National Survey of Statutory and Case Law Authority for Inclusionary Zoning

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

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National Association of Home Builders

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I. INTRODUCTION AND EXECUTIVE SUMMARY.

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

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

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

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

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

- thirteen states have statutes or regulations that either expressly authorize inclusionary zoning (using the actual words "inclusionary zoning") or clearly imply such authority by granting broad powers to promote affordable housing (Connecticut, Florida, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Virginia);

- seven states have no express authorization for inclusionary zoning, but one or more major municipalities in the state law have adopted inclusionary zoning programs (California, Georgia, Idaho, Maine, New Mexico, New York, and Washington);

- two states (Texas and Oregon) prohibit inclusionary zoning by statute;

- in two states (Colorado and Wisconsin), inclusionary zoning ordinances have been invalidated as conflicting with the state's prohibition on rent control; and

- in the remaining 26 states,[1] there is no express or implied authorization or prohibition, and authority to enact inclusionary zoning will depend on home rule powers, which vary widely, and the particular characteristics and facts of the proposed inclusionary zoning ordinance.

Because there is **relatively little statutory authority and case law guidance** on inclusionary zoning, we conclude that absent a relatively clear statutory or case law prohibition, the best strategy for NAHB and its members is to challenge proactively the **practicality,**

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[1] Alabama, Alaska, Arizona, Arkansas, Delaware, Hawaii, Indiana, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wyoming.

feasibility, and effectiveness of the proposed program. Government intervention in the housing market is a highly complicated undertaking, and in our experience and review of inclusionary zoning programs across the country, their most common failing is to omit, fail to address, or vaguely define critical details. This reality is the subject of Section V, a discussion of how to deal with the practical aspects of inclusionary zoning programs.

II. DISCLAIMER.

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

III. SUMMARY OF RESEARCH SCOPE AND METHOD.

Our research was undertaken between August 2006 and February 2007, and consisted of three parts: a 50 state survey of state-level statutes and regulations; a survey of court decisions challenging inclusionary zoning; and a review of significant municipal inclusionary ordinances and programs. We relied on the LexisNexis database for our research.

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

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

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

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

Headnotes ("inclusion! w/5 zon!) and date aft 1/1/1990 – this search produced 35 cases, most of which were irrelevant;[2]

Opinion ("inclusionary zoning") and date aft 1/1/1990 – this search produced 19 cases, some of which were duplicative of the first search; and

Opinion ("inclusionary zoning") and date between 1/1/1970 and 1/1/1990 – this search produced 12 cases, many of which were duplicative of the first search.

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

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

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

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[2] For instance, this search retrieved a number of cases from Ohio in which a court had written, "Inclusion of conditional use provisions in zoning regulations." Other cases included similar, irrelevant statements that technically fit our search term, but had nothing to do with inclusionary zoning.

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

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

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

Clay Wirt, "Dillon's Rule," 24 Virginia Town & City, no. 8, at 12-15 (Aug. 1989), available at http://www.nlc.org/about_cities/cities_101/154.cfm (last visited March 2, 2007).

Home Rule Powers: Home rule is a delegation of power from the state to its sub-units of government (counties, municipalities, towns or townships, or villages). The power is limited to specific fields, and subject to judicial interpretation. Home rule creates local autonomy and limits the degree of state interference in local affairs.

There are four primary areas in which "home rule" powers are exercised by governments:

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

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

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

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

National League of Cities, Home Rule, http://www.ncl.org/about_cities/cities_101/153.cfm (last visited March 2, 2007).

Set forth on the next five pages is a summary of the 50 state survey, followed by state-by-state descriptions.

Summary of State Authority

STATE	INCLUSIONARY ZONING STATUTE	HOME RULE STATUS	INCLUSIONARY ZONING CASE LAW
Alabama	None	Dillon's Rule	None
Alaska	None, but broad zoning enabling statute, liberal house rule	By state statute, liberally construed	None
Arizona	None, and 2006 property rights measure makes inclusionary program unlikely	Structural home rule	None
Arkansas	None	Home rule (functional and structural powers)	None
California		Broad functional and structural home rule	*Home Builders Ass'n v. City of Napa*, 90 Cal. App. 4th 188 (2001)
Colorado	None, but Denver and Boulder have enacted ordinances	Broad functional and structural home rule	*Town of Telluride, Colo. v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30 (Colo. 2000)
Connecticut	Yes, *see* p. 17	Structural home rule, but Dillon's Rule with respect to municipal powers	None
Delaware	None	Functional home rule	None
Florida	Yes, *see* p. 18. Ordinances in Tallahassee and Palm Beach County.	Functional and structural home rule	None
Georgia	None, but ordinance adopted in Fulton County	Functional and structural home rule	None
Hawaii	None	Functional and structural home rule	None

STATE	INCLUSIONARY ZONING STATUTE	HOME RULE STATUS	INCLUSIONARY ZONING CASE LAW
Idaho	None. Voluntary program in Ketchum.	Dillon's Rule, but home rule police powers	None
Illinois	Yes, *see* p. 20	Structural and broad functional home rule	None
Indiana	None	Functional home rule	None
Iowa	None	Structural and limited functional home rule	None
Kansas	None	Functional, structural and fiscal home rule	None
Kentucky	None	Functional and structural home rule	None
Louisiana	Yes, *see* p. 25	Broad functional, structural, and fiscal home rule	None
Maine	None, but Portland has adopted voluntary ordinances	Functional and structural home rule	None
Maryland	Yes, *see* p. 27	Structural and functional home rule	*Montgomery County v. May Dept. Stores, Co.*, 721 A.2d 249 (Md. 1998)
Massachusetts	Yes, *see* p. 28	Limited functional, structural, and fiscal home rule	*Dacey v. Town of Barnstable* (2000) (unpublished)
Michigan	None (as of 3/07, bill pending in legislature to authorize)	Functional, structural, and fiscal home rule (liberally construed)	None
Minnesota	Yes, *see* p. 31	Functional and structural home rule	None

STATE	INCLUSIONARY ZONING STATUTE	HOME RULE STATUS	INCLUSIONARY ZONING CASE LAW
Mississippi	None	Functional and structural home rule	None
Missouri	None	Functional, structural, and fiscal home rule	None
Montana	None	Functional and structural self-government powers (not home rule)	None
Nebraska	None	Dillon's Rule	None
Nevada	Yes, *see* p. 34	Dillon's Rule	None
New Hampshire	Yes, *see* p. 35	No powers beyond authority to adopt and amend local charter and establish form of government	None
New Jersey	Yes, *see* p. 36	Functional, limited structural, and limited fiscal home rule (but home-rule provisions must be broadly construed)	*Southern Burlington County NAACP v. Mount Laurel Township*, 92 N.J. 158, 456 A.2d 390 (1983) ("*Mount Laurel II*"); *Holmdel Builders Assoc. v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990)
New Mexico	None, but Santa Fe has adopted an ordinance	Liberally construed structural and functional powers, but no fiscal authority	None
New York	None, but New York City has adopted an ordinance	Functional and structural, but limited fiscal home rule	None

STATE	INCLUSIONARY ZONING STATUTE	HOME RULE STATUS	INCLUSIONARY ZONING CASE LAW
North Carolina	None	Modified Dillon's Rule; structural home rule	None
North Dakota	None	Strong home rule, maximum self-government	None
Ohio	None	Strong home rule, full structural, functional, and fiscal powers	None
Oklahoma	None	Structural home rule	None
Oregon	Yes, *see* p. 42 (inclusionary prohibited)	Structural home rule	None
Pennsylvania	None	Structural home rule	None
Rhode Island	Yes, *see* p. 43	Structural home rule	None
South Carolina	None	Strong home rule, full structural, functional, and fiscal powers that must be liberally construed	None
South Dakota	None	Very broad home rule	None
Tennessee	None, but ordinances in Memphis and Nashville	Structural home rule	None
Texas	Yes, *see* p. 44 (inclusionary prohibited)	Functional and structural home rule	None
Utah	None	Functional, structural, and limited fiscal home rule	None
Vermont	Yes, *see* p. 45	None	None

STATE	INCLUSIONARY ZONING STATUTE	HOME RULE STATUS	INCLUSIONARY ZONING CASE LAW
Virginia	Yes, *see* p. 46	Dillon's Rule; functional home rule	*The Bd. of Supervisors of Fairfax County v. DeGroff Enterprises, Inc.*, 214 Va. 235, 198 S.E.2d 600 (1973)
Washington	None, but ordinances in Vancouver, King County, Seattle, and Bellevue	Limited structural home rule	None
West Virginia	None	Limited structural home rule	None
Wisconsin	None	Functional and limited structural home rule	*Apartment Assoc. of South Central Wisconsin, Inc. v. City of Madison*, 2006 WI App 192, 722 N.W.2d 614, *review denied*, 727 N.W.2d 35 (Wis. 2006)
Wyoming	None	Functional and structural home rule	None

Alabama

Inclusionary Zoning Statute: None

Case Law: None

Home Rule Provision: Alabama is a Dillon's Rule state. The Alabama Constitution grants limited home rule by restricting the legislature from enacting local laws in a number of enumerated categories. Alabama Const. Art. IV, § 104. (2006)(housing is not listed as an area in which the legislature is prohibited from enacting local laws). However, the Alabama Constitution contains an amendment that grants limited home rule powers to Shelby County. Further, a proposed amendment would provide additional counties with limited home rule granting limited home rule on a county-specific basis. *See* Ala. Const. Amend. Shelby Cty., § 3. (2006), Alabama Const. Amend. Proposed Amendments, Acts 2006, No. 06-317. (2006).

Alaska

Inclusionary Zoning Statute: Alaska has a broad statute, 529.40.040, that authorizes zoning regulations that further the goals of a comprehensive land use plan, and it is a liberal home rule state, but there is no specific mention of or authorization for inclusionary zoning.

Case Law: None

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

Arizona

Inclusionary Zoning Statute: In 2006, the Arizona legislature approved a bill that would have prohibited the use of inclusionary zoning, but this was ultimately vetoed by the governor. *See* http://www.azleg.state.az.us/DocumentsForBill.asp?Bill_Number=SB1479 (last visited on March 1, 2007).

Case Law: None

Discussion: In November 2006, voters in Arizona passed the Private Property Rights Protection Act. A.R.S. §§ 12-1131 *et seq.* ("Proposition 207"). This Act, in addition to restricting eminent domain, entitles landowners to just compensation if, after the date of transfer, a land use law is enacted that diminishes the fair market value of the property. Although it may be possible for municipalities to pass inclusionary zoning regulations under their general authority to enact zoning regulations, *see* A.R.S. § 9-462.01 (2006), it seems unlikely that an Arizona municipality or county would adopt inclusionary zoning and draw an immediate challenge under the new Act.

A.R.S. § 12-1134. Diminution in value; just compensation

A. If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the owner is entitled to just compensation from this state or the political subdivision of the state that enacted the land use law.

B. This section does not apply to land use laws that:

1. Limit or prohibit a use or division of real property for the protection of the public's health and safety, including rules and regulations relating to fire and building codes, health and sanitation, transportation or traffic control, solid or hazardous waste, and pollution control;

2. Limit or prohibit the use or division of real property commonly and historically recognized as a public nuisance under common law;

3. Are required by federal law;

4. Limit or prohibit the use or division of a property for the purpose of housing sex offenders, selling illegal drugs, liquor control, or pornography, obscenity, nude or topless dancing, and other adult oriented businesses if the land use laws are consistent with the constitutions of this state and the United States;

5. Establish locations for utility facilities;

6. Do not directly regulate an owner's land; or

7. Were enacted before the effective date of this section.

C. This state or the political subdivision of this state that enacted the land use law has the burden of demonstrating that the land use law is exempt pursuant to subsection B.

D. The owner shall not be required to first submit a land use application to remove, modify, vary or otherwise alter the application of the land use law to the owner's property as a prerequisite to demanding or receiving just compensation pursuant to this section.

E. If a land use law continues to apply to private real property more than ninety days after the owner of the property makes a written demand in a specific amount for just compensation to this state or the political subdivision of this state that enacted the land use law, the owner has a cause of action for just compensation in a court in the county in which the property is located, unless this state or political subdivision of this state and the owner reach an agreement on the amount of just compensation to be paid, or unless this state or political subdivision of this state amends, repeals, or issues to the landowner a binding waiver of enforcement of the land use law on the owner's specific parcel.

F. Any demand for landowner relief or any waiver that is granted in lieu of compensation runs with the land.

G. An action for just compensation based on diminution in value must be made or forever barred within three years of the effective date of the land use law, or of the first date the reduction of the existing rights to use, divide, sell or possess property applies to the owner's parcel, whichever is later. . . . .

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

Arkansas

Inclusionary Zoning Statute: None

Case Law: None

Home Rule Provision: Arkansas is a home rule state; municipalities have structural and functional powers, including the power to adopt their own charters, and have the authority to exercise all powers relating to municipal affairs. Ark. Code Ann. §§ 14-42-307; 14-43-602 (2006).

California

Inclusionary Zoning Statute: California has enacted a number of incentives to encourage the development of affordable housing. Cal Gov Code § 65582.1 (2007). Relevant provisions of two statutes are provided below.

Cal Gov Code § 65913.1

§ 65913.1. Zoning vacant land for residential use; Definitions

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

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

(2) "Vacant land" does not include agricultural preserves pursuant to Chapter 7 (commencing with Section 51200) of Part 1 of Division 1 of Title 5.

(b) Nothing in this section shall be construed to require a city, county, or city and county in which less than 5 percent of the total land area is undeveloped to zone a site within an urbanized area of that city, county, or city and county for residential uses at densities that exceed those on adjoining residential parcels by 100 percent. For the purposes of this section, "urbanized area" means a central city or cities and surrounding closely settled territory, as defined by the United States Department of Commerce Bureau of the Census in the Federal Register, Volume 39, Number 85, for Wednesday, May 1, 1974, at pages 15202-15203, and as periodically updated.

Cal Gov Code § 65915. Local government incentives, concessions or density bonuses

(a) When an applicant seeks a density bonus for a housing development within, or for the donation of land for housing within, the jurisdiction of a city, county, or city and county, that local government shall provide the applicant incentives or concessions for the production of housing units and child care facilities as prescribed in this section. All cities, counties, or cities and counties shall adopt an ordinance that specifies how compliance with this section will be implemented.

(b)

(1) A city, county, or city and county shall grant one density bonus, the amount of which shall be as specified in subdivision (g), and incentives or concessions, as described in subdivision (d), when an applicant for a housing development seeks and agrees to construct a housing development, excluding any units permitted by the density bonus awarded pursuant to this section, that will contain at least any one of the following:

(A) Ten percent of the total units of a housing development for lower income households, as defined in Section 50079.5 of the Health and Safety Code.

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

(C) A senior citizen housing development as defined in Sections 51.3 and 51.12 of the Civil Code, or mobile home park that limits residency based on age requirements for housing for older persons pursuant to Section 798.76 or 799.5 of the Civil Code.

(D) Ten percent of the total dwelling units in a common interest development as defined in Section 1351 of the Civil Code for persons and families of moderate income, as defined in Section 50093 of the Health and Safety Code, provided that all units in the development are offered to the public for purchase.

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

(c)

(1) **An applicant shall agree to, and the city, county, or city and county shall ensure, continued affordability of all low-and very low income units that qualified the applicant for the award of the density bonus for 30 years or a longer period of time if required by the construction or mortgage financing assistance program, mortgage insurance program, or rental subsidy program. Rents for the lower income density bonus units shall be set at an affordable rent as defined in Section 50053 of the Health and Safety Code. Owner-occupied units shall be available at an affordable housing cost as defined in Section 50052.5 of the Health and Safety Code.**

(2) An applicant shall agree to, and the city, county, or city and county shall ensure that, the initial occupant of the moderate-income units that are directly related to the receipt of the density bonus in the common interest development, as defined in Section 1351 of the Civil Code, are persons and families of moderate income, as defined in Section 50093 of the Health and Safety Code, and that the units are offered at an affordable housing cost, as that cost is defined in Section 50052.5 of the Health and Safety Code. The local government shall enforce an equity-sharing agreement, unless it is in conflict with the requirements of another public funding source or law. The following apply to the equity-sharing agreement:

(A) Upon resale, the seller of the unit shall retain the value of any improvements, the down payment, and the seller's proportionate share of appreciation. The local government shall recapture any initial subsidy and its proportionate share of appreciation, which shall then be used within three years for any of the purposes described in subdivision (e) of Section 33334.2 of the Health and Safety Code that promote homeownership.

(B) For purposes of this subdivision, the local government's initial subsidy shall be equal to the fair market value of the home at the time of initial sale minus the initial sale price to the moderate-income household, plus the amount of any down payment assistance or mortgage assistance. If upon resale the market value is lower than the initial market value, then the value at the time of the resale shall be used as the initial market value.

(C) For purposes of this subdivision, the local government's proportionate share of appreciation shall be equal to the ratio of the initial subsidy to the fair market value of the home at the time of initial sale.

Case Law: *Home Builders Ass'n v. City of Napa*, 90 Cal. App. 4th 188 (2001).

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

California law is generally very supportive of affordable housing. For example, Cal. Gov Code § 65915 (2006) specifically authorizes incentive zoning. Cal. Gov Code § 65915 (2006) requires cities and/or counties to grant density bonuses, incentives and concessions to applicants seeking to build houses for low income or elderly populations.

However, in 2001, California enacted the Costa-Hawkins Rental Housing Act, which preempts and prohibits certain forms of rent control. Cal. Civ. Code 1954.50-1954.535 (2001). While no courts have used this Act as a basis to invalidate inclusionary zoning, whether inclusionary ordinances may be invalidated as violating the Cook-Harkins Act is a hot topic in the California legal community, particularly in light of the recent Wisconsin case, *see* p. 50, below.

Home Rule Provision: California has broad structural and functional home rule. Local governments have the authority to make and enforce all ordinances and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their charters and in the general laws. Cal Const, Art. XI §§ 5, 7 (2006). Local governments also have the ability to make their own charters. Cal Const, Art. XI § 3 (2006). For rules on county charters, *see* Cal Const, Art. XI § 4.

Colorado

Inclusionary Zoning Statute: None

Case Law: *Town of Telluride, Colo. v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30 (Colo. 2000).

Discussion: In *Town of Telluride, Colo. v. Lot Thirty-Four Venture, LLC*, the Supreme Court found that an inclusionary zoning ordinance was a form of rent control, which is prohibited under state law. C.R.S. 38-12-301 (2006). Because rent control is a matter of statewide concern, and because the local ordinance conflicted with a state statute, the ordinance was held invalid.

Denver has an inclusionary zoning ordinance that applies to for-sale developments of 30 or more units. Revised Municipal Code, City and County of Denver, Chapter 27, Art. IV, available at http://www.municode.com/resources/gateway.asp?pid=10257&sid=6 (last visited on March 1, 2007). Boulder recently revised its inclusionary zoning program, which applies to all residential developments. *See* http://www.bouldercolorado.gov/files/PDS/New%20LUC/Training%20Copies/9_13_tra.pdf (last visited on March 5, 2007).

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

Connecticut

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

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

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

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

Case Law: None.

Home Rule Provision: Connecticut allows structural home rule, but is a Dillon's' Rule state with respect to municipal powers. Two Connecticut municipalities, Stamford and Hamden, have adopted inclusionary zoning ordinances. Stamford's ordinance is detailed and, amid the City's thriving downtown area, has been applied to several recent multi-family developments. Stamford's ordinance may be found in Section 7.4 of its zoning regulations, available at http://www.cityofstamford.org/filestorage/25/52/138/164/174/755/204/615/617/Zoning_Regulations.pdf (last visited on Feb. 28, 2007).

Delaware

Inclusionary Zoning Statute: None

Case Law: None

Home Rule Provision: Delaware has functional home rule whereby municipalities have the authority to exercise powers of local self government. The Delaware legislature has granted each municipality the power to "amend its charter so as to have and assume all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute." Del. Code Ann. Tit. 22, § 802 (2006). *See also* Delaware Constitution Article II, § 25 (for county-specific zoning authority for Sussex, New Castle, and Kent Counties).

Florida

Inclusionary Zoning Statute: Fla. Stat. Ann. § 163.3202 (2006).

§ 163.3202. Land development regulations

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

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

Florida also adopted in 2006 the Manny Diaz Affordable Housing Property Tax Relief Initiative, regarding disposition of government-owned land for affordable housing, mobile home parks, and comprehensive plan amendments.

Case Law: None

Discussion: Tallahassee has enacted an inclusionary zoning ordinance that requires 10 percent of new homes in developments of 50 or more units to be sold for $159,378. If the development is a rental community, 15 percent of the units must be rented at "workforce rates." Overview available at http://www.talgov.com/planning/af_inch/af_inchouse.cfm (last visited on February 28, 2007). This ordinance has been challenged by the Florida Home Builders Association, however as of the date of this paper, we have not located a decision.

Palm Beach County recently adopted a mandatory Workforce Housing Program that applies to any residential development of more than 10 units. The details are available at http://www.co.palm-beach.fl.us/pzb/Zoning/newsrelease/wkforcehousing.htm (last visited on February 28, 2007).

Home Rule Provision: Florida has structural and functional home rule, whereby municipalities have the authority to enact and revise charters, and are given the authority to perform municipal functions. Fla. Stat. §§ 125.64, 125.82; Fla. Const. Art. VIII, § 2 (2006).

Georgia

Inclusionary Zoning Statute: None

Case Law: None

Discussion: Fulton County amended Section 4.26 of the Fulton County Zoning Resolution in April 2006 to include a voluntary inclusionary zoning program. *See* http://www.fultonecd.org/planning/zoning/ammendments/2005z-0103-inclus-zone.pdf (last visited on March 5, 2007). In return for developing affordable housing, Fulton County offers developers incentives such as density bonuses, a streamlined approval process, and modifications of development standards. This ordinance has a sunset provision and will be revisited after 24 months.

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

Hawaii

Inclusionary Zoning Statute: None

Case Law: None

Discussion: Maui has an inclusionary zoning ordinance that requires developers to price-restrict up to 50 percent of residential developments. Maui County Code Title 2.96, available at http://ordlink.com/codes/maui/index.htm (last visited June 29, 2007).

Home Rule Provision: Hawaii has functional and structural home rule. The legislature has the power to create county governments and each county can exercise the powers conferred to it by the general laws of the state. Hawaii Const. Art. VIII, § 1 (2006). Political subdivisions have the power to frame and adopt charters for their own self-government within such limits and under such procedures as may be provided by general law. Hawaii Const. Art. VIII, § 2 (2006).

Idaho

Inclusionary Zoning Statute: None

Case Law: None

Discussion: The City of Ketchum, Idaho has a voluntary inclusionary zoning program that permits a modification of certain zoning requirements if a developer is constructing affordable housing.

Home Rule Provision: Idaho is a Dillon's Rule state, where the only home rule powers granted to counties or incorporated cities or towns are police powers (*i.e.*, the power to exert local policy powers as well as enact sanitary regulations). Idaho Const. Art. 12, §2 (2006).

Illinois

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

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

For the purpose of promoting the public health, safety, morals, comfort and general welfare, conserving the values of property throughout the county, lessening or avoiding congestion in the public streets and highways, and lessening or avoiding the hazards to persons and damage to property resulting from the accumulation or runoff of storm or flood waters, the county board or board of county commissioners, as the case may be, of each county, shall have the power to regulate and restrict the location and use of buildings, structures and land for trade, industry, residence and other uses which may be specified by such board, to regulate and restrict the intensity of such uses, to establish building or setback lines on or along any street, trafficway, drive, parkway or storm or floodwater runoff channel or basin outside the limits of cities, villages and incorporated towns which have in effect municipal zoning ordinances; to divide the entire county outside the limits of such cities, villages and incorporated towns into districts of such number, shape, area and of such different classes, according to the use of land and buildings, the intensity of such use (including height of buildings and structures and surrounding open space) and other classification as may be deemed best suited to carry out the purposes of this Division; to prohibit uses, buildings or structures incompatible with the character of such districts respectively; and to prevent additions to and alteration or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed hereunder: Provided, that permits with respect to the erection, maintenance, repair, alteration, remodeling or extension of buildings or structures used or to be used for agricultural purposes shall be issued free of any charge. The corporate authorities of the county may by ordinance require the construction of fences around or protective covers over previously constructed artificial basins of water dug in the ground and used for swimming or wading, which are located on private residential property and intended for the use of the owner and guests. In all ordinances or resolutions passed under the authority of this Division, due allowance shall be made for existing conditions, the conservation of property values, the directions of building development to the best advantage of the entire county, and the uses to which property is devoted at the time of the enactment of any such ordinance or resolution.

. . .

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

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

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

(1) To regulate and limit the height and bulk of buildings hereafter to be erected; (2) to establish, regulate and limit, subject to the provisions of Division 14 of this Article 11 [65 ILCS 5/11-14-1 *et seq.*], the building or set-back lines on or along any street, traffic-way, drive, parkway or storm or floodwater runoff channel or basin; (3) to regulate and limit the intensity of the use of lot areas, and to regulate and determine the area of open spaces, within and surrounding such buildings; (4) to classify, regulate and restrict the location of trades and industries and the location of buildings designed for specified industrial, business, residential, and other uses; (5) to divide the entire municipality into districts of such number, shape, area, and of such different classes (according to use of land and buildings, height and bulk of buildings, intensity of the use of lot area, area of open spaces, or other classification) as may be deemed best suited to carry out the purposes of this Division 13; (6) to fix standards to which buildings or structures therein shall conform; (7) to prohibit uses, buildings, or structures incompatible with the character of such districts; (8) to prevent additions to and alteration or remodeling of existing buildings or structures in such a way as to avoid the restrictions and limitations lawfully imposed under this Division 13; (9) to classify, to regulate and restrict the use of property on the basis of family relationship, which family relationship may be defined as one or more persons each related to the other by blood, marriage or adoption and maintaining a common household; and (10) to regulate or forbid any structure or activity which may hinder access to solar energy necessary for the proper functioning of a solar energy system, as defined in Section 1.2 of The Comprehensive Solar Energy Act of 1977 [30 ILCS 725/1.2]; and (11) **to require the creation and preservation of affordable housing, including the power to provide increased density or other zoning incentives to developers who are creating, establishing, or preserving affordable housing.**

§ 30 ILCS 67/. Affordable Housing Planning and Appeal Act

. . .

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

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

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

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

(C) Rental payment assistance.

(D) Home-ownership purchase assistance.

(E) Preservation of existing affordable housing.

(F) Weatherization.

(G) Emergency repairs.

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

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

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

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

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

. . .

Case Law: None

Discussion: The Affordable Housing Planning and Appeal Act, 310 ILCS 167/1, *et seq.*, establishes a 10 percent affordable housing goal for all municipalities. Highland Park has an inclusionary zoning ordinance that requires that 20 percent of units in residential developments of 5 or more dwellings be affordable. *See* http://www.cityhpil.com/pdf/ordinances/article21.pdf (last visited on March 5, 2007).

Home Rule Provision: Illinois has structural and broad functional home rule. Home rule units have the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt, as well as the ability to alter the specific forms of government and officers. The powers and functions of home rule units are liberally construed. Ill. Const. Art. VII, § 6 (2006).

Indiana

Inclusionary Zoning Statute: None

Case Law: None

Home Rule Provision: Indiana has functional home rule whereby government units have all of the powers expressly granted or necessarily implied in order to perform municipal functions. Ind. Code Ann. § 36-1-3-4, 5, 6 (2006).

Iowa

Inclusionary Zoning Statute: None

Case Law: None

Home Rule Provision: Iowa has a structural and limited functional home rule. Iowa grants the powers necessary to conduct local government affairs to its municipal corporations, as well as to counties or joint county-municipal corporation governments. Iowa Const. Art. III, §§ 38A, 39A (2005).

Kansas

Inclusionary Zoning Statute: None

Case Law: None

Home Rule Provision: Kansas has functional, structural and fiscal home rule. In Kansas, cities are granted the authority and power to determine their local affairs and government, including taxing powers, as well as the power to enact their own charters. Kan. Const. Art. 12, § 5. Counties in Kansas are granted similar rights, as they have the authority to enact county charters and have the authority to govern county affairs. County rights are also liberally construed. K.S.A. §§ 19-101, 101a, 101b, 101c (2006).

Kentucky

Inclusionary Zoning Statute: None

Case Law: None

Home Rule Provision: Kentucky has structural and functional home rule, whereby cities are granted the power to perform any function within its boundaries, including the power to levy taxes, and are also granted the authority to govern themselves to the full extent required by local government. KRS §§ 83.410, 83.520 (2006). This home rule authority is broadly construed. KRS § 83.410 (2006).

Louisiana

Inclusionary Zoning Statute: La. R.S. 33:5002 (2006)

A. The legislature finds that:

(1) In many municipalities and parishes, there is a serious shortage of decent, safe, and sanitary residential housing available at prices or rents that are affordable to low and moderate income families.

(2) The affordable housing shortage constitutes a danger to the health, safety, and welfare of all residents of the state and is a barrier to sound growth and sustainable economic development for the state's municipalities and parishes.

(3) These conditions have been exacerbated by the damage to the state's housing stock caused by Hurricane Rita and Hurricane Katrina.

(4) The state will undergo an unprecedented residential construction boom over the next decade to restore housing for hurricane victims and new residents to the state in both damaged parishes and receiving parishes.

(5) While pre-hurricane concentrated poverty contributed to social isolation and its concurrent ills, mixed income communities have proven to hold better social outcomes for all residents, including better education, workforce, and health outcomes.

(6) Hundreds of jurisdictions and a dozen states have adopted planning and implementation policies to deliver economically integrated housing development through inclusionary zoning to ensure all sectors of housing need are securely met.

(7) Inclusionary zoning, which requires all residential developments of a certain scale to include the development of affordable housing along with market rate housing, has proven a highly effective strategy to build on the expertise of private developers, while compensating them for their contributions.

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

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

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

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

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

Case Law: None

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

Maine

Inclusionary Zoning Statute: None. However, the state legislature has set a 10 percent affordable housing goal for local governments. 30-A M.R.S. § 4326. Inclusionary zoning is not specifically addressed by this statute, or in the statute that enables municipalities to enact zoning regulations. 30-A M.R.S. §4352 (2006).

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

. . .

G. Ensure that the municipality's or multimunicipal region's land use policies and ordinances encourage the siting and construction of affordable housing within the community and comply with the requirements of section 4358 pertaining to individual mobile home and mobile home park siting and design requirements. The municipality or multimunicipal region shall seek to achieve a level of at least 10% of new residential development, based on a 5-year historical average of residential development in the municipality or multimunicipal region, that meets the definition of affordable housing. A municipality or multimunicipal region is encouraged to seek creative approaches to assist in the development of affordable housing, including, but not limited to, cluster housing, reduced minimum lot and frontage sizes, increased residential densities and use of municipally owned land.

Case Law: None

Discussion: Portland enacted a voluntary inclusionary zoning program late in 2006. *See* http://www.portlandmaine.gov/Chapter014.pdf at 591 (last visited on March 5, 2007).

Home Rule Provision: Maine has structural and functional home rule, whereby municipalities are given the power to amend their charters on all matters which are local and municipal in character. ME Const. Art. VIII, Pt 2, § 1 (2005). Maine's Home Rule provisions are liberally construed. 30-A.M.R.S. § 2109 (2005); *James v. West Bath*, 437 A.2d 863, 1981 Me. LEXIS 1028 (Me. 1981).

Maryland

Inclusionary Zoning Statute: Md. Ann. Code art. 66B, §12.01 (2006).

§ 12.01. Affordable housing.

(a) Ordinances or laws authorized. – To promote the creation of housing that is affordable to persons and families who have low or moderate incomes, a local legislative body that exercises authority granted by this article may enact ordinances or laws that:

(1) **Impose inclusionary zoning** and award density bonuses to create affordable housing units; and

(2) Impose restrictions on the use, cost, and resale of housing that is created under this subtitle to ensure that the purposes of this subtitle are carried out.

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

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

Discussion: Maryland's affordable housing statute authorizes municipalities to enact inclusionary zoning measures. Prince George's County had an inclusionary ordinance from 1991-1996. Montgomery County, of course, has had an inclusionary zoning ordinance in place since the 1970's. In 2006, an Associate County Attorney reported in an article that the ordinance has produced 11,700 affordable housing units over 30 years. V. Gaul, *Affordable Housing in Montgomery County, Maryland: Inclusionary Zoning and Beyond*, presentation to International Municipal Lawyers Association, April 2006.

Home Rule Provision: In Maryland, counties are granted structural and functional home rule, whereby they have the power to form a charter under the provisions of Article XI-A of the Maryland Constitution. They have the express power to regulate a number of areas, as well as all other areas which "may be deemed expedient in maintaining the peace, good government, health and welfare of the county." Md. Ann. Code art. 25A, §§ 4, 5 (2006).

Massachusetts

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

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

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

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

1. The proposed district shall be located in an eligible location;

2. The zoning for the proposed district shall provide for residential use to permit a mix of housing such as for families, individuals, persons with special needs or the elderly.

3. Housing density in the proposed district shall be at least 20 units per acre for multi-family housing on the developable land area: 8 units per acre for single-family homes on the developable land area; and 12 units per acre for 2 and 3 family buildings on the developable land area.

4. The zoning ordinance or by-law for each proposed district shall provide that not less than 20 percent of the residential units constructed in projects of more than 12 units shall be affordable, as defined in section 2, and shall contain mechanisms to ensure that not less than 20 percent of the total residential units constructed in each district shall be affordable.

5. A proposed district shall permit infill housing on existing vacant lots and shall allow the provision of additional housing units in existing buildings, consistent with neighborhood building and use patterns, building codes and fire and safety codes.

6. A proposed smart growth zoning district shall not be subject to limitation of the issuance of building permits for residential uses or a local moratorium on the issuance of such permits.

7. A proposed district shall not impose restrictions on age or any other occupancy restrictions on the district as a whole. This shall not preclude the development of specific projects that may be exclusively for the elderly, the disabled or for assisted living. Not less than 25 percent of the housing units in such a project shall be affordable housing.

8. Housing in a smart growth zoning district shall comply with federal, state and local fair housing laws.

9. A proposed district may not exceed 15 percent of the total land area in the city or town. Upon request, the department may approve a larger land area if such approval serves the goals and objectives of the chapter.

10. The aggregate land area of all approved smart growth zoning districts in the city or town may not exceed 25 percent of the total land area in the city or town.

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

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

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

(c) The zoning for the proposed district may provide for mixed use development.

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

be coterminous or non-coterminous with the smart growth zoning district. Within any such historic district, the provisions and requirements of the historic district may apply to existing and proposed buildings.

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

(f) With respect to a city or town with a population of fewer than 10,000 persons, as determined by the most recent federal decennial census, for hardship shown, the department may, pursuant to regulations adopted under this chapter, approve zoning for a smart growth zoning district with lower densities than provided in this chapter, if the city or town satisfies the other requirements set forth in this section; provided, however, that such approval shall not be withdrawn solely because, in a future census, the population of the city or town exceeds 10,000.

(g) Any amendment or repeal of the zoning for an approved smart growth zoning district ordinance or by-law shall not be effective without the written approval by the department. Each amendment or repeal shall be submitted to the department with an evaluation of the effect on the city or town's comprehensive housing plan described in section 8. Amendments shall be approved only to the extent that the district remains in compliance with this chapter. If the department does not respond to a complete request for approval of an amendment or repeal within 60 days of receipt, the request shall be deemed approved.

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

ALM GL ch. 40R, § 9. Smart Growth Zoning District-Payments.

Each city or town with an approved smart growth zoning district shall be entitled to payments as described below.

(a) Within 10 days of confirmation of approval by the department of a smart growth zoning district, the commonwealth shall pay from the trust fund a zoning incentive payment, according to the following schedule: Click here to view image.

The projected number of units shall be based upon the zoning adopted in the smart growth zoning district and consistent with the city or town's comprehensive housing plan.

(b) The commonwealth shall pay from the trust fund a one-time density bonus payment to each city or town with an approved smart growth zoning district. This payment shall be $3,000 for each housing unit of new construction that is created in the smart growth zoning district. The amount due shall be paid on a unit-by-unit basis, within 10 days of submission by a city or town of proof of issuance of a building permit for a particular housing unit or units within the district.

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

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

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

Home Rule Provision: Home rule powers in Massachusetts are limited. Local governments have structural powers, but must choose their form of government based on their population. They only have functional powers granted by the legislature, and fiscal powers are very limited. ALM Constitution Amend. Art. II, §§ 1-9 (2006); ALM GL ch. 43B, § 13 (2006).

Michigan

Inclusionary Zoning Statute: None as of the date of this study. However, an inclusionary zoning bill was introduced in the state senate on January 24, 2007. *See* Senate Bill 0067 (2007), available at http://www.legislature.mi.gov/(S(emars1zdfryvb3i3ey5skkmb))/mileg.aspx?page=getobject&objectname=2007-sb-0067 (last visited on March 5, 2007).

Case Law: None

Home Rule Provision: Michigan has structural, functional and fiscal home rule, whereby cities, which are organized as bodies corporate, are given the power to amend their charters, and the power to exercise powers of local government, including the power to levy and collect taxes. MCLS prec §§ 117.1-117.2 (2006). Provisions of home rule cities act must be liberally construed in favor of municipalities. *Inch Memorials v. Pontiac*, 93 Mich. App. 532, 286 N.W.2d 903 (1979).

Minnesota

Inclusionary Zoning Statute: Minnesota authorizes voluntary inclusionary housing programs.

Minn. Stat. § 473.255. Inclusionary housing account

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

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

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

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

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

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

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

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

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

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

Case Law: None

Discussion: While Minnesota does not have an inclusionary zoning statute, metropolitan areas must have a comprehensive plan for low and moderate income housing (Minn. Stat. § 473.859 (2005).

Home Rule Provision: Minnesota has structural and functional home rule, whereby local government units may adopt a home rule charter when authorized by law. Minn. Const. Art XII, § 4 (2005); *see also*, Minn. Stat. Chapter 410 (2005) (charter provisions) and Minn. Stat. Chapter 471 (municipal rights, powers and duties).

Mississippi

Inclusionary Zoning Statute: None

Case Law: None

Home Rule Provision: Mississippi has structural and function home rule. Municipalities have the power to further all proper municipal purposes. Miss. Code Ann. §§ 21-17-1, 21-17-5 (2006). Municipalities have the authority to choose their form of government, and enact and revise their charters. Miss. Code Ann. §§ (2006) 21-3-1, 21-5-1, 21-7-1, 21-8-1, 21-9-1, 21-17-9,11. The board of supervisors of any county have the power to adopt any orders, resolutions or ordinances with respect to county affairs, property and finances, not inconsistent with the law. Miss. Code Ann. § 19-3-40 (2006).

Missouri

Inclusionary Zoning Statute: None

Case Law: None

Home Rule Provision: Missouri has structural, functional and fiscal home rule. Cities having more than 5,000 inhabitants or any other incorporated city have the authority to frame and adopt a charter for its own government, in addition to home rule powers and any additional powers conferred by law. Mo. Const. Art. VI, § 19, 19(a) (2005). Counties may also adopt charters. Mo. Const. Art. VI, § 18(a)-(d) (2006).

Montana

Inclusionary Zoning Statute: None

Case Law: None

Home Rule: Montana is not a "home rule" state but a self-government state. Local governments have self-government powers and may exercise any powers not expressly denied by constitution, law, or charter. Mont. Const., Art. XI § 6. Their authority is both structural and functional. Mont. Const., Art. XI.

Nebraska

Inclusionary Zoning Statute: None

Case Law: None

Home Rule: Nebraska is a Dillon's Rule state. Although cities with a population of 5,000 or more may enact a charter, local governments are only authorized to legislate in areas "of purely municipal concern." *City of Millard v. City of Omaha*, 185 Neb. 617, 620, 177 N.W.2d 576 (1970); Neb. Const. Art. XI, § 2 (2006).

Nevada

Inclusionary Zoning Statute: Nev. Rev. Stat. § 278.250 (2006)

Zoning districts and regulations.

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

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

. . .

(l) To ensure the development of an adequate supply of housing for the community, including the development of affordable housing.

. . .

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

5. As used in this section:

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

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

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

Case Law: None

Home Rule: Nevada is a Dillon's Rule state. Nev. Const. Art. 8, § 8 (2006).

New Hampshire

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

RSA 674:21 Innovative Land Use Controls.

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

(a) Timing incentives.

(b) Phased development.

(c) Intensity and use incentive.

(d) Transfer of density and development rights.

(e) Planned unit development.

(f) Cluster development.

(g) Impact zoning.

(h) Performance standards.

(i) Flexible and discretionary zoning.

(j) Environmental characteristics zoning.

(k) Inclusionary zoning.

(l) Accessory dwelling unit standards.

(m) Impact fees.

(n) Village plan alternative subdivision.

. . .

IV. As used in this section:

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

Case Law: None

Home Rule: Municipalities may adopt charters to address local needs, but local governments do not have any powers beyond the authority to amend the charter or establish a form of government. RSA Title III, Ch. 49-B (2006).

New Jersey

Inclusionary Zoning Statute: The Council on Affordable Housing ("COAH"), established by the New Jersey legislature under the Fair Housing Act, N.J. Stat. § 52: 27D-301 (2006) *et seq.*, has authorized municipalities to promulgate inclusionary zoning ordinances as part of their "Fair Share Plan." This statutory delegation has been further defined in the COAH regulation set forth below.

N.J.A.C. § 5:94-4.4 Municipal zoning options:

(a) A municipality may adopt a land use ordinance permitting zoning for residential and/or mixed-use development to address the growth share obligation that would apply to all or some zones within the municipality. The municipality shall provide the Council with a draft or adopted ordinance. The zoning may provide for equal or fewer than one unit for every eight market-rate units or one unit for every 25 jobs created in a non-residential development to be affordable to households of low and moderate income in an inclusionary development, provided that the Fair Share Plan demonstrates the units lost shall be constructed or provided pursuant to other components of the plan. Alternatively, the zoning may provide for greater than one unit for every eight market-rate units or one unit for every 25 jobs created in a non-residential development to be affordable to households of low and moderate income in an inclusionary development. The municipality shall take into consideration the economic feasibility of such zoning. The following shall apply:

1. If the zoning has not allowed an increase in density to accommodate affordable housing and requires a maximum of one for every eight market-rate residential units or one unit for every 25 jobs created in a non-residential development to be affordable to low and moderate income households, the zoning shall be exempt from the State Development and Redevelopment Plan provisions of N.J.A.C. 5:94-4.5(a)1 and 2.

2. If the zoning requires more than one for every eight market-rate residential units or one unit for every 25 jobs created in a non-residential development to be affordable to low and moderate income households, or if there has been a density increase on the site to accommodate affordable housing, the zoning shall conform to the criteria in N.J.A.C. 5:94-4.5.

(b) The affordable housing obligation is cumulative and accrues to the municipality regardless of the size of each development. Through the zoning ordinance, a municipality shall require a developer to construct the affordable units on site or elsewhere in the municipality or, alternatively, allow the option of a payment in lieu of constructing the units on site. Any development or portion of a development zoned for the production of affordable housing that generates an affordable housing obligation, but does not provide for those affordable housing units on site or elsewhere in the municipality in proportion to the market-rate units or jobs on site shall be subject to a payment in lieu. Zoning that does not require a growth share set-aside or payment in lieu may be subject to a development fee under the Fair Share Plan unless exempted pursuant to N.J.A.C. 5:94-6.8.

1. A zoning ordinance may contain a development size threshold below which the construction of affordable units shall not be required on site. Sites falling below such threshold shall be required to make a payment in lieu of constructing the proportional number of affordable units associated with the number of market-rate units or jobs.

(c) The amount of payments in lieu of constructing affordable units on site shall be negotiated between the municipality and the developer.

(d) Payments in lieu of constructing affordable units on site shall only be used to fund eligible affordable housing activities within the municipality pursuant to a spending plan in accordance with N.J.A.C. 5:94-6.12.

(e) Payments in lieu of constructing affordable units shall be deposited in a separate, interest-bearing housing trust fund or deposited in the housing trust fund established pursuant to N.J.A.C. 5:94-6.11(a) and shall at all times be identifiable from development fees.

(f) Such zoning shall require affordable housing units to be built in accordance with the following schedule:

Percentage of Market-rate Units Completed	Minimum Percentage of Low and Moderate Income Units Completed
25	0
25 + 1 unit	10
50	50
75	75
90	100

(g) The Council encourages the design of inclusionary and mixed-use developments providing affordable housing to be in conformance with the design guidelines in the State Development and Redevelopment Plan.

(h) The Council encourages a design of inclusionary and mixed-use developments providing affordable housing that integrates the low and moderate income units with the market units.

(i) Municipal ordinances regulating owner-occupied and rental units in inclusionary and mixed-use developments providing affordable housing shall require that affordable units utilize the same heating source as market units within the inclusionary development.

(j) The municipality shall:

1. Demonstrate capacity to administer the units in accordance with the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26;

2. Demonstrate that the units will have a low/moderate income split in accordance with the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26;

3. Demonstrate that the units will be affirmatively marketed in accordance with N.J.A.C. 5:94-7;

4. Demonstrate that the units will have the appropriate controls on affordability in accordance with N.J.A.C. 5:94-7; and

5. Demonstrate that the units will have the appropriate bedroom distributions in accordance with the Uniform Housing Affordability Controls, N.J.A.C. 5:80-26.

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

Discussion: As is well-known, *Southern Burlington*, also known as "*Mount Laurel II*," established New Jersey's mandatory "fair share" requirement for low and moderate income housing, and specifically identified inclusionary zoning as one technique to promote development. *Holmdel Builders* was one of several later cases that dealt with municipal ordinances passed in response to *Mount Laurel II*.

The plaintiffs in *Holmdel Builders* challenged the inclusionary zoning ordinances in five townships, each of which required developers to pay a fee as a condition of obtaining development approval. The fees were then deposited with an affordable housing trust fund, which would be used to meet each township's *Mount Laurel* obligation. The plaintiffs challenged these ordinances on the grounds that they were an unconstitutional taking, a violation of substantive due process and equal protection, and an unconstitutional tax. The New Jersey Supreme Court determined that the fees were a valid exercise of each township's police powers. Nevertheless, the Court recognized that the New Jersey Legislature had granted authority to the COAH to determine what types of inclusionary zoning measures were appropriate. Because COAH had not yet spoken on this issue, the Court set aside the ordinances and declined to consider the constitutional questions. New Jersey's current COAH rules are in litigation, with a New Jersey trial court recently having upheld several parts and invalidated others.

In the Matter of the Adoption of N.J.A.C. 5:94 and 5:95 By the New Jersey Council on Affordable Housing, 390 N.J. Super. 1, 914 A.2d 348 (January 25, 2007). Suffice it to say that inclusionary zoning programs are authorized by statute in New Jersey, but the governing state law is in flux.

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

New Mexico

Inclusionary Zoning Statute: None

Case Law: None

Discussion: New Mexico does not explicitly authorize inclusionary zoning. However, Santa Fe has a detailed inclusionary zoning program under its "Santa Fe Homes Program," (Article 14-8.11 of its zoning code), which was enacted pursuant to its general police powers. Santa Fe Homes Ordinance Program, Chapter XXVI of the City Code. The Program applies to most "development[s] which propose dwelling units or buildings or portions of buildings which

may be used for both nonresidential and residential purposes and manufactured home lots." If the Program applies, developers must set aside 30 percent of the dwelling units or manufactured home lots for residents who meet certain income requirements.

Home Rule: Municipalities that have adopted a charter have the authority to exercise legislative powers and to perform all functions not expressly prohibited by law. N.M. Const. art. X, § 6 (2006). They have structural and functional powers, but no fiscal authority – any new taxes must be approved by a majority vote in the municipality. *Id.* All powers are to be liberally construed. *Id.* Incorporated counties and urban counties have the same powers as municipalities. N.M. Const. art. X, §§ 5 and 10 (2006).

New York

Inclusionary Zoning Statute: None

Case Law: None

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

In December 2006, the New York City Council passed a new program: Introductory Bill No. 486-A, which substantially modifies the City's tax incentive program for multi-family housing and imposes an inclusionary zoning requirement. Since the 1970s, the City has exempted new multi-family residential construction from local property taxes (the program is known as "§ 421-a"). The December 2006 modification limits the tax exemption to the wealthiest areas of the City (Manhattan, primarily) and requires that those who avail themselves of the tax exemption dedicate either 20 percent of the units for 20 years to households earning 60 percent of the area median income or 25 percent for households at 80 percent or less. The change is effective in December 2007.

Home Rule: New York is a limited home rule state, with structural and functional powers, but only limited fiscal powers, granted to local governments. N.Y. Const. art. IX, § 2 (2006). In the same provision, the New York Constitution provides an enumerated list of powers granted to local governments and limits the legislature's power to interfere with local affairs. *Id.*

North Carolina

Inclusionary Zoning Statute: None

Case Law: None

Home Rule: North Carolina is a modified Dillon's Rule state because municipalities have structural powers. N.C. Const. art. VII, § 1 (2006); N.C. Gen. Stat. § 160A-101 (2006). Municipal powers granted by the legislature are to be broadly construed to include supplementary powers that are not contrary to state or federal law or policy. N.C. Gen. Stat. § 160A-4 (2006).

North Dakota

Inclusionary Zoning Statute: None

Case Law: None

Home Rule: North Dakota is a strong home rule state and provides for "maximum local self-government." N.D. Const. Art VII, § 1 (2006). Local governments have full structural, functional, and fiscal powers. *See* N.D. Cent. Code, §§ 11-09.1-05, 40-05.1-06 (2006).

Ohio

Inclusionary Zoning Statute: None

Case Law: None

Home Rule: Ohio is a strong home rule state, and municipalities are authorized to "exercise all powers of local government." Oh. Const. Art. XVIII, § 3 (2006). Municipalities have full structural, functional, and fiscal powers. *See* ORC Ann. 715.01 (2006) (general powers) and 717.01 (2006) (specific powers).

Oklahoma

Inclusionary Zoning Statute: None

Case Law: None

Discussion: Rent control is prohibited under 11 Okl. St. § 14-101.1 (2005).

Home Rule: Oklahoma is not a strong home rule state, and municipalities only have structural powers. Okl. Const. Art. XVIII, § 1 (2005). Counties do not have any home rule powers.

Oregon

Inclusionary Zoning Statute: ORS § 197.309 (2006)

Local ordinances or approval conditions may not effectively establish housing sale price or designate class of purchasers; exception.

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

(2) Nothing in this section is intended to limit the authority of a city, county or metropolitan service district to adopt or enforce a land use regulation, functional plan provision or condition of approval creating or implementing an incentive, contract commitment, density bonus or other voluntary regulation, provision or condition designed to increase the supply of moderate or lower cost housing units.

See also ORS § 91.225 (2006) (rent control prohibited). Oregon, of course, adopted property rights legislation in 2004, known as "Measure 37." This law provides that if government action devalues property, the government must either compensate the landowner or waive the regulation. Oregon continues to sort out the particulars of how to implement this policy, but in the meantime, Oregon attorney and LANDS member Jon Chandler agreed that even if the statutory prohibition on inclusionary ordinance were repealed, Measure 37 would likely deter a county or municipality from enacting an inclusionary ordinance.

Case Law: None

Home Rule: Oregon is not a strong home rule state. Municipalities and counties only have structural powers. Ore. Const. Art. VI, § 10 (2006); Ore. Const. Art. XI, § 2 (2006).

Pennsylvania

Inclusionary Zoning Statute: None

Case Law: None

Home Rule: Pennsylvania is not a strong home rule state. Municipalities and counties only have structural powers. Pa. Const. Art. 9, § 2 (2006).

Rhode Island

Inclusionary Zoning Statute: R.I. Gen. Laws § 45-24-46.1 (2006)

Inclusionary zoning.

A zoning ordinance requiring the inclusion of affordable housing as part of a development shall provide that the housing will be affordable housing, as defined in § 42-128-8.1(d)(1), that the affordable housing will constitute not less than ten percent (10%) of the total units in the development, and that the units will remain affordable for a period of not less than thirty (30) years from initial occupancy enforced through a land lease and/or deed restriction enforceable by the municipality and the state of Rhode Island.

Case Law: None

Discussion: The "Rhode Island Low-Moderate Income Housing Act," R.I. Gen. Laws §§ 45-53-1 (2006) *et seq.*, establishes a ten percent affordable housing goal for each municipality in the state. We have identified East Providence, Tiverton, and South Kingstown as municipalities that have inclusionary zoning ordinances. See http://www.eastprovidenceri.net/resources/documents/EP_Sub_division2-14-05.pdf (last visited on February 28, 2007); http://www.smartgrowth.org/news/article.asp?art=5688&state=40 (last visited on February 28, 2007). Other towns, including Providence, have considered enacted inclusionary zoning ordinances in order to meet their housing goal.

Home Rule: Rhode Island is not a strong home rule state, and local governments only have structural powers. R.I. Const. art. XIII, § 1 (2006).

South Carolina

Inclusionary Zoning Statute: None

Case Law: None

Discussion: Under the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, local governments must pass zoning regulations that provide for adequate affordable housing. S.C. Code Ann. § 6-29-710 (2005). The South Carolina General Assembly considered the "Inclusionary Zoning Act" during its 116th Session (2005-2006) (H. 4228). However, this bill did not pass.

Home Rule: South Carolina is a strong home rule state. S.C. Const. Ann. Art. VIII, § 7 (2005). Municipalities have full structural, functional, and fiscal powers that must be "liberally construed" in favor of the municipality. *See* S.C. Code Ann. §§ 5-7-10 (2005), 5-7-30 (2005).

Counties have full structural and functional powers, as well as limited fiscal powers. *See* S.C. Code Ann. § 4-9-25 (2005). Their powers must also be liberally construed. *Id.*

South Dakota

Inclusionary Zoning Statute: None

Case Law: None

Home Rule: Local governments have extremely broad authority. They may enact a charter and "exercise any legislative power or government function" that is not denied by the charter, the state constitution, or the general state laws. S.D. Const. Article IX, § 2 (2006).

Tennessee

Inclusionary Zoning Statute: None

Case Law: None

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

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

Texas

Inclusionary Zoning Statute: Tex. Loc. Gov't § 214.904 (2006) *

Prohibition of Certain Municipal Requirements Regarding Sales of Housing Units or Residential Lots

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

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

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

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

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

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

* There are two sections 214.904.

Case Law: None

Home Rule: Texas is a limited home rule state. Cities and towns have structural and functional powers, but no fiscal powers. Tex. Const. art. XI, §§ 4, 5 (2006).

Utah

Inclusionary Zoning Statute: None

Case Law: None

Discussion: Salt Lake City has an ordinance regarding mitigating the loss of affordable housing. § 18.97.010.

Home Rule: Utah is a fairly strong home rule state, and local governments have structural, functional, and limited fiscal powers. Utah Const. Art. XI, §§ 1, 5 (2006).

Vermont

Inclusionary Zoning Statute: 24 V.S.A. § 4414, which reads, in relevant part:

§ 4414. Zoning; permissible types of regulations

(7) Inclusionary zoning. In order to provide for affordable housing, bylaws may require that a certain percentage of housing units in a proposed subdivision or planned unit development meets defined affordability standards, which may include lower income limits than contained in the definition of "affordable housing" in subdivision 4303(1) of this title and may contain different

affordability percentages than contained in the definition of "affordable housing development" in subdivision 4303(2) of this title. These provisions, at a minimum, shall comply with all the following:

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

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

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

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

Case Law: None

Discussion: Burlington has enacted an inclusionary zoning ordinance. Burlington Zoning Ordinance Article 14. See http://www.ci.burlington.vt.us/planning/zoning/znordinance/article14.html (last visited on February 28, 2007).

Home Rule: Municipalities are extremely limited in their powers, and may only incorporate with permission from the General Assembly. V.S.A. Const. §§ 6, 69 (2006). The General Assembly cannot grant a charter to a county, so they do not have any home rule powers. *See* V.S.A. Const. § 69 (2006).

Virginia

Inclusionary Zoning Statute: Va. Code Ann. § 15.2-735.1 (2006)

Affordable dwelling unit ordinance; permitting certain densities in the comprehensive plan

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

Residential, commercial, or mixed-use projects with a density less than 1.0 FAR, or an equivalent density based on units per acre, shall be exempt from the requirements of this section and the county's zoning ordinance adopted pursuant to this section. The county's zoning ordinance requirements shall provide as follows:

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

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

a. Affordable Dwelling Units shall be provided off-site at a location within one-half mile of any Metrorail Station for projects within a Metro Station Area as defined in the county's comprehensive plan, or within one-half mile of the residential, commercial, or mixed-use project for projects not within a Metro Station Area, as provided in the county's zoning ordinance, the total gross square footage of which units shall be 7.5% of the amount of the gross floor area of the project that is over 1.0 FAR or an equivalent density based on units per acre, or

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

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

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

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

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

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

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

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

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

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

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

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

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

matter of the application to permit a use provided for by the county's comprehensive plan designation for the subject property.

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

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

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

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

Case Law: *The Bd. of Supervisors of Fairfax County v. DeGroff Enterprises, Inc.*, 214 Va. 235, 198 S.E.2d 600 (1973). *See* p. 53, *infra*.

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

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

Washington

Inclusionary Zoning Statute: None

Case Law: None

Discussion: While there is no express authority for inclusionary zoning, Rev. Code Wash. § 35A.63.100 grants municipalities broad authority. As a result, voluntary inclusionary programs have been adopted in Seattle (Municipal Code § 23.49.015); Vancouver (Municipal Code § 20.250.020); and Bellevue (Land Use Code § 20.20.20).

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

West Virginia

Inclusionary Zoning Statute: None

Case Law: None

Home Rule: Local governments have only very limited structural powers. The legislature classifies municipalities determines their type of government. W. Va. Const. Art. VI, § 39a (2006). However, municipalities with a population over 2,000 may "frame, adopt, and amend a charter" to regulate municipal affairs. *Id.*

Wisconsin

Inclusionary Zoning Statute: None

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

Discussion: In *Apartment Assoc. of South Central Wisconsin, Inc.*, appellants challenged the City of Madison's inclusionary housing ordinance. This ordinance required developments with 10 or more rental units to set-aside at least 15% of the units for low and moderate housing if the application required an amendment to the zoning map, a subdivision, or land division. The ordinance provided incentives for developers based on a formula that considered a number of

factors, including the number of units offered to families with area median incomes at certain levels. Appellants alleged that the ordinance was pre-empted by a state statute prohibiting municipal rent control.

The Wisconsin Court of Appeals agreed with the appellants. Under the state rent control statute, local governments are authorized to enter a rent control agreement with developers. Wis. Stat. § 66.1015 (2006). However, the Court determined that despite the use of "incentives," the ordinance was mandatory in nature, and therefore prohibited under state law.

It is interesting to note that the *Apartment Assoc.* case only challenged the part of Madison's ordinance applicable to rental units. The ordinance also covers sale units. According to Madison attorney and LANDS member John Kassner, the City of Madison has not repealed the ordinance since the court decision, but is not enforcing it either, and a local builders group is considering a further challenge to the ordinance's coverage of sale units.

Home Rule: Local governments have functional and limited structural authority. Wis. Const. art. XI, § 3 (2006). The legislature determines how municipalities are organized, but they have functional powers.

Wyoming

Inclusionary Zoning Statute: None

Case Law: None

Home Rule: Wyoming is a home rule state, but municipalities have only structural and functional powers. Wyo. Const. art. 12, § 4 (2006); *see also* Wyo. Stat. §§ 15-1-101 (2006) *et seq.*

POLICY, PRACTICAL, AND LEGAL CHALLENGES TO INCLUSIONARY ZONING PROPOSALS: RESOURCE MANUAL FOR NAHB MEMBERS

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

A. Introduction: How To Use This Resource Manual.

The Land Development Committee and staff of NAHB have commissioned this Resource Manual in response to the reality that as housing affordability problems grow around the United States, more and more municipal and county governments[3] – approximately 400 so far – are turning to inclusionary zoning as part of their public policy response. NAHB's September 2006 official policy on inclusionary zoning, opposing it in principle, is reprinted below in Section B.

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

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

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

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

1. convincing government officials that an inclusionary ordinance is an **unwise, ineffective, or unfair policy choice**;

2. if political forces favor a proposed inclusionary ordinance, identifying to the drafters **the critical administrative choices and details that need to be considered,** lest the ordinance be unworkable, ineffective, and detrimental to housing production;

3. as a proposal proceeds through the governmental process, **shaping those choices and details as favorably as possible to the building community;**

4. if the proposal proceeds through formal "on the record" consideration by government agencies, making as much of an **administrative record** as possible in the event of a **subsequent legal challenge**; and

5. if the ordinance is adopted, considering legal challenges, starting with the basic **procedural compliance**, then **substantive authority** to enact the ordinance, and then **substantive challenges** to the ordinance **as it applies** to a specific development.

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

B. NAHB's Policy on Inclusionary Zoning, Adopted September 2006.

NAHB resolves to:

1. Support addressing housing affordability through the use of a competitive market operating in a climate that encourages and accommodates housing options for all income levels and that provides broad funding supplements where market forces cannot supply housing without added incentives or subsidy.

2. Support an NAHB initiative to create a toolkit on a broad choice of approaches that, if implemented, will meet a community's needs for workforce housing as well as affordability in housing generally.

3. Oppose the adoption of mandatory inclusionary zoning programs, but support the provision of affordable housing through a broad and comprehensive strategy to address housing affordability at the 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, and

4. *Support the production of a broad spectrum of housing by the home building industry that guarantees appropriate development incentives and subsidies and that guarantees that the cost is borne by the general community and not by the home buying public.*

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

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

1. **Inclusionary zoning is a form of price control.** It imposes a direct cost, in the form of below-market price restrictions, on builders and residents/tenants. Economic studies in housing and other industries have shown consistently that price controls distort the free market but do not solve underlying economic problems.

2. Lack of affordable housing in a particular community is the result of many factors, usually including a local government's past and existing restrictive land use regulation. **The home building industry – a supplier of housing – is rarely if ever the cause of a shortage of housing in a particular market.** Thus, imposing price controls on builders imposes a direct cost on a constituency whose contribution to the affordability problem is minimal at best, and most likely non-existent.

3. Inclusionary zoning requires the production and sale or rental of housing at below-market prices, thereby imposing a cost on builders. Builders either absorb this cost directly or pass some or all on to purchasers or tenants of market-rate residential units. **Thus, inclusionary zoning does not reduce the cost of constructing housing, but it increases the price of the non-restricted units.**

4. The following factors have been identified as affecting housing affordability:

   - land cost;
   - land use regulation;
   - construction material costs;
   - construction labor costs;
   - prices and rents of comparable properties in the same market;
   - household incomes –both the median and the range;

- vacancy rates;
- property maintenance;
- availability of government subsidies for planning, construction, operations, and rent or mortgage payments;
- infrastructure costs;
- impact fees; and
- citizen attitudes.

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

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

D. Practical And Legal Challenges To Inclusionary Zoning Proposals.[4]

Practical Considerations and Challenges

1. Factual justification.

There are, of course, numerous articles and studies about whether inclusionary zoning programs actually produce a supply of price-restricted housing or have an opposite, adverse effect. In a famous article, *The Irony of Inclusionary Zoning*, Professor Robert Ellickson concluded that inclusion programs actually exacerbate housing shortages. Housing market

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

economics and causation are beyond the scope of this manual, but reams of information on this topic are available from NAHB and other sources. Suffice it to say that a critical, first, practical challenge to an inclusionary program is: **Will the ordinance result in greater housing affordability as its drafters intend, and what evidence exists to support this contention?** This, of course, requires a case-by-case analysis. That analysis should include a comprehensive review of existing housing stock, housing conditions, vacancy rates, market trends, and existing funding sources for rehabilitation of existing units. Inclusionary zoning proposals should not be considered in a vacuum, without consideration of these important contextual factors.

2. Voluntary vs. mandatory.

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

Mandatory, according to the Wisconsin courts in a recent case. A state statute banned rent control, but contained an exception for voluntary "agreements" between a local government and a developer. Madison, Wisconsin adopted an inclusionary zoning program for rental units, which local builders challenged as a violation of the statewide rent control law. The city argued that because a developer had no obligation to build housing at all, compliance with the inclusionary program was a voluntary agreement. But the state Court of Appeals held that the inclusionary program was a use of government's land use regulatory power, and thus compliance was thus not an agreement. A truly voluntary inclusionary zoning ordinance would provide that a builder could undertake either a market-rate development or one in which a portion of the units are subject to price restrictions. Conversely, any program in which the acceptance of price controls is a condition of receiving permission to build should be regarded as mandatory.

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

3. Link of inclusionary requirements to other regulations.

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

4. Construction incentives.

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

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

5. Financial incentives.

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

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

6. In lieu fees.

Many inclusionary ordinances provide an alternative method of compliance to constructing inclusionary housing, in the form of payments or fees-in-lieu of such construction. Such payments can be a flat fee per market rate unit, a percentage of the market value of the land, or a percentage of the construction cost. The legal issues that arise with such fees are (1) whether there is an "essential nexus," or some causation, between the builder's housing proposal and the government's requirement of payment; and (2) whether there is "rough proportionality" between the housing proposal and the amount of the fee. These are discussed further in Nos. 7 and 45 below. Having this alternative can be critical to builders whenever compliance with the construction mandates of an inclusionary ordinance are problematic.

7. Waivers/exemptions.

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

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

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

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

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

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

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

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

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

Defining Applicability

8. Geographic applicability.

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

- the entire jurisdiction;

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

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

A critical factor in evaluating the geographic applicability of an inclusionary program arises from the theory of inclusionary zoning noted above on p. 56: inclusionary zoning will likely not be effective if builders have the option to build nearby or elsewhere without facing price controls. Thus, **the smaller the geographic area that is subject to inclusionary requirements, the more likely it is that builders will go elsewhere,** and that the effect of the ordinance will be simply to reduce housing production where inclusionary requirements are imposed.

9. "Minimum applicability" definitions.

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

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

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

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

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

10. Type of developments included and excluded.

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

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

11. Type of construction covered.

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

- sale, rental, condominium, or cooperative;
- new residential construction;
- residential construction that constitutes "substantial rehabilitation" (a term with many, varied definitions, but often focusing on a project whose construction cost exceeds 50 percent of the current market value of the building);
- single-family detached;
- single-family attached (duplexes, triplexes);

- townhouses;
- multi-family, consisting of more than x units;
- apartments in a "stacked flat" configuration;
- mixed use; and
- multi-phase development.

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

Resident Eligibility And Selection

12. Purchaser/tenant eligibility: local resident preferences.

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

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

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

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

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

And so on.

A sample provision might look like this:

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

Yet another issue is whether preference will apply only to initial sales or renting, or to resales and reletting. If the latter, the builder or whoever administers the price restrictions will need to create two permanent lists and resident selection systems, and will have to deal with inevitable perceptions of favoritism when, for example, the mayor's third cousin receives preferences over a struggling single parent and her child.

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

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

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

Combining inclusionary requirements with age-restricted housing can also be problematic because it combines three limitations on resident eligibility (minimum age, maximum income, maximum unit price or rent) that may impede marketability.

14. Required set aside percentages.

The core of an inclusionary program, of course, is the specification of the number or percentage of residential units that will be subject to maximum sale/resale or rent restrictions. This number is almost always expressed as a percentage rather than an actual number. It is common for percentages to vary in relation to income strata that the program seeks to serve, *e.g.*, 15 percent of the units set aside for those earning 80 percent of the area median income, and an additional 10 percent for households earning 60 percent or less. Different percentages are also applied sometimes to units based on their number of bedrooms, or even on square footage of living area. This particular issue is usually not difficult, but the ordinance should state its requirements clearly.

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

15. Duration of set aside requirements.

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

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

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

16. Selection of purchasers/tenants.

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

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

17. Lotteries.

When the number of qualified applicants exceeds the number of available affordable housing units, developers will sometimes use a lottery to determine which applicants will receive

housing. Lotteries may be employed each time a vacancy arises, or they may be used only for the initial sale or rental, with subsequent vacancies filled by the first subsequent qualified applicant. A lottery, however, may generate suspicion of municipalities or favoritism. A disinterested party (e.g., a non-profit group) to conduct the lottery is advisable. A sample provision:

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

18. Marketing and outreach requirements.

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

A sample provision:

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

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

A. Analyzing census, town profiles, and other data to identify racial and ethnic groups least likely to apply based on representation in the municipality's population, including Asian Pacific, Black, Hispanic, and Native American populations.

B. Announcements/advertisements in publications and other media that will reach minority populations, including newspapers and radio stations serving the municipality's Metropolitan Statistical Area and Regional Planning Area, and advertisements or flyers likely to be viewed on public transportation or public highway areas.

C. Announcements to social service agencies and other community contacts serving low-income minority families (such as churches, civil rights organizations, the housing authority, and other housing authorities in towns represented in municipality's Metropolitan Statistical Area and Regional Planning Agency, legal services organizations, etc.).

D. Assistance to minority applicants in processing applications.

E. Marketing efforts in geographic areas of high minority concentrations within the housing market area and metropolitan statistical area.

F. Beginning affirmative marketing efforts prior to general marketing of units, and repeating again during initial marketing and at 50 percent completion.

All notices shall comply with the Fair Housing Acts.

– OR –

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

19. Renewals and reverifications.

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

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

20. Definition of household income.

The Code of Federal Regulations contains a comprehensive definition of what is and is not income. *See* 24 C.F.R. § 5.609. This regulation is fairly lengthy, but as a rule of thumb, what counts as income is any regular and reasonably-guaranteed payment or set of payments to a

member of the household. Thus, for example, alimony is income, as are regular payments from an annuity or trust. A winning lottery ticket is not income.

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

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

21. Family size adjustments.

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

22. Down payment assumptions.

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

23. Minimum occupancy requirements.

In an effort to make sure that household size and number of bedrooms are appropriately matched, to avoid discrimination against families with children, and to avoid wasted bedroom space, inclusionary zoning and affordable housing programs typically have guidelines, if not regulations, on placement. For example: a three-bedroom unit may not be occupied by less than three or four people. Federal Fair Housing Act regulations contain guidelines for minimum occupancy. 24 C.F.R. §§ 100.1 *et seq.*

Construction Issues

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

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

It is important for builders to avoid a commitment that price-restricted units be *occupied* on a schedule relative to market-rate units. For a variety of reasons, it may be harder to locate, qualify and close the sale or lease with an income-limited occupant than a market rate occupant. **A builder should only be required to commit to build and offer the restricted units for sale or lease at proportional rate a so-called "best efforts" commitment.**

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

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

inclusionary development until such time as a sufficient number of certificates of occupancy for Inclusionary Units have been issued to maintain the ratio required by this Plan.

25. Administration of limitations.

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

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

Financial Information And Management

26. Comparability of market vs. affordable units.

Because inclusionary zoning ordinances require builders to provide residential units at below-market prices or rents, a question arises as to whether the price or rent restricted units need to be "comparable" to the market-rate units. There are three critical considerations. First, builders should insist on "comparable" as a standard, as opposed to identical. If a builder proposes luxury interior amenities for market rate units, there is no basis for an inclusionary ordinance to require exactly the same amenities in a restricted unit. Second, the government's greater interest in specifying comparability is in the exterior appearance of the units. In general, when one drives through a development with price-restricted and market-rate units, the two should be indistinguishable. This prevents the residents of price-restricted units from being

stigmatized, and it also helps the builder with marketing the market-rate units. Third, the best way to handle comparability is for the builder to prepare and file with his or her land use application a specification of minimum interior amenities, finishes, and quality, and intended exterior appearance (siding, lighting, etc.) of the market rate and restricted units.

27. Compliance reporting.

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

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

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

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

28. Confidentiality of income data.

A local government that has established an inclusionary program that limits a percentage of units to households earning below a certain income level will want, at some point, compliance reports. Such a report will typically involve the affordability plan administrator reporting the annual income of residents or tenants. This leads to the question of confidentiality. Tenants and residents obviously do not want their income disclosed publicly, and a

developer/owner/landlord/administrator could violate the resident's or tenant's rights to confidentiality by reporting such information in a public forum.

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

29. Sale/resale process and documentation.

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

> *An Owner may sell a Inclusionary Unit at any time, provided the Owner complies with the restrictions concerning the sale of homes as set forth in this Affordability Plan and in the deed restrictions attached hereto as Schedule E (the "Deed Restrictions"). If the Owner wishes to sell, the Owner shall notify the Administrator in writing. The Administrator shall then work with the Owner to calculate a Maximum Sale Price, as set forth in Section X above. The Administrator shall publish notice in the same manner as was followed for the initial sale, as set forth in Section VI above. The Administrator shall bring any purchase offers received to the attention of the Owner.*
>
> *The Owner may hire a real estate broker or otherwise individually solicit offers, independent of the Administrator's action, from potential purchasers. The Owner shall inform any potential purchaser of the affordability restrictions before any purchase and sale agreement is executed by furnishing the potential purchaser with a copy of this Affordability Plan. The purchase and sale agreement shall contain a provision to the effect that the sale is contingent upon a determination by the Administrator that the potential purchaser meets the eligibility criteria set forth in this Plan. Once the purchase and sale agreement is executed by the Owner and potential purchaser, the potential purchaser shall immediately notify the Administrator in writing. The Administrator shall have thirty (30) days from such notice to determine the eligibility of the potential purchaser in accordance with the application process set forth above. The Administrator shall notify the Owner and the potential purchaser of its determination of eligibility in writing within said thirty (30) day period. If the Administrator determines that the potential purchaser is not eligible, the purchase and sale agreement shall be void, and the Owner may solicit other potential purchasers. If the Administrator determines that the potential purchaser is eligible, the Administrator shall provide the potential purchaser and the Owner with a signed certification to the effect that the sale of the particular Inclusionary Unit has complied with the provisions of this Affordability Plan.*

In the event of any sale or transfer of a Inclusionary Unit by the Owner pursuant to this Paragraph, then, upon the closing of title with respect to such sale or transfer, the Owner shall pay to the Administrator, its successors or assigns, a transfer fee as established between the developer and Administrator.

30. Lender documentation.

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

31. Required vs. optional resident fees.

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

A sample provision on fees:

As set forth in the preceding sample calculation of steps for the maximum sales price for Inclusionary Units, and elsewhere in this Plan, all owners of Inclusionary Units within the development must be members of a common interest ownership association. All owners and occupants of Inclusionary Units shall have the same rights and privileges in such association as owners of market-rate units within the development, including access to and use of recreational and community amenities owned or operated by the association. However, common interest ownership fees charged to owners of Inclusionary Units shall not be set by the association or any subassociation so as to cause such owners to pay more than the maximum monthly payment as determined in

Step 5 of the preceding sample calculation. It is recognized that monthly requirements for the other items referenced in Step 5 may reduce what a Inclusionary Unit owner may pay to a minimal amount. This limitation on such fees shall be incorporated into common interest ownership documents for the development.

32. Utility allowances.

Formulas setting maximum sale prices on rents typically include reference to utility allowance, because, after rent or mortgage payments and taxes, this is typically the biggest, recurring monthly expense. Several issues lurk here. First, allowances vary by the size of the residential unit. Typically, allowances vary by number of bedrooms, but they can also be based on square footage (which is, in actuality, probably a more accurate basis). Next of course, costs vary substantially by region of the country and available fuel sources, and in today's volatile energy markets, they can vary enormously within several months, i.e., within the term of a typical residential lease.

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

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

33. Government enforcement.

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

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

34. Real property taxation.

Case law and state statutes around the country vary on the valuation and real property taxation of residential developments in which some percentage of the units are subject to maximum sale prices or rents. The variation among state laws prevents a brief list but comprehensive treatment of this topic here, but the critical point is be kept in mind: **how a development that will be subject to inclusionary requirements will be taxed should be specified in the ordinance or should be a permit condition, because it will be a substantial operating cost**. It should be clear that price or rent restricted units will be valued based on the restriction, and the method of valuation (comparable sales, income, replacement cost) should also be known in advance.

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

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

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

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

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

36. Consumer price index/escalation formulas.

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

37. Capital improvements to price restricted units.

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

38. Principal residence.

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

39. Subletting.

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

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

Another critical need regarding the duration of a set aside provision is what happens when price or rent restrictions expire. At the end of a restrictive period, possibilities include: (a) the restrictions simply expire and the current owner/occupant receives any appreciation (and perhaps a windfall); (b) the affordability plan for the set aside units allows a government agency an opportunity to purchase the restricted units at a market or other specified price and to maintain them as restricted units beyond the expiration date; or (c) a required donation of any windfall, or portion of it, to a local government's housing trust fund. A provision allowing municipal government the opportunity to purchase and preserve the price or rent restrictions might look like this:

> *(a) After the expiration of the thirty (30) year period during which the Restrictions are in effect, in the event said owner desires to convey said property, said owner shall first offer said property to the Town (the "Town"), which shall have the right to acquire said property, free and clear of all liens and encumbrances except those existing on the date of the initial conveyance of said property by the owner(s) or its successor(s) or assign(s) to an eligible family or household (the "Original Liens").*

(b) Said owner shall give written notice (the "Transfer Notice") to the Town and the Administrator of its intention to convey said property. The offer price (the "Offer Price") shall be calculated promptly by the Administrator in accordance with the formula set forth in Paragraph B of the Restrictions basing the computations on then-current data for median income. The Administrator shall provide written notice of the Offer Price to said owner and the Town within fifteen (15) days of the date of the Transfer Notice. The Town shall have forty-five (45) days from the date of the Transfer Notice to give written notice (the "Election Notice") to said owner of its election to purchase said property for the Offer Price and free and clear of all liens and encumbrances except the Original Liens.

(c) If the Town shall so elect to purchase said property, the closing (the "Closing") on such purchase and sale shall take place at the offices of the Town at 10:00 a.m. on the date sixty (60) days from the date of the Election Notice, or at such other place or upon such earlier date as the parties may mutually agree. At the Closing, any closing adjustments and allocation of closing costs which are then usual and customary in the Town for real estate closings shall be made between seller and purchaser. Following the Closing, the Town may sell said property to any party at any time for any price, free and clear of the Restrictions, including this right of first offer.

(d) In the event the Town (i) notifies said owner that it elects not to purchase said property, (ii) does not provide the Election Notice within said forty-five (45) day period, or (iii) fails to consummate its purchase of said property, said owner shall file an affidavit on the Land Records evidencing such event, following which said owner may sell said property to any party at any time for any price, free and clear of the Restrictions, including this right of first offer.

Procedural And Substantive Legal Challenges

41. Procedural compliance.

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

42. Authority to enact.

The 50 state survey of authority to adopt inclusionary zoning programs, set forth above (pp. 11 to 51), provides a starting point for reviewing whether inclusionary zoning is authorized by state law in any particular jurisdiction.

43. Preemption.

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

44. Rent control.

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

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

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

The Supreme Court of Colorado also invalidated an inclusionary zoning ordinance under a state statute prohibiting rent control. The ordinance in *Town of Telluride, Colo. v. Lot Thirty-Four Venture, LLC* required developers to mitigate the impact of the new development "by generating affordable housing units for forty percent of the new employees created by the development." 3 P.3d 30, 33 (Colo. 2000). The ordinance provided developers with four options, allowing them to either (1) deed-restrict new units; (2) deed-restrict existing market-rate units; (3) pay fees in lieu of deed-restricting units; or (4) convey to the Town land with a fair market value equivalent to fees required under the third option. *Id.*

The ordinance was challenged under a state statute prohibiting local rent control regulations. Colo. Rev. Stat. § 38-12-301 (1999). The Court first agreed that the local ordinance constituted a form of rent control. *Id.* at 35. It then determined that the ordinance was an invalid

exercise of the municipality's home rule powers because rent control was a matter of "mixed" state and local concern, and the local ordinance conflicted with the state law. *Id.* at 39.

45. Illegal exaction/regulatory taking.

In *Home Builders Ass'n of Northern California v. City of Napa*, 90 Cal. App. 4th 188 (2001), the City passed an ordinance requiring ten percent of all newly constructed to be "affordable." Developers had two alternatives. Developers of single-family units could fulfill their requirement by dedicating land or by constructing affordable units on another site. Developers of multi-family units only had this option if the city council determined that the alternative proposal would result in "affordable housing opportunities equal to or greater than those created by the basic inclusionary requirement." The second alternative was to pay a fee in lieu of constructing affordable housing. Developers of single-family units could choose this alternative by right, but developers of multi-family units had to request permission from the city council. Developers who constructed affordable housing were eligible to receive several benefits, such as loans, expedited processing, and density bonuses. The inclusionary requirement could be waived "based upon the absence of any reasonable relationship or nexus between the impact of the development and the inclusionary requirement." *Id.* at 192.

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

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

Id. at *1.

In both cases, challengers brought a facial takings claim. In *City of Napa*, the plaintiffs also brought a substantive due process claim.

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

In *BIA of San Diego County*, the wording of the waiver clause was held to be inadequate because City was not empowered to waive the inclusionary requirement even in the event that the exaction was not reasonably related to the impact of the development. 2006 WL 1666822 at *2. This consideration rendered the ordinance facially invalid under the Takings Clause. *Id.*

Holmdel Builders Assoc. v. Township of Holmdel involved challenges to inclusionary ordinances from five townships. 121 N.J. 550 (1990). Each of the ordinances imposed a fee on developers as a condition of obtaining development approval. *Id.* at 556. The fees were then deposited with an affordable housing trust fund, which would be used to meet the municipality's *Mount Laurel* obligation. *Id.* at 557. The plaintiffs challenged these ordinances on the grounds that they were an unconstitutional taking, a violation of substantive due process and equal protection, and an unconstitutional tax. *Id.* at 558. The New Jersey Supreme Court stated that even though the municipalities were imposing fee requirements rather than demanding set-asides, the ordinances still bore a "real and substantial relationship" to the regulation of land, and were a valid exercise of the zoning power. *Id.* at 286. It determined that the development fees were not exactions:

> Inclusionary zoning through the imposition of development fees is permissible because such fees are conducive to the creation of a realistic opportunity for the development of affordable housing; development fees are the functional equivalent of mandatory set-

> asides; and it is fair and reasonable to impose such fee requirements on private developers when they possess, enjoy, and consume land, which constitutes the primary resource for housing. Such measures do not offend the zoning laws of the police powers.

Id. at 572-73. Nevertheless, the Court recognized that the New Jersey Legislature had granted authority to the Council on Affordable Housing ("COAH") to determine what types of inclusionary zoning measures were appropriate. *Id.* at 578. Because COAH had not yet spoken on this issue, the Court set aside the ordinances and declined to consider the constitutional questions. *Id.* at 578-581. COAH, of course, has since adopted detailed regulations that permit municipalities to enact inclusionary zoning ordinances. *See* N.J.A.C. § 5:94-4.4.

ENDNOTES

1. R. Ellickson, *The Irony of Inclusionary Zoning*, 54 S. CA. L. REV. 1167 (1981).

VI. CONCLUSION.

In summary, inclusionary zoning is a complicated undertaking, one with many more moving parts and practical considerations than drafters realize. Thus, inclusionary zoning should first be carefully scrutinized and challenged as to whether it constitutes sensible policy. If government proceeds with implementation, it is essential that all of the critical details be identified, addressed, and molded into a workable program.

VII. SELECTED ARTICLES AND RESOURCES.

1. *Handbook On: Developing Inclusionary Zoning*, Harrisville Village, Burrillville, Rhode Island, Statewide Planning Program, Division of Planning, Rhode Island Department of Administration (2006) (available at www.planning.ri.gov).

2. Brian R. Lerman, *Mandatory Inclusionary Zoning – The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383 (2006).

3. Nick Brunick, Lauren Goldberg, and Susannah Levine, *Large Cities and Inclusionary Zoning*, Business and Professional People for the Public Interest (Nov. 2003) (available at www.bpchicago.org).

4. *Inclusionary Zoning: Lessons Learned in Massachusetts*, 2 NHC Affordable Housing Policy Review, National Housing Conference, Issue 1 (Jan. 2002) (available at www.nhc.org).

5. *Study of Inclusionary Zoning*, Minnesota Housing Finance Agency, Report to the Legislature (Feb. 2002).

6. *Constitutional Law – Fifth Amendment Takings Clause – California Court of Appeal Finds Nollan's and Dolan's Heightened Scrutiny Inapplicable to Inclusionary Zoning Ordinance*, 115 HARV. L. REV. 2058 (2002).

7. Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971 (2002).

8. Karen Destorel Brown, *Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area*, The Brookings Institution Center on Urban and Metropolitan Policy (Oct. 2001) (available at www.brookings.edu).

9. Julie M. Solinski, *Affordable Housing Law in New York, New Jersey and Connecticut*, Land Use Law Center, Pace Law School (Spring 1998) (available at www.pace.edu/lawschool/landuse/afford.html).

10. Nico Calavita, Kenneth Grimes, and Alan Mallach, *Inclusionary Housing in California and New Jersey: Comparative Analysis*, 8 Housing Policy Debate, Fannie Mae Foundation, Issue 1 (1997).

11. Jennifer M. Morgan, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359 (1995).

12. Robert C. Ellickson, *The Irony of 'Inclusionary Zoning'*, 54 S. CAL. L. REV. 1167 (1980-81).

13. Dr. Robert W. Burchell and Catherine C. Galley, *Inclusionary Zoning: A Viable Solution to the Affordable Housing Crisis? Inclusionary Zoning: Pros and Cons* (available at http://www.ginsler.com/documents/nhc-2.html).

VII. SELECTED INCLUSIONARY ORDINANCES REVIEWED.

California

Napa

City of Napa Ordinances, Chapter 15.94, available at http://www.napa-ca.gov/sire/documents/viewfile.aspx?cabinet=City_Clerk&docid=209967&pagenum=5

Sacramento

City Code, Chapter 17.190, available at http://www.lsnc.net/housing/Sac_city_ordinance.pdf

San Diego

San Diego Municipal Code, Chapter 14, Article 2, available at http://www.sandiego.gov/development-services/news/pdf/ahinordinance.pdf

San Francisco

San Francisco Planning Code, Section 315 (amended 4/17/07), available at http://www.sfgov.org/site/uploadedfiles/moh/programs/FirstTimeBuyer/Ordinance%20101-07%20-%20passed%204.17.07.pdf

Colorado

Boulder

Land Use Code, Chapter 9-13, available at http://www.bouldercolorado.gov/files/PDS/New%20LUC/Training%20Copies/9_13_tra.pdf

Denver

Revised Municipal Code, City and County of Denver, Chapter 27, Art. IV, available at http://www.municode.com/resources/gateway.asp?pid=10257&sid=6

Connecticut

Stamford

Stamford Zoning Regulations, Section 7.4, available at http://www.cityofstamford.org/filestorage/25/52/138/164/174/755/204/615/617/Zoning_Regulations.pdf

Florida

Palm Beach County

Work Force Housing Program, available at http://www.co.palm-beach.fl.us/pzb/Zoning/newsrelease/wkforcehousing.htm

Tallahassee

Tallahassee Land Development Code, Ordinance No. 04-O-90AA, available at http://www.talgov.com/planning/pdf/af_inch/104o90aa.pdf

Georgia

Fulton County

Fulton County Zoning Resolution, Section 4.26, available at http://www.fultonecd.org/planning/zoning/ammendments/2005z-0103-inclus-zone.pdf (currently voluntary)

Hawaii

Maui

Maui County Code, Title 2.96, available at http://ordlink.com/codes/maui/index.htm

Illinois

Highland Park

Ordinance Chapter 150, Article XXI, available at http://www.cityhpil.com/pdf/ordinances/article21.pdf

Maine

Portland

City of Portland Code of Ordinances, Section 14-484, Div. 30, available at http://www.portlandmaine.gov/Chapter014.pdf at 591

Massachusetts

Barnstable

Barnstable Code, Chapter 9, available at http://www.town.barnstable.ma.us/TownCouncil/Ba2043-0.pdf

New Mexico

Santa Fe

City Code, Chapter XXVI, Article 14-8.11, available at http://www.santafenm.gov

Vermont

Burlington

Burlington Zoning Ordinance Article 14, available at http://www.ci.burlington.vt.us/planning/zoning/znordinance/article14.html