of building permits.¹⁷

¹⁶ Note that inclusionary zoning that requires a conditional use permit will add expense for the developer. To avoid this, density bonus units and other incentives provided under inclusionary zoning should be allowed as of right.

¹⁷ There are also “hybrid” inclusionary zoning ordinances, which require affordable housing units to be included only if the developer seeks government aid.

Location and Appearance of Units and Type of Housing Stock

Quality design is a critical component of mixed-income developments. Constructing affordable units that are similar in outward appearance and distributed throughout the development contributes to cohesiveness in the physical appearance of a community, and avoids isolating or stigmatizing residents of affordable units. However, to improve the feasibility of constructing the affordable units, they are often allowed to be smaller than the market-rate units and to have lower-quality finishes. In addition, to allow flexibility developments may be allowed to include a mix of housing types and lot sizes, such as single-family units, duplexes, triplexes, and quadraplexes.

Timing of Development

In drafting an inclusionary zoning ordinance, it is important for local jurisdictions to pay attention to the timing of the construction of affordable housing units in proposed developments. Whether due to availability of financing, community opposition or any number of possible challenges, the development of affordable units is often delayed. The inclusionary zoning ordinance can provide guidance on when affordable units should be constructed. In addition, the inclusionary zoning ordinance can stipulate penalties as a result of undeveloped affordable units. Bonds or the requirement of phased construction plans can be used to encourage developers to construct affordable units either before or concurrent with market-rate units. For multifamily units, a local community may withhold a certificate of occupancy until the affordable units are made available.

Alternatives to On-site Development

The goal of inclusionary zoning is to make affordable units available throughout the community in subdivisions, condominium developments, and multifamily buildings. However, communities sometimes provide the developer with alternatives to on-site construction of the affordable units under special circumstances.

Off-site Construction

If a developer proves to the Planning Board that the provision of units on site is infeasible due to environmental constraints or financial considerations, the developer may be allowed to provide the affordable units off-site.

In Lieu of Fees

Another alternative to providing on-site units is to allow the developer to pay “in lieu of fees” dedicated to affordable housing in the town or an Affordable Housing Trust Fund. Some ordinances require developers to show that constructing affordable units would constitute a unique hardship, or that a fee would produce a greater benefit. Ideally, in lieu of fees should be sufficient to allow the community to produce the same number of affordable units regardless of whether they are part of the original development or built elsewhere by another developer.

Land Dedication

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A third alternative to providing on-site units is to allow the developer to substitute a donation of land suitable for development that can accommodate affordable units in place of constructing the units. Ordinances may require the developer to show that constructing the affordable units would constitute a unique hardship. This may be particularly useful in communities with very high land prices, where land constitutes a significant portion of the total cost of providing affordable units. When used, land dedicated for affordable units should accommodate a greater number of affordable units than the developer would otherwise have been required to build. However, communities should take care to avoid concentrations of housing units designated for lower-income residents, or placing affordable units in remote locations with limited access to public transportation and job opportunities.

Developer credit transfer

Last, developers are sometimes allowed to build the affordable housing off-site or receive credit for excess affordable units built in previous projects through credit transfers.

Income Groups to be Served

“Affordable housing” must be defined by the inclusionary zoning and a methodology established for determining the sales price or rent of an affordable unit. Inclusionary zoning ordinances generally target households with “low” or “very low” incomes as defined by HUD, where low-income is household income from 50 to 80 percent of the area median income, and very low-income is below 50 percent of the area median income. Some ordinances, however, allow affordability to be defined to include moderate-income households, or those with incomes up to 120 percent of the area median income. Income requirements are generally more stringent for rental units than for units intended for ownership.

In the case of dwelling units for sale, housing that is affordable means housing in which principal, interest, taxes, and insurance constitute no more than 30 percent of the gross household income for a particular income target. In the case of dwelling units for rent, housing that is affordable means housing for which the rent, heat, and utilities other than telephone constitute no more than 30 percent of the gross annual household income for a given income target, adjusted for household size.

Duration of Affordability

In order to preserve units produced under inclusionary zoning ordinances as affordable, a control period is generally established. During this period, rental and ownership units must remain affordable. New tenants and buyers must meet income requirements, and the rent or sales price must be established according to the current area median income (interest rates may also be a factor for ownership units). Home buyers are typically allowed to keep a portion of the proceeds from the sale or to earn a specified rate of appreciation on the unit.

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Changes in Duration of Affordability in MPDUs

Montgomery County has lengthened the duration of affordability of units created under its inclusionary zoning law (called moderately priced dwelling units, or MPDUs) over time. Initially, both rental and for-sale affordable units were price-controlled for only five years. After this period, units could be sold or rented at market rates. Amendments to the law extended the affordability control period to 10 years in 1981, and then to 20 years for rental units in 1989. The 1989 changes also required owners to pay a portion of the profit from a market-rate sale of the property to the Housing Initiative Fund even after the expiration of the control period.¹⁸

Despite these changes, by 2001, the county was forecasting the loss of over 2,000 for-sale MPDUs to expiration of the control period over the next decade.¹⁹ A subsequent change in the MPDU law extended the control period to 30 years for homes purchased after April 1, 2005. This 30-year control period renews each time the MPDU is sold within the existing control period. The same law extended the control period for rental MPDUs to 99 years.

Many ordinances around the country require permanent affordability; 30 years is also a common standard. A few jurisdictions require no control period on for-sale units and as little as five years for rental units. Legal mechanisms such as deed restrictions and covenants can be used to guarantee that units remain affordable for the required time period. Deed restrictions, for example, are attached to the deed of each affordable unit, setting forth affordability parameters including how the maximum resale price is to be determined and what the income qualifications are. Another mechanism municipalities or other monitoring agents have used is to reserve the right of first refusal at resale of the unit. This ensures an opportunity for continued participation by the community in the resale process and an obligation to monitor resale prices.

Monitoring of Long-Term Affordability

Monitoring is important to assure continued compliance with the initial affordability requirements. A local agency or other monitoring agent must be established for low- and moderate-income housing developed under inclusionary zoning. This agent will be responsible for verifying applicants' income and establishing the resale price or rent. It is also important that buyers understand the resale restrictions of their unit. The monitoring agent may need to play a role in explaining these restrictions to buyers.

Consideration of Legal Objections to Inclusionary Zoning

¹⁸ Brown, Karen Destorel, "Expanding Affordable Housing Through Inclusionary Zoning: Lessons From the Washington Metropolitan Area," Brookings Institution Center on Urban and Metropolitan Policy, October 2001.

¹⁹ "Technical Supplement to the Montgomery County, Maryland Housing Policy: Montgomery County – The Place to Call Home," Department of Housing and Community Affairs, July 2001.

A well-designed inclusionary zoning ordinance can avoid (or successfully withstand) many of the legal challenges that have been brought against ordinances in cities such as San Diego and Tallahassee. Objections to inclusionary zoning, primarily by developers, usually allege one or more of three Constitutional violations: the prohibition against taking without just compensation, the right to due process, and the right to equal protection.²⁰

San Diego's Legal Struggle Over Inclusionary Zoning

The City of San Diego, California, adopted a city-wide inclusionary zoning ordinance in 2003. The ordinance requires a 10 percent set-aside on all developments of 10 or more units, although developers have the option to pay a fee in lieu of building affordable units on-site. The fee in lieu of payment is calculated based on the square footage of the project, and rose from \$1.00 per square foot the first year to \$2.50 per square foot the third year. In July 2006, the fee rose to \$7.31 per square foot.

Shortly after the ordinance was adopted, the Building Industry Association (BIA) of San Diego County challenged the policy. In its lawsuit, the BIA contended that the law is unconstitutional because "the U.S. and California Constitutions prohibit government agencies from imposing conditions on a development project that are not reasonably necessary to mitigate the impacts of that project."

A judge ruled in May 2006 that the law was an unconstitutional taking because it was unfairly cumbersome to builders. The ordinance failed to include a waiver provision allowing developers to argue that the law should not apply to them because their housing projects do not contribute to the city's affordable housing problem.²¹

In July 2006, the city and the BIA reached an agreement under which language permitting requests for waivers will be included. In addition, the affordable housing fee levied on projects will be calculated when a development application is submitted and determined to be complete, instead of when building permits are pulled. Some developers will be able to escape paying higher housing fees, which increased in July, and there will be less uncertainty about the cost of developers' affordable housing obligations.²²

Although local laws and precedents are clearly crucial, in general it is important to ensure that the ordinance substantially advances a legitimate state interest (providing necessary affordable housing). It must not be administered ad hoc, but be broadly applicable to developers, and there must be clear implementation standards and

²⁰ For a much more thorough discussion of legal issues associated with inclusionary zoning, see Deborah Collins and Michael Rawson, "Avoiding Constitutional Challenges to Inclusionary Housing," *NHC Affordable Housing Policy Review*, Vol. 3, Issue 1, February 2004.

²¹ McLaughlin, Evan, "Housing Law Illegal, Judge Says," *Voice of San Diego*, May 25, 2006.

²² Weisberg, Lori, "City Amends Affordable-Housing Law," *San Diego Union Tribune*, July 20, 2006.

procedures, especially for reducing, waiving, or mitigating the requirements of the ordinance.²³

²³ Deborah Collins and Michael Rawson, “Avoiding Constitutional Challenges to Inclusionary Housing,” *NHC Affordable Housing Policy Review*, Vol. 3, Issue 1, February 2004.

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