



# Opening the Door to Inclusionary Housing

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## Authorship

“Opening the Door to Inclusionary Housing” is a project of the Regional Inclusionary Housing Initiative of BPI. Authored by Mary Anderson.

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# INTRODUCTION



Where we live has a significant effect on the quality of our lives. What community we live in affects our access to job opportunities, the quality of the schools our children attend, our use of public transportation, and the amount of involvement we have with our surrounding neighborhood. Most families and individuals want to live in communities with a plethora of employment possibilities, excellent schools, robust economic growth, and a healthy civic environment. But because the demand to live in communities with these characteristics is so high, housing prices increase and price out the very families and individuals that make the community such an attractive and healthy place to live.

Many cities and municipalities around the country have started to see for themselves how rapidly rising values of real estate can push out or keep out the working families and individuals that make their community diverse and dynamic: school teachers, police officers, entry- and mid-level

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private employees, to name a few. These cities and municipalities have become concerned that their community will become too “top-heavy” and thus economic growth will stagnate, for there will not be workers within the area to provide the necessary services for their community to thrive. Cities and municipalities want to figure out how to create opportunities for working families and individuals to be able to live within the community. In other words, they want to address the challenge of how to create affordable housing.

In an era of constricting state and federal resources, cities and municipalities have had to be creative in addressing the demand for affordable housing. Turning to their own local government policy tools, many cities and municipalities have used their zoning powers to promote the development of affordable housing within the private market. Through the creation of requirements and incentives, some cities and municipalities have been able to seize the opportunities presented by the booming private real estate market to create a supply of affordable housing within their communities. The resulting Inclusionary Housing Programs have become models for other communities across the country.

Business and Professional People for the Public Interest (BPI) has researched models of Inclusionary Housing Programs nationwide. BPI has examined the inclusionary housing ordinances of 12 municipalities across the country: Boston, Massachusetts; Boulder, Colorado; Cambridge, Massachusetts; Davis, California; Denver, Colorado; Fairfax County, Virginia; Irvine, California; Longmont, Colorado; Montgomery County, Maryland; Newton, Massachusetts; Sacramento, California; Santa Fe, New Mexico; and has brought them together in “Opening the Door to Inclusionary Housing” in order for readers to learn from these experiences. BPI hopes this Inclusionary Housing workbook will give municipalities guidance in creating policies for integrated affordable housing within their communities.



## The purpose of the workbook

“Opening the Door to Inclusionary Housing” is a guide for municipal governments and affordable housing advocates to explore the feasibility of Inclusionary Housing as a tool to address the issue of affordable housing in their community. While not a how-to book, the workbook outlines the major components of an Inclusionary Housing Program.

After a general introduction to Inclusionary Housing, the first part of the workbook is divided into specific sections to address the nuts and bolts of an Inclusionary Housing Program. Utilizing the

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experience of 12 different municipalities from around the country, each section addresses specific issues in the creation and implementation of an Inclusionary Housing Program. The workbook is not meant to be read cover-to-cover, but to be used as a reference guide by municipalities as they work through the process of creating an Inclusionary Housing Program that fits the needs and opportunities of their own community.

The second part of the workbook contains specific case studies of 12 cities in the country that have implemented mandatory Inclusionary Housing Programs. Each of these case studies contains a narrative describing the general characteristics of the program, as well as the accomplishments and the challenges of each program. Each case study also contains the actual ordinances and regulations for each of the programs so readers can review the language used by other municipalities.

Finally, the workbook contains a list of additional resources and a Glossary of terms.

This workbook is not a substitute for legal advice. A municipality seeking to draft and implement an Inclusionary Housing Program should consult with their legal counsel as to the applicable and relevant laws of their state and local municipality. However, “Opening the Door to Inclusionary Housing” endeavors to give municipalities an introduction to the main issues of an Inclusionary Housing policy.



## What is Inclusionary Housing?

Inclusionary Housing Programs promote the production of affordable housing by requiring residential developers to set aside a certain percentage of the housing units in a proposed development to be priced affordable to low- and moderate-income households. The Inclusionary Housing Program can be either a mandatory requirement on developers to create a certain number of units or a voluntary goal with built-in incentives to encourage developers to include affordable units in their developments.

Inclusionary Housing Programs are usually citywide and apply to almost every new residential development. Therefore, the market engine that drives private residential development at the same time creates integrated affordable units.

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The purpose of Inclusionary Housing Programs is to not only increase the supply of affordable housing in municipalities but to disperse the affordable units throughout the community.

Inclusionary Housing Programs enable low- and moderate-income families to live in homes indistinguishable from – and adjacent to – market-rate housing, and to live in communities with better access to employment and educational opportunities.

### **Inclusionary Housing Programs help municipalities serve the needs of local employers, including businesses, schools and the municipalities themselves:**

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

### **Inclusionary Housing Programs help meet the needs of current and future residents of a municipality:**

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



### **Inclusionary Housing Programs are effective in a variety of housing market conditions:**

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

While an Inclusionary Housing Program can significantly increase the supply of affordable housing in a community, it is not a complete solution to the affordable housing crisis. Inclusionary Housing Programs can be successful at creating units for moderate- and low-income families. However, Inclusionary Housing Programs have a more difficult time creating units for very-low income families. Municipalities that have reached very-low income families through their



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Inclusionary Housing Programs have used additional public subsidies to fund the construction and maintenance of those units. While Inclusionary Housing cannot solve all the issues around the supply of affordable housing, it can be a useful and effective component of a municipality's affordable housing program.

## What are the basic elements of an Inclusionary Housing Program?

Inclusionary Housing Programs vary from city to city and are created to meet the housing needs of each specific community. The following characteristics are shared by almost all Inclusionary Housing Programs and are discussed in detail in specific sections of the workbook:

### **Set-Aside Requirement**

The set-aside requirement is the percentage of units within a proposed development that a developer is required to price affordable. Cities have set-aside requirements that range from as low as five percent to as high as 35%.

### **Developer Incentives**

Municipalities give developers certain benefits to compensate the developer for pricing some units below market rates. One of the most popular developer incentives used by municipalities is the density bonus, where the developer is allowed to construct additional market rate units beyond what is allowed under the current zoning ordinance. Other incentives given are expedited permit processes, relaxed design standards, and waivers of certain municipal fees, all designed to decrease the developer's cost of construction.

### **Income Targeting**

Municipalities must decide what income range they want to target the affordable units. Most targets are based upon a percentage of the area's median income. For example, a municipality might decide that affordable units must be priced affordable for families with an income between 50 and 80% of the area median income.



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## Period of Affordability

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

## Monitoring and Enforcement

Once a program is in place, a municipality must have an administrative system to make sure that the program is being followed and that eligible families are being housed in the affordable units. Some municipalities use their local housing authority to administer the program. Others use community development departments or create a separate administrative agency.

Most municipalities also conduct a housing market study to determine the affordable housing needs of the community. The housing market study should examine the demand for housing in the community, the availability and cost of land, the number and type of development projects that are already in the pipeline, the present development opportunities, and the possible effects of an Inclusionary Housing Program on future development.<sup>1</sup> This study can help determine at what income levels the affordable units should be targeted. The housing market study can also be the basis for the municipality’s nexus study,<sup>2</sup> which will show the impact of market-rate housing development on affordable housing in the community, as well as the relationship between this impact and the requirements the Inclusionary Housing Program will place on the developer.



## About BPI

Business and Professional People for the Public Interest (BPI) is a public interest law and policy center dedicated to equal justice and to enhancing the quality of life for all people living in the Chicago region. BPI’s staff of lawyers and policy specialists uses a variety of approaches, including litigation, research, advocacy, community organizing, and collaboration. Currently, BPI works to transform segregated public housing, revitalize economically disadvantaged communities, improve public education and increase the supply of affordable housing. BPI has become a leader in the area of inclusionary housing, working with a variety of municipalities to help them create policies that reflect the needs of their community and create incentives for the construction of affordable housing.

1. Netter, Edith. “Inclusionary Zoning: Guidelines for Cities and Towns,” prepared for the Massachusetts Housing Partnership Fund, September, 2000.  
2. For a more detailed discussion of a nexus study, please see the section entitled, “What is a ‘nexus study?’”

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# Part 1: NUTS AND BOLTS

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# The Development Process

## What type of developments are covered?

The vast majority of Inclusionary Housing Programs applies to new construction.<sup>3</sup> However, many Inclusionary Housing Programs also apply to substantial rehab<sup>4</sup> and condominium conversion.<sup>5</sup> A municipality should determine the development pattern in their community and the price points for these different types of developments. For example, if a municipality is experiencing significant gentrification that consists of gut rehabs and condominium conversions, an Inclusionary Housing Program that includes these types of developments could create more units of affordable housing and guarantee a mix of incomes in gentrifying neighborhoods.

A municipality will also have to determine if it wants to treat for-sale and rental developments differently under an Inclusionary Housing Program. While some municipalities treat for-sale and

3. Boston Executive Order; Boulder Ordinance; Cambridge Ordinance, 11.201; Denver Ordinance, 27-103(v); Fairfax County Ordinance; Longmont Ordinance; Newton Ordinance

4. Boston Executive Order; Boulder Ordinance; Denver Ordinance, 27-103(bb); Newton Ordinance

5. Boulder Ordinance; Cambridge Ordinance, 11.201; Fairfax County Ordinance

rental units exactly the same, several municipalities have different periods of affordability for for-sale and rental units,<sup>6</sup> different in-lieu of options,<sup>7</sup> different density bonuses and other developer incentives<sup>8</sup> and different income targeting.<sup>9</sup> A municipality should look at the development patterns within the community to see if there is a greater demand for rental versus for-sale housing, and thus if incentives need to be given for the development of one versus the other.

## What is the threshold number of units to trigger the Inclusionary Housing Program?

Threshold unit numbers range across municipalities. Some trigger points are as low as five units in a development<sup>10</sup> to as high as 50 unit subdivisions.<sup>11</sup> In Boulder, Colorado, the Inclusionary Housing Program applies to all developments, regardless of size. For developments of five units or

more, the developer must set-aside 20% of the units as affordable. For developments under five units, the developer can either set-aside one unit as affordable on-site, one affordable unit off-site, dedicate land off-site for affordable housing development, or pay a cash in-lieu payment.<sup>12</sup>

*A municipality should look at the development patterns within the community to see if there is a greater demand for rental versus for-sale housing.*

Some municipalities create trigger points that are calculated but by size or price points. In Cambridge, Massachusetts, the trigger for a development is either 10 units or if the development contains at least 10,000 square feet.<sup>13</sup> In Santa Fe, New Mexico, the trigger is based on the income level for whom the market rate units are priced. For example, if one or more units in the development are priced for households with incomes greater than 120% of area median income, then the Inclusionary Housing Program requirements are triggered.<sup>14</sup>

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Every municipality with an Inclusionary Housing Program has a different triggering point. How a municipality determines that threshold amount is dependent on two factors.

First, a city must look at the type of development that is occurring in the municipality. For example, if the majority of the development occurring in a municipality consists of six flat condominium

6. Fairfax County Ordinance, 2-812(1); Longmont Ordinance; Montgomery County Ordinance, 25A-3(g)  
7. Boulder Ordinance, 9-6.5-8(a), 9-6.5-7(b)  
8. Davis Ordinance, 18.05.050(a)(1)(A, C)  
9. Denver Ordinance, 27-109(c), 27-113(c); Longmont Ordinance, 19.04.036, 19.04.037  
10. Davis Ordinance, 18.05.050  
11. Montgomery County Ordinance, 25A-5; Fairfax County Ordinance, 2-802  
12. Boulder Ordinance, 9-6.5-5(a)(b)  
13. Cambridge Ordinance, 11.201  
14. Santa Fe Ordinance, 26-1.4(C)(D)

buildings, it would not make sense to have the threshold number be 50 units, for then the vast majority of the new development occurring would not be covered by the ordinance. However, a higher threshold number may make sense in a municipality where most of the development is occurring in large, high rise buildings or large tract subdivisions.

Second, the municipality also must examine the economics of development in the municipality. Some developments may be so small that providing affordable units may not be financially feasible. Also, the unit number trigger may create unexpected incentives. For example, if the threshold number of units under the Inclusionary Housing Program is ten units and land and construction pricing is such that smaller developments can be profitable, the municipality may begin to see an increasing number of nine-unit development proposals.

*The percentage of housing units that a municipality decides to require a developer to set aside as affordable is a critical decision in developing an Inclusionary Housing Program. Some municipalities have set-aside requirements as low as 10% while others require set-aside amounts as high as 20 or 25%.*

## What is a “set-aside” and how high should it be?

A “set-aside” is the percentage of units in a development that an Inclusionary Housing Program requires the developer to price as affordable. For example, a “10% set-aside” means a developer is required to construct one affordable unit for every ten market-rate units.

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The percentage of housing units that a municipality decides to require a developer to set aside as affordable is a critical decision in developing an Inclusionary Housing Program. For example, the percentage of set-aside strongly affects the cost determinations of potential developments, negotiations over fee in-lieu payments and off-site development, the strength and type of developer incentives that may be offered and the quantity of affordable units that will eventually be developed.

The percentage level of set-aside units is dependent on a variety of factors: the goals of the Inclusionary Housing Program, the cost of construction in the municipality and the political strength of the developer community.

Cities and municipalities differ significantly on the percentage of set-aside required. Some municipalities, such as Boston, Denver and Longmont, Colorado, have set-aside requirements as low as

10%<sup>15</sup> while others require set-aside amounts as high as 20 or 25%.<sup>16</sup> Several municipalities have different set-aside requirements for for-sale versus rental units.<sup>17</sup> Others have a percentage range of required set-aside that coincides with the percentage of density bonus the developer would like to use. For example, in Montgomery County, Maryland the percentage of units required to be set-aside as affordable ranges from 12.5% to 15%. At a 12.5% set-aside, a developer receives a zero density bonus. However, if the developer sets aside 15% of the units as affordable, the developer will receive a 22% density bonus, creating an incentive for the developer to set-aside more units as affordable.<sup>18</sup>

Often the set-aside requirements are linked to specific income eligibility requirements in order to create a range of affordable units across income levels. For example, in Davis, California, in rental developments with 20 or more units, 35% of the units need to be set-aside as affordable – 25% affordable to households making between 50 and 80% of area median income, and 10% affordable to households making below 50% area median income.<sup>19</sup>

## Should incentives be given to developers? If so, what kind?

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The vast majority of municipalities provide some combination of incentives to developers to complement their Inclusionary Housing Program. Developer incentives have several different benefits. The incentives can help soften the political opposition to an Inclusionary Housing Program, especially if they address a specific challenge of the developers. Incentives such as relaxed development standards or decreased minimum lot size requirements allow a municipality to decrease the financial burden on developers for constructing affordable units. By decreasing the cost of affordable housing development, developers are less likely to show that an Inclusionary Housing Program causes an excessive economic loss that could be interpreted as a taking of private property without just compensation.<sup>20</sup>

15. Boston Executive Order; Denver Ordinance, 27-105(a); Longmont Ordinance

16. Boulder Ordinance, 9-6.5-5; Davis Ordinance, 18.05.050; Newton Ordinance

17. See, e.g., Davis Ordinance, 18.05.060

18. Montgomery County Ordinance, 25A-5(b)

19. Davis Ordinance, 18.05.060

20. For a more detailed discussion of the legal issues around an Inclusionary Housing Program, see the section entitled, “What is a ‘taking’ and what effect does it have on Inclusionary Housing?”

The table below outlines the different developer incentives used by 12 municipalities. Following the table is a description of several categories of developer incentives used by municipalities.

# Developer Incentives in Select Municipalities

Boston, Massachusetts	<ul style="list-style-type: none"> <li>▶ tax break for developer</li> <li>▶ increased height or FAR allowance</li> </ul>
Boulder, Colorado	<ul style="list-style-type: none"> <li>▶ waiver of development excise taxes</li> </ul>
Cambridge, Massachusetts	<ul style="list-style-type: none"> <li>▶ 30% density bonus (15% market-rate, 15% affordable)</li> <li>▶ increased FAR for affordable units</li> <li>▶ decreased minimum lot area requirements</li> <li>▶ no variances required to construct affordable units</li> </ul>
Davis, California	<ul style="list-style-type: none"> <li>▶ 25% density bonus (California state law)</li> <li>▶ one-for-one density bonus for on-site for-sale affordable units</li> <li>▶ 15% density bonus for affordable rental units</li> <li>▶ relaxed development standards</li> </ul>
Denver, Colorado	<ul style="list-style-type: none"> <li>▶ 10% density bonus</li> <li>▶ cash subsidy</li> <li>▶ reduced parking requirement</li> <li>▶ expedited permit process</li> </ul>
Fairfax County, Virginia	<ul style="list-style-type: none"> <li>▶ 20% density bonus for single-family units</li> <li>▶ 10% density bonus for multi-family units</li> </ul>
Irvine California	<ul style="list-style-type: none"> <li>▶ 25% density bonus (California state law)</li> <li>▶ reduced parking requirement</li> <li>▶ reduced fees</li> <li>▶ reduced park land set-aside requirement</li> <li>▶ expedited permit processing</li> </ul>
Longmont, Colorado	<ul style="list-style-type: none"> <li>▶ negotiated density bonus</li> <li>▶ expedited development review process</li> <li>▶ relaxed development standards</li> <li>▶ fee waivers</li> <li>▶ marketing assistance</li> </ul>
Montgomery County, Maryland	<ul style="list-style-type: none"> <li>▶ up to 22% density bonus</li> <li>▶ fee waivers</li> <li>▶ up to 40% attached unit development in detached unit development area</li> <li>▶ decreased minimum lot area requirements</li> <li>▶ 10% compatibility allowance</li> </ul>
Newton, Massachusetts	<ul style="list-style-type: none"> <li>▶ up to 20% density bonus</li> </ul>
Sacramento, California	<ul style="list-style-type: none"> <li>▶ 25% density bonus (California state law)</li> <li>▶ expedited permit process for affordable units</li> <li>▶ fee waivers</li> <li>▶ relaxed design guidelines</li> <li>▶ priority for subsidies</li> </ul>
Santa Fe, New Mexico	<ul style="list-style-type: none"> <li>▶ 11 – 16% density bonus</li> <li>▶ fee waivers</li> <li>▶ relaxed development standards</li> </ul>

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## Density Bonuses

A density bonus is a percentage of units that the municipality permits the developer to construct above and beyond what the zoning designation for that specific site would otherwise allow. Most municipalities pair the density bonus to match or be greater than the set-aside requirement.

For example, let's say a municipality's Inclusionary Housing Program has a 10% set-aside requirement and also a 15% density bonus. If a developer proposed a 100-unit development, under this program 10 of the proposed units would have to be priced as affordable but the developer would be allowed to construct 15 additional market rate units. Therefore, the development would consist of 115 units – 10 affordable units and 105 market rate units.

*Density bonuses may help protect a municipality from a successful legal challenge to an Inclusionary Housing Program.*

The percentage of density bonus given by municipalities is based upon the percentage set-aside required as well as the tolerance for increased density in the municipality. Some municipalities, like Denver, Colorado with a 10% density bonus, have an across-the-board density bonus. Other municipalities have a range of density bonuses that increases as the set-aside percentage increases. For example, in Montgomery County, Maryland, if a developer sets-aside 12.5% of the proposed units as affordable, the smallest percentage allowed, the developer will not receive any density bonus. However, for every tenth of a percentage point increase in set-aside units, the developer receives a one-percent density bonus. For example, if the developer sets-aside 13.6% of the units as affordable, the developer will receive an 11% density bonus. The range continues up to a 14.5% set-aside, where the developer can receive a density bonus of 20%, and then jumps to a maximum 22% density bonus in exchange for a 15% set-aside.<sup>23</sup>

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Like other cost offsets, density bonuses may help protect a municipality from a successful legal challenge to an Inclusionary Housing Program, for the density bonus mitigates the economic impact of requiring the development of affordable units and compensates the developer for the sub-market sales or rentals of the affordable units.

## Expedited Permit Process

An expedited permit process saves a developer money by allowing construction to begin on the site sooner, which brings units to market at a faster pace. Some municipalities allow an expedited permit

23. Montgomery County Ordinance, 25A-5(b)(3)

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process for all units in the development; some, like Sacramento, California, only allow the expedited process for the affordable units in order to give another incentive for the construction of these units.

### **Fee Waivers**

One of the largest complaints from developers is the cost of impact and permit fees from municipalities on developments that are designed to cover the costs of infrastructure development, municipal service provision, etc. Fee waivers under Inclusionary Housing Programs may help buy the political support of developers. However, municipalities need to determine the cost of waiving such fees to the municipality's budget.

### **Relaxed Design Standards and Requirements**

Municipal requirements such as minimum lot sizes, set-back requirements, landscaping requirements, minimum side yards and parking spaces can add significant costs to a project. Many municipalities relax or reduce these requirements for developments that include a certain percentage of affordable units. Relaxing these standards can save developers substantial costs at very little expense to the municipality.



## **When should the affordable units be constructed?**

The affordable set-aside units in a development should be constructed simultaneously with the market-rate units. By requiring simultaneous construction, not only will the affordable units be available for rental or purchase at the same time as market rate units but municipalities can prevent developers from abandoning projects prior to constructing the affordable units. Residential development is an economically risky business. By requiring the affordable units to be built in conjunction with the market rate units, municipalities can help guarantee that the affordable units will be built even if a developer runs into financial difficulties later on in the project.

Municipalities have created certain requirements and incentives in their Inclusionary Housing Programs to make sure that affordable units are built simultaneously with market rate units. Some municipalities require the developer to submit a construction schedule for both the market rate and the affordable units with the development proposal, and building permits are issued based

upon that schedule.<sup>24</sup> In Sacramento, California, the city requires the developer to submit a “phasing plan” that determines when the affordable units will be built. The language in the ordinance gives the municipality the ability to negotiate the construction schedule with the developer and also take into account the changing conditions of each development project.<sup>25</sup> Montgomery County, Maryland requires a “staging plan” that sequences the construction of affordable and market rate units: “The staging plan included in the affordable dwelling unit agreement for all dwelling units must be sequenced so that:

- (1) [the affordable units] are built along with or before other dwelling units;**
- (2) no or few market rate dwelling units are built before any [affordable units] are built;**
- (3) the pace of [affordable unit] production must reasonably coincide with the construction of market rate units; and**
- (4) the last building built must not contain only [affordable units].”<sup>26</sup>**

In other municipalities, the issuing of building permits is staggered to assure the affordable units are built concurrently with market rate units. In Fairfax County, Virginia, the County will not issue building permits for more than 75% of the total number of units until all the permits have been issued for the affordable units.<sup>27</sup> In Longmont, Colorado, each phase of a development project must price 10% of the units as affordable units so that the affordable housing is not concentrated in one phase of the development. This also ensures that the affordable housing is not completely left for the last phase of a development and thus at risk of never being built.<sup>28</sup>



## What should the affordable units look like?

In order to promote the goal of economic integration, most municipalities require that the affordable units be relatively similar in size and outward appearance as the market rate units. Similar look and size between the market rate and affordable units avoids stigmatization of the households in the affordable units and eases the fears of market-rate owners that the affordable units will affect

24. See, e.g., Denver Ordinance, 27-106(a)

25. Sacramento Ordinance, 17.190.030(C)

26. Montgomery County Ordinance, 25A-5(i)

27. Fairfax County Ordinance, 2-808(1,2)

28. Longmont Ordinance

property values.<sup>29</sup> While the interiors of the affordable units may have fewer amenities, the exteriors look similar or exactly like the market rate units.

Most municipalities use general regulatory language that requires comparability, but gives some flexibility to developers: “To ensure livability, Affordable Units in an Inclusionary Project shall be generally comparable in size and materials to the other units in the overall project and consistent with local needs for affordable housing... [A]ppropriate exteriors of affordable units shall closely resemble the exteriors of other units in a project, and shall be reasonably distributed throughout the project.”<sup>30</sup>

*By requiring the affordable units to be built in conjunction with the market rate units, municipalities can help guarantee that the affordable units will be built even if a developer runs into financial difficulties.*

In Sacramento, California, the ordinance makes clear that the exteriors must be similar, but the interiors can reflect differences in costs: “Inclusionary Units shall be visually compatible with Market Rate Units. External Building material and finishes shall be the same type and quality for Inclusionary Units as for Market Rate Units... Upon application by the developer to the City, the City may, to the maximum extent appropriate in light of project design elements as determined by the Planning Director, allow builders to finish out the interior of Inclusionary Units with less expensive finishes and appliances.”<sup>31</sup>

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In order to promote the similar appearance of affordable and market-rate units, some municipalities give extra incentives to developers. In Montgomery County, Maryland, the county allows for a 10% “compatibility allowance.” The developer may increase the price of the affordable units by 10% to fund amenities that will make the affordable units visually compatible on the exterior to the market rate units.<sup>32</sup> Fairfax County, Virginia allows for a 2% increase in the sales price of affordable units to cover exterior architectural compatibility upgrades and additional landscaping.<sup>33</sup>

Some municipalities require minimum unit sizes for affordable units, so developers do not create sub-par affordable units to cut costs. In Boulder, Colorado, the Inclusionary Housing Program requires the total finished floor area of detached affordable units must equal at least 48% of the

29. See Siegel, Joyce. *The House Next Door*. Innovative Housing Institute, 1999, finding no significant difference in price trends between market rate units in inclusionary developments and the market as a whole.  
30. Cambridge Ordinance, 11.204(b)  
31. Sacramento Ordinance, 17.190.030(E); 17.190.140(C)  
32. Montgomery County Ordinance, 25A-7(a)(6)  
33. Fairfax Ordinance

total floor area of market rate units, up to 1,200 square feet per affordable unit. For attached affordable units, the total finished floor area must equal at least 80% of the total floor area for the market rate units.<sup>34</sup>

Some compatibility requirements may have unintended adverse effects. In Newton, Massachusetts, the Inclusionary Housing Program requires that the affordable units be equal in size to the market rate units. In luxury developments where units have been more than 3,000 square feet, this requirement creates a small number of enormous affordable units instead of several, smaller affordable units.<sup>35</sup>

## Should the affordable units be developed on or off-site?

To create economically integrated neighborhoods, affordable housing must be built throughout the market rate development. This integration is achieved by requiring affordable units to be constructed on the same site as the market rate units. In addition, requiring the affordable units to be constructed on-site and throughout each phase of development prevents affordable housing from being clustered and prevents income-based concentration within a community.<sup>36</sup> In order to guarantee the integration of affordable and market rate units, some municipalities will not allow any off-site development of required affordable units unless there are “certain exceptional circumstances.”<sup>37</sup>

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However, some municipalities have allowed for off-site development of affordable units to address certain trade-offs. While one goal of an Inclusionary Housing Program may be to integrate housing, another is to increase the supply of affordable housing. Land and construction costs in luxury developments are usually high. By allowing developers to build affordable units off-site, less expensive land can be purchased and more affordable units developed for the same price.

Also, by allowing off-site development, different types of housing can be built. For example, while a developer may want to build luxury senior housing, the municipality may be in need of affordable family housing. By allowing off-site development, the developer of the luxury senior housing could develop multi-family rental units.<sup>38</sup>

Municipalities create different requirements and incentives for developers to address the on- or off-site issue. Some municipalities require a certain percentage of the units to be developed

34. (Boulder Ordinance, 9-6.5-5(c)).

35. Engler, Robert. “An Inclusionary Housing Case Study: Newton, Massachusetts,” *National Housing Conference Affordable Housing Policy Review*, VI. 2, Issue 1, January, 2002.

37. Cambridge Ordinance, 11.203.2

38. Netter, Edith. “Inclusionary Zoning: Guidelines for Cities and Towns,” prepared for the Massachusetts Housing Partnership Fund, September, 2000.

on-site, in order to give the developer some flexibility but still require a portion of integration. In Boulder, Colorado, the ordinance requires at least one-half of the for-sale affordable units to be developed on-site, unless the construction of the units off-site will accomplish additional benefits

that are consistent with the ordinance or if zoning, environmental or other legal restrictions make a particular number of on-site units unfeasible.<sup>39</sup> In Davis, California, at least 40% of the for-sale affordable units must be built on-site.<sup>40</sup>

*While one goal of an Inclusionary Housing Program may be to integrate housing, another is to increase the supply of affordable housing.*

In other municipalities, developers must increase the total number of affordable units developed if they want to develop the units off-site. In Boston, Massachusetts, if a developer wants to build the affordable units off-site, the percentage of units to be set-aside as affordable increases from 10% to 15%.<sup>41</sup>

Therefore, what the city may lose in economic integration, it gains in the increased supply of affordable units.

## What is a Fee In-Lieu and how does it work?

A “fee in-lieu,” also known as a “buyout,” is when a municipality allows a developer to make a cash payment instead of constructing the required affordable units within the development.

Usually these payments are deposited into an affordable housing trust fund or similar instrument to fund the construction of other affordable units within the municipality.

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Some municipalities like the flexibility of a fee in-lieu option, for it allows municipalities to mold developments to the needs of the community. In Boston, Massachusetts, some affordable housing advocates who supported an Inclusionary Housing Program did not necessarily want affordable units built within the luxury developments occurring in the downtown area, where there was less access to schools and open space for families. The fee in-lieu payments gave them the flexibility to have the affordable units built elsewhere.<sup>42</sup>

Market-rate, and especially high-end developers, may not have the skills or the experience to market or manage affordable housing units, while not-for-profit affordable housing developers are strapped for cash. With a fee in-lieu program, not-for-profit affordable housing developers can access the funds that market-rate developers pay in fees and use the funds to write down the costs of affordable housing projects.

39. Boulder Ordinance, 9-6.5-7(b)

40. Davis Ordinance, 18.050.050(a)(1)

41. Boston Executive Order

42. Interview with Tom Callahan, Director, Massachusetts Affordable Housing Alliance, July, 2001.

The drawbacks to a fee in-lieu program are also numerous. Unless strictly administered, fees may be collected by a municipality but affordable units may never be built, undermining the whole purpose of an Inclusionary Housing Program.<sup>43</sup> In Newton, Massachusetts, fees have been collected but no units have been constructed from these fees.<sup>44</sup> This is especially the case in municipalities where available land is at a premium, so there may literally be no space to build the affordable units outside of the proposed development.

Also, as most municipalities structure fee in-lieu options, the amount of dollars paid in fees by developers is usually not enough to cover the full costs of production of affordable units. Once again, this can be seen in Newton, Massachusetts, where the fee in-lieu payment has not been indexed to inflation so the pay-

ment level has decreased in real terms over time.<sup>45</sup> Finally, if one of the goals of a municipality's Inclusionary Housing Program is to disperse and integrate affordable housing throughout the community, a fee in-lieu option moves away from this goal. By giving developers an option to not build affordable units within their developments, mixed income communities are not created and affordable units are more likely to be concentrated. Because of these reasons, several municipalities, such as Sacramento, California, have specifically chosen not to allow fee in-lieu payments.<sup>46</sup>

Municipalities that have fee in-lieu options create them to address specific issues. For example, fee in-lieu options may be beneficial for extremely small develop-

ments, such as three-flats, where the inclusion of an affordable unit may not be economically feasible.<sup>47</sup> In Boulder, Colorado, fee in-lieu payments are allowed for developments with four or fewer units for just this reason.<sup>48</sup>

Many municipalities that have a fee in-lieu option only allow it in certain “exceptional circumstances,” in order to make the use of this option more difficult and to provide a stronger incentive for the construction of affordable units within proposed developments. Municipalities with these limitations create standards that developers must meet in order to show the need for the fee in-lieu payment. In Cambridge, Massachusetts, a developer is offered a fee in-lieu option only if “extreme circumstances” and “significant hardship” require it. The burden of proof is on the developer to show that “the property

43. Ray, Ann. “Inclusionary Housing: A Discussion of Policy Issues,” prepared for the Alachua County Department of Planning and Development, Gainesville, Florida. June 15, 2001.

44. Engler, Robert. “An Inclusionary Housing Case Study: Newton, Massachusetts,” *National Housing Conference Affordable Housing Policy Review*, VI. 2, Issue 1, January, 2002.

45. *Id.*

46. Interview with David Jones, City Council Member, Sacramento, California, June, 2002.

47. Netter, Edith. “Inclusionary Zoning: Guidelines for Cities and Towns,” prepared for the Massachusetts Housing Partnership Fund, September, 2000.

48. Boulder Ordinance, 9-6.5-6

*Fee in-lieu options may be beneficial for extremely small developments, such as three-flats, where the inclusion of an affordable unit may not be economically feasible.*

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cannot physically accommodate the required affordable units and/or related requirements, such as height, setbacks, or parking.” The Board of the Affordable Housing Trust reviews the developer's request and supporting evidence and then makes a recommendation to the Planning Board as to “whether the alternate means of compliance shall be of comparable value to the affordable unit that would have been otherwise provided in a comparable Inclusionary Project.”<sup>49</sup> The strength of Cambridge’s standards is seen in the fact that as of the end of 2002, the Planning Board has never received a request for a fee in-lieu payment.<sup>50</sup>

Other municipal Inclusionary Housing Programs have also set high standards for fee in-lieu payments. In Fairfax County, Virginia, the developer must show the development is an “exceptional case” by proving that the affordable units are physically and/or economically infeasible, the overall public benefit outweighs the benefit of having affordable units constructed on-site, and the alternative payment would still achieve the objective of creating a broad range of housing opportunities in the county.<sup>51</sup>

Montgomery County, Maryland has a similar standard for fee in-lieu payments. The County asks the developer to show, in significant detail, that the package of residential services at the development would make the units unaffordable, the in-lieu payment would create “significantly” more affordable units elsewhere, and the public benefits of the in-lieu payment would outweigh the benefit of constructing affordable units on the development site.<sup>52</sup> In order for the developer to meet this standard, the fee in-lieu payment has to be significant enough to produce more affordable units than would have been produced on-site, as well as produced within the same time period as the market-rate units.<sup>53</sup>

In order to make the case for the fee in-lieu payment, the developer must provide a complete accounting of the proposed costs of services and facilities, a justification as to why those services and facilities cannot be reduced, a schedule of when the affordable units will be produced, development status for alternative sites for the affordable units (including engineering records, property title, and environmental data), and financial indemnification in case of default by the developer.<sup>54</sup>



49. Cambridge Ordinance, 11.203.2(e)  
50. Interview with Chris Cotter, Cambridge Community Development Department, November, 2002.  
51. Fairfax Ordinance, 2-815(3)  
52. Montgomery County Ordinance, 25A-5(e)(2)  
53. Montgomery County Executive Regulation, 7-94  
54. Montgomery County Executive Regulation, 7-94



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If a municipality decides to have a fee in-lieu option, formulas based on the cost of constructing a unit must be created in order to calculate the fee amounts. The fee must be high enough to create an economic incentive for the creation of affordable units instead of the payment of the fee. If the fee is too low, then developers are likely to just pay the fee rather than include the affordable units within the development.

Under Boston’s Inclusionary Housing Program, a developer must set-aside 10% of the units in the development as affordable. However, if the developer chooses a fee in-lieu option, the developer must make a financial contribution equal to a 15% set-aside. Boston has indexed the fee in-lieu payment amount to the amount of the average public subsidy required to construct an affordable unit in Boston and updates this amount annually. The initial fee in-lieu amount was set at \$52,000.<sup>55</sup> Therefore, if the proposed development was 100 units, the fee in-lieu payment would be:

$$(15\% \text{ set-aside})(\text{number of units in the development})(\text{fee in-lieu payment amount}) \\ = (.15)(100)(52,000) = \$780,000.^{56}$$

In Boulder, Colorado, fee in-lieu payments are based upon square footage of the proposed development. The City Manager uses data from the Boulder County Assessors office to calculate the market rate per square foot for attached or detached residential development in the area on an annual basis. That market rate is then multiplied by 20%, the percent set-aside required in the Inclusionary Housing Program, to calculate the fee in-lieu payment.<sup>57</sup> For example, suppose a developer proposed a four attached-unit development, with each unit being 1200 square feet. The City Manager has set the market rate for attached residential development in the Boulder area at \$50 per square foot. With these numbers, the fee in-lieu payment for this development would be:

$$(\text{number of units})(20\% \text{ of square footage per unit})(\text{market rate per square foot}) \\ = (4)(240)(\$50) = \$48,000.$$

55. For the process for the annual determination, see City of Boston, Department of Neighborhood Development web site, <http://cityofboston.gov/dnd>  
56. Minnesota Housing Finance Agency, “Report to the Legislature: Study of Inclusionary Housing Initiatives,” February, 2002.  
57. Boulder Ordinance, 9-6.5-6

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# The Benefiting Families

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## At what income levels should affordable units be targeted?

Each municipality must decide who should be eligible to rent or own the set-aside affordable units. Some municipalities that want to target moderate-income households for its affordable units, such as municipal employees, have set higher income targeting for affordable units – such as 80% or 100% of area median income (AMI). Municipalities that have wanted to create affordable units for the very poor have created lower income tiers, such as 50% of area median income and below. What income levels to target depends on the housing needs and the policy goals of the municipality.

Municipalities can also create incentives within the income tiering structure to promote the construction of affordable units within certain income tiers. For example, in Longmont, Colorado, the lower the income to which the developer targets the affordable units, the more incentives the developer becomes entitled to, such as an expedited review process, additional fee waivers, and increased density bonuses. In Sacramento, California, developers who price affordable units for families making between 50 - 80% AMI receive \$1,000 in fee reductions per unit. If the developer prices the affordable units for families making below 50% AMI, the developer receives \$4,000 in fee reductions per unit.<sup>58</sup>

*The majority of municipalities with Inclusionary Housing Programs utilize the income tiering method.*

### How do municipalities structure the income targeting for affordable units?

Municipalities with Inclusionary Housing Programs have used two basic methods for setting the sale or rental price for the set-aside affordable units: income tiering and income averaging.

Income tiering is when a municipality creates categories of income levels for which affordable units must be appropriately priced. For example, a municipality may say that half of the affordable units produced in a development must be priced for households making less than 50% of the area median income (AMI) and the remaining half must be priced for families making between 50 and 80% AMI.

Income averaging is when a municipality states that the affordable units in a development must be priced so that the average price of a unit is affordable to a certain income level. For example, a

58. Sacramento Developer's Guide

municipality could say that the affordable units in a development must be priced so that the average price of a set-aside affordable unit is affordable to a household making 65% of the area median income. This means some of the affordable units could be priced affordable to households making above 65% AMI, but some will have to be priced below.<sup>59</sup>

The majority of municipalities with Inclusionary Housing Programs utilize the income tiering method. Income tiering is easier to administer, for there are clear definitions of income categories and clear percentages of units that must be developed within each income category. In Boston, Massachusetts, for the affordable units constructed in each development, half of the units must be priced for households making less than 80% AMI for the Boston Metropolitan Statistical Area (MSA) and the remaining half must be priced for households making between 80 and 120% AMI for the Boston MSA. These prices must be adjusted for household size.<sup>60</sup>

The income averaging method gives developers and municipalities more flexibility in the price mix of affordable units in each development, and thus room for negotiation on each individual development project. Santa Fe, New Mexico uses an income averaging method in their Inclusionary Housing Program. While households making between 50 and 80% AMI are eligible for affordable units produced under the program, “[t]he general intent of [the program] is that the average buyer of a[n affordable] home will have an income of approximately 65% of median income...”<sup>61</sup> The Community Services Department then works with the developer to price and market the affordable units so there is a mix of prices that satisfies the Department.<sup>62</sup>

Boulder, Colorado has a less hands-on income averaging method. Affordable rental units in a development must be affordable, on average, to households earning 10% less than the definition of low-income for the Boulder PMSA, as defined by the U.S. Department of Housing and Urban Development (HUD), with no unit renting at a rate that is not affordable to a household making 10% above HUD's definition of low-income.<sup>63</sup> Affordable for-sale units in a development must be affordable, on average, to households earning the HUD low-income limit for the Boulder PMSA, with no unit exceeding a price affordable to a household earning 10% more than the HUD low-income limit.<sup>64</sup>

59. The rule of thumb for the vast majority of municipalities is that no more 30% of a household's gross income, regardless of income level, should go towards housing costs.

60. Some municipalities that have used income-tiering have different income levels for for-sale units versus rental units. In Longmont, Colorado, the affordable for-sale units must be priced for households making less than 80% AMI for the Boulder-Longmont area, while the affordable rental units must be priced for households making less than 60% AMI for the Boulder-Longmont area. (Longmont Ordinance, 19.04.036, 19.04.037).

61. Santa Fe Administrative Procedures, 8.1.2

62. Santa Fe Administrative Procedures, 8.4, 8.9

63. Boulder Ordinance, 9-6.5-8(b)64. Boulder Ordinance, 9-6.5-9

64. Boulder Administrative Regulations, 9.2



The specific price mix of the affordable units is not governed by the ordinance, as long as the average price of the total number of affordable units meets the ordinance requirements and no affordable unit price is above the stated maximum. In order to determine the average price for the affordable units in a development, the developer must submit to the City Manager for each affordable unit the legal description, the total square footage, the number of bedrooms and bathrooms, the targeted AMI, the estimated construction schedule, and the title commitment within 30 days of the restrictive covenant.<sup>65</sup>

Whether a municipality is using the income tiering or the income averaging method, the municipality must create definitions of income levels that can be easily adjusted over time. The vast majority of municipalities use the Section 8 Income Limits created by the U.S. Department of Housing and Urban Development (HUD). The Section 8 Income Limits are tables created annually by HUD that outline the income levels of different Metropolitan Statistical Areas (MSA) and Primary Metropolitan Statistical Areas (PMSA) throughout the United States. In these tables, HUD defines the area median income (AMI) level for each MSA or PMSA, as well as the income levels for very-low income and low-income, based on household size, for the MSA or PMSA. HUD defines MSA's and PMSA's in the Income Limit Area Definitions tables, which lists what MSA or PMSA each municipality or county is within in the United States. HUD also gives definitions of very-low income as 50% of AMI and low-income as 80% AMI. A municipality can find which MSA or PMSA to which they belong, and the income limits for their MSA or PMSA, on HUD's web site, located at [www.huduser.org](http://www.huduser.org).

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Let's use Sacramento, California as an example to demonstrate how HUD's Income Limits tables are utilized. In HUD's Section 8 Income Limits for Fiscal Year 2002, the following table exists for the PMSA for Sacramento:

### FY2002 Sacramento, CA Median Family Income: \$57,300

	1 person	2 person	3 person	4 person	5 person	6 person	7 person
30% of median	\$12,050	\$13,750	\$15,450	\$17,200	\$18,550	\$19,950	\$19,950
Very Low-income (50% of median)	\$20,050	\$22,900	\$25,800	\$28,650	\$30,950	\$33,250	\$33,250
Low-income (80% of median)	\$32,100	\$36,650	\$41,250	\$48,850	\$49,500	\$53,150	\$56,850

65. Boulder Administrative Regulations, 9.2

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The area median income (AMI) for the Sacramento PMSA is \$57,300. HUD calculates very low-income and low-income categories for the Sacramento PMSA based on household size. For example, the income limit for a very low-income three person household in the Sacramento PMSA is \$25,800.

Under Sacramento’s Inclusionary Housing Program, 10% of units in a development must be priced to be affordable for very-low income households, and 5% must be priced to be affordable for low-income households, for a total set-aside requirement of 15%.<sup>66</sup> Sacramento uses HUD’s Section 8 Income Limits to define income levels, adjusted for household size and less a reasonable allowance for utilities.<sup>67</sup> Therefore, if a developer wanted to price an affordable unit targeted to a very low-income household of three persons, the unit would have to be priced so a household with an income of \$25,800 could afford the unit. At the same time, a household of three persons could not make more than \$25,800 annually to qualify for the unit.<sup>68</sup>

Since HUD updates these tables on an annual basis, municipalities use these tables to track income-eligibility levels. These annual tables make the administration of the income targeting and price targeting of affordable units under Inclusionary Housing Programs much simpler.



66. Sacramento Ordinance, 17.190.030  
67. Sacramento Ordinance, 17.190.020  
68. Sacramento used the general rule of thumb that no more than 30% of gross household income should go towards housing costs.

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## How does a municipality determine if a household is income eligible for an affordable unit?

Once a municipality determines the qualifying household income levels for affordable units under an Inclusionary Housing Programs – such as 0 to 50% of area median income (AMI) or incomes averaging 65% AMI – a process must be created to verify the incomes of families applying for the affordable units. Also, it must be determined who will collect income-eligibility information – the developer or the municipality.

*Most municipalities use the supporting regulations for their Inclusionary Housing Programs to outline the documentation required to determine income-eligibility for the affordable units.*

Most municipalities use the supporting regulations for their Inclusionary Housing Programs to outline the documentation required to determine income-eligibility for the affordable units. The documents required for income verification are similar to document requirements for other income-eligible government programs. In Boulder, Colorado, households must submit an Income Certification Form to the City Manager, which includes copies of the household's most recent federal income tax returns and W-2 forms; letter from employer indicating annual gross wage; documentation of any benefit payments; bank statement of all savings accounts as well as a bank statement documenting the average balance on the household's checking accounts for the last six months; a current statement of all assets; and a copy of a preapproval letter from a lender.<sup>69</sup>

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Fairfax County, Virginia, has similar documentation requirements, and also looks at whether the household has income from tips, overtime, unemployment insurance, pension or retirement payments, or documented regular gifts.<sup>70</sup>

Some municipalities also have the requirement that a household could not have owned residential property within a certain time period. For example, in Montgomery County, Maryland, a household cannot have owned residential property within the last five years of applying for an affordable unit.<sup>71</sup> In Fairfax County, Virginia, a household cannot have owned residential property within the last three years unless the household is a “displaced homemaker” and/or a single parent.<sup>72</sup>

69. Boulder Administrative Regulations, 8.3

70. Fairfax County Administrative Regulations, 3A(1), 3A(2)

71. Montgomery County Ordinance, 25A-4(d)

72. Fairfax County Administrative Regulations, 3A(3)

Municipalities have various methods for collecting income verification information. Some municipalities have interested households submit income information directly to the municipality. In Boulder, Colorado, potential renters and purchasers submit their income information and the Income Certification Form directly to the City Manager. This information and form must be submitted by a household between six months and 14 days of renting or purchasing a unit.<sup>73</sup> The City Manager then determines the household's income and whether they qualify for affordable units. The City Manager creates a list of approved households that is available to developers and/or landlords on request.<sup>74</sup> While developers can select a household on their own (as long as the City Manager can verify the household's income and assets) most developers and landlords depend upon the list created by the City.<sup>75</sup>

*Very few municipalities have the developer and/or landlord collect income information on interested households.*

The city of Denver has adopted a model similar, with households submitting income information to the Community Planning and Development Agency (CPDA) which creates a waiting list for developers and landlords.<sup>76</sup> In Cambridge, Massachusetts, the City maintains a list of income-certified buyers to be used by developers in selecting households to purchase the affordable units.<sup>77</sup>

Very few municipalities have the developer and/or landlord collect income information on interested households. In Longmont, Colorado, a copy of the mortgage application for the buyer of the affordable unit is submitted to the CDBG office when the other closing documents for the unit are also submitted. As for the rental units, the landlord must collect the income information of tenants and submit for an Annual Rental Compliance Certificate on a yearly basis for each affordable unit. Davis, California places the majority of the administrative process of income verification in the hands of developers and landlords. Davis allows the developer to create his or her own certification process as long as the process gains City approval.<sup>78</sup>

Finally, some municipalities have different methods for for-sale units versus rental units. In Fairfax County, Virginia, households who want to purchase an affordable unit submit income information

73. Boulder Administrative Regulations, 3.1  
74. Boulder Ordinance, 9-6.5-3  
75. Boulder Ordinance, 9-6.5-9(d), (g)  
76. Denver Ordinance, 27-103(y), 27-109(a), (e)  
77. Cambridge Ordinance, 11.204(d)(4)  
78. Davis Ordinance, 18.05.050(a)(1)(D)



to the Fairfax County Redevelopment and Housing Authority (FCRHA) in order to obtain a Certificate of Qualification.<sup>79</sup> However, if a household wants to rent an affordable unit, the landlord is responsible for determining if the household meets the income criteria outlined in the County's Ordinance.<sup>80</sup>

## How do municipalities set the initial prices for affordable units?

Virtually all municipalities price both the affordable for-sale and the rental units such that a household in the designated income category would spend no more than 30% of their monthly gross income towards the mortgage or rent, and other associated and designated costs.<sup>81</sup> Municipalities differ in what additional costs to include in the calculation, and the formulas to create the final price.

*In Cambridge, Massachusetts, the price of an affordable for-sale unit must be priced so that an eligible family will not pay more than 30% of their gross household income towards the mortgage payment, plus insurance, utilities and real estate taxes.*

The costs municipalities take into account in calculating that monthly 30% payment for qualified households vary significantly. Monthly costs such as insurance and property taxes are included in the calculation for most municipalities. In Cambridge, Massachusetts, the price of an affordable for-sale unit must be priced so that an eligible family will not pay more than 30% of their gross household income towards the mortgage payment, plus insurance, utilities and real estate taxes.<sup>83</sup> In Davis, California, no more than 30% of the gross monthly income of an eligible family can go towards the mortgage payment, plus insurance and property taxes. In Sacramento, California, the affordable price for a for-sale unit must take into account not only the mortgage payment but taxes, insurance and “other related assessments” such as monthly condominium assessments and home owner association fees.<sup>84</sup>

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Rental prices for affordable units also take into account monthly costs. In Montgomery County, Maryland, the monthly rental price includes the cost for parking as well as

79. Fairfax County Ordinance, 2-813(1)

80. Fairfax County Ordinance, 2-813(2)

81. See, e.g., Cambridge Ordinance, 11.201; Davis Ordinance, 18.050.020; Developer's Guide to the Mixed Income Housing Ordinance of the City of Sacramento

82. Cambridge Ordinance, 11.201

83. Davis Ordinance, 18.05.020

84. Developer's Guide to the Mixed Income Housing Ordinance of Sacramento

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utility costs, if tenants cover utilities throughout the development.<sup>85</sup> In Davis, California, utilities are included in monthly rental costs.<sup>86</sup>

Other municipalities also take into account one-time costs in calculating an affordable price for a unit. In Montgomery County, Maryland, the price of affordable for-sale units must take into account the closing costs and brokerage fees.<sup>87</sup> In Fairfax County, Virginia, the for-sale price of affordable units must take into account a marketing and commission allowance equal to one and one-half percent of the sales price plus the mortgage placement cost, the buy-down fees and the closing fees.<sup>88</sup> The resulting sales price cannot be set such that the developer will suffer “economic loss” as a result of building the affordable unit. The developer must be able to recoup at least the cost of construction in the resulting for-sale price.<sup>89</sup>



85. Montgomery County Ordinance, 25A-7(b)

86. Davis Ordinance, 18.05.060

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

88. Fairfax Ordinance, 2-810(7)

89. Fairfax Ordinance, 2-810(9)

*Santa Fe, New Mexico has a detailed formula for determining the sales price for affordable ownership units that is a helpful demonstration of how a municipality can do the actual calculation of a for-sale or rental price. The affordable price for a for-sale unit in Santa Fe includes a 3% down payment, a mortgage payment, taxes, and insurance. Santa Fe sets a limit of 28%, instead of 30%, of a qualified family's gross monthly income should go towards the housing payment. Santa Fe also assumes that taxes and insurance will take up about 3% of a qualified buyer's annual income, which means 25% of the buyer's income should be available for the mortgage principal and interest payments. The interest rate for a 30-year, fixed-rate mortgage is determined by Santa Fe's Community Services Department.<sup>90</sup>*

*Using the above assumptions, Santa Fe calculates the price of an affordable unit through the following formula:*

$$Y = X + .03Y$$

*Where Y = the affordable purchase price; X = affordable mortgage amount; and .03 = the down payment (3%).<sup>91</sup>*

*Santa Fe then gives a step-by-step example of how this formula works in practice.*

*The income limits for affordable units in Santa Fe are 65% of area median income. For example, suppose a four-person household that makes 65% of the area median income for Santa Fe wants to purchase a three-bedroom affordable unit. According to the U.S. Department of Housing and Urban Development (HUD), the area median income for a household of four in Santa Fe is \$53,300.<sup>92</sup> Sixty-five percent of that income is \$34,645. On a monthly basis, that comes to an income of \$2,887 per month (\$34,645 divided by 12). Assuming that 25% of this household's monthly income should be spent on the mortgage payment, an affordable monthly payment should equal:*

$$\$2,887 \times .25 = \$722 \text{ monthly mortgage payment}$$

*The Santa Fe Community Services Department has determined that the current rate for a 30-year fixed-rate mortgage is 8.09%.<sup>93</sup> Using a mortgage payment calculator or mortgage tables, this household could afford a mortgage loan of \$97,561.*

*Inserting the above information, we can use the initial equation to determine the price of the affordable unit. We know that X = affordable mortgage = \$97,561. So, assuming a 3% down payment and using the equation above:*

$$Y = X + .03Y$$

$$Y = \$97,561 + .03Y$$

$$.97Y = \$97,561$$

$$Y = \$100,579$$

*Therefore, this three-bedroom unit, to be affordable for a household of four making 65% of the area median income, should be priced at \$100,579.<sup>94</sup>*

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90. Santa Fe Administrative Procedures, 8.2.3(a-e)

91. Santa Fe Administrative Procedures, 8.2.3(f)

92. In this example, 1996 HUD figures are used. See Section 8 Income Limits for 1996 at [www.huduser.org](http://www.huduser.org).

93. This was the interest rate determined by the Santa Fe Community Services Department in 1996.

94. Santa Fe Administrative Regulations, 8.3

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## How do municipalities determine the resale price of affordable units?

Most municipalities with Inclusionary Housing Programs calculate the resale price of an affordable unit in such a way that it takes into account the rate of inflation over time plus other transaction costs. Montgomery County, Maryland, the county with the original Inclusionary Housing Program, has created a model for resale pricing that has been used by Fairfax County, Virginia and various municipalities. Montgomery County officials take the original sales price of the affordable unit and then adjust the price for inflation by adding the percentage of the original sales price that is equal to the increase in the cost of living since the unit first sold, determined by the Consumer Price Index (CPI). Also added to the sales price are the fair market value of any capital improvements made to the unit, an allowance for closing costs not paid for by the initial seller of the unit, and a reasonable sales commission if the unit was not sold during the “priority marketing period.”<sup>95</sup>

Boulder, Colorado has a similar resale pricing model as Montgomery County. The resale price of affordable units can only exceed the original sales price by an inflation factor based upon either the CPI or the area median income for Boulder. Other factors that can increase the resale price for an affordable unit include traditional closing costs such as title insurance, half of the real estate settlement fee, a document review fee, a tax service fee, and a tax certificate fee; also a customary real estate commission fee and any permanent, eligible capital improvements.<sup>96</sup>

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Some municipalities with Inclusionary Housing Programs not only want to keep units affordable for eligible buyers but also want the eligible sellers of the affordable units to be able to financially benefit from the market appreciation of their unit over time. In calculating the resale price, these municipalities allow the sellers to retain some of the value of the appreciation of the unit.

In Denver, Colorado, where there is a new Inclusionary Housing Program, the ordinance sets out a “maximum sales price” calculation that gives cash back to the seller of the affordable unit. In the calculation of the resale price, first the appreciation in the market value of the unit is calculated by finding the difference between the current appraised value of the unit and the prior appraised value of the unit. Second, in order to determine the seller’s share of appreciation, the appreciation

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

96. Boulder Ordinance, 9-6.5-9(g); Boulder Administrative Regulations, 9.7

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in market value is multiplied by the “shared appreciation value,” which is set percentage defined by the ordinance that increases each year the seller has lived in the unit.

For example, if the seller had lived in the unit for four years, the shared appreciation factor is defined in the ordinance as 35%. If the unit’s appreciation in market value was \$10,000, then the seller’s share of appreciation would be  $(.35) \times \$10,000 = \$3,500$ . The final step in determining the resale price is to add the owner’s share of the appreciation in market value to the prior purchase price.<sup>97</sup>

## How are the affordable units marketed under Inclusionary Housing Programs?

Municipalities have several different methods to make sure the word gets out that affordable units are available to rent or to buy. While some municipalities provide detailed marketing plans for developers, owners and landlords, others give very little guidance on how affordable units should be marketed.

In Santa Fe, New Mexico, the ordinance requires that any marketing materials for the sale or rental of affordable units must clearly state the policies of the Inclusionary Housing Program with regard to the pricing of the units and income eligibility of potential buyers or renters.<sup>98</sup> The City also maintains a list of pre-qualified prospective buyers and renters to which developers, owners and landlords may refer.<sup>99</sup>

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Boulder, Colorado provides much more detail on the requirements of developers, sellers and landlords for marketing the affordable units. Boulder’s ordinance contains a “Good Faith Marketing Requirement” which states: “All sellers or owners of permanently affordable units shall engage in good faith marketing efforts each time a permanently affordable unit is rented or sold such that members of the public who are qualified to rent or purchase such units have a fair chance to become informed of the availability of such units.”<sup>100</sup> The burden of marketing the affordable units is clearly on the developer, seller or landlord and not on the City itself.

97. Denver Ordinance, 27-111(b)(8)(A)(i)(a-e)

98. Santa Fe Administrative Procedures, 8.9.4

99. Santa Fe Ordinance, 26-1.19(C); Santa Fe Administrative Procedures, 8.9.5

100. Boulder Ordinance, 9-6.5-10(d)

However, the city does give guidance in what is required to meet this good faith requirement. A developer, seller or landlord must host at least one open house; list the affordable units in the Multiple Listing Service (MLS) or place at least two print advertisements during separate weeks in a local newspaper of general circulation; provide information about each property, including square footage, number of bedrooms, price and amenities, to the City of Boulder so the City itself can disseminate the information; and finally, place the affordable units on the open market for at least 30 days. The developer, seller or landlord also must maintain a marketing log to document that these steps were taken as well as keep a list of prospective buyers or renters who have expressed an interest in one of the affordable units.<sup>101</sup>

*While some municipalities place the burden of marketing on the developers, sellers and landlords, other municipalities take on the marketing of affordable units themselves.*

While some municipalities place the burden of marketing on the developers, sellers and landlords, other municipalities take on the marketing of affordable units themselves. In Montgomery County, Maryland, the marketing of affordable units is conducted by the Department of Housing and Community Development. Once the developer or seller gives notice to the county that affordable units are available, if the Department does not purchase the unit itself, then the Department must notify eligible households of the available unit.<sup>102</sup> This begins a 90-day “priority marketing period.”<sup>103</sup> If more than one eligible family express interest in the unit, the Department, through a lottery, creates a priority order of these eligible families to whom the developer can sell an affordable unit. If the priority market period passes and all possible eligible households have had an opportunity to purchase a unit, only then are the units offered to the general public.<sup>104</sup>

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Municipalities may also use marketing requirements to address policy goals that serve current residents or employees. In particular, municipalities can create required preferences for affordable units. For example, in Santa Fe, eligible households who live or work within Santa Fe are given preference for affordable units and thus are more likely to be referred to a developer, seller or

101. Boulder Administrative Regulations, 10.3  
102. Montgomery County Ordinance, 25A-9(b)  
103. The priority-marketing period for the resale of an affordable unit is 60 days; Montgomery County Ordinance, 25A-8(a)  
104. Montgomery County Ordinance, 25A-9(b)

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landlord.<sup>105</sup> In Boulder, if more than one household has expressed an interest in an affordable unit, preference may be given to a household that can document they have lived and/or worked in Boulder for at least five years or to a household that has been on Boulder’s pre-certified list for at least a year.<sup>106</sup>



105. Santa Fe Ordinance, 26-1.19(B)

106. Boulder Administrative Regulations, 10.3

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## The Long Term Life of The Program

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## How long do the affordable units stay affordable?

The length of time a unit stays affordable under an Inclusionary Housing Program ranges across the country. Some municipalities have affordability periods as short as ten years, such as Longmont, Colorado and Montgomery County, Maryland, to periods of perpetuity, such as Boulder, Colorado and Cambridge, Massachusetts.

A significant lesson can be learned from municipalities that have had Inclusionary Housing Programs in place over many years: the longer the affordability period, the better. For example, in

*Short affordability time periods meant that affordable units began “aging out” of the program before new affordable units could be built.*

Montgomery County, Maryland, which has the oldest Inclusionary Housing Program in the country, the original period of affordability on affordable units was only five years for for-sale units and 10 years for rental units. Montgomery County quickly learned that such short affordability time periods meant that affordable units began “aging out” of the program before new affordable units could be built, even during boom development times. In order to address this age-out issue, Montgomery County extended the period of affordability to 10 years and 20 years, respectively.

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However, the affordability time period may have to be extended again. Now that Montgomery County is almost completely built-out and development has slowed, affordable units are aging out at a much higher rate than development is occurring, resulting in a net loss of affordable units. As of 1999, while over 11,000 units of affordable housing have been created under Montgomery County’s program, only 3,800 of those units remain. In the next ten years, over 2,000 for-sale affordable units will be lost.<sup>107</sup>

Newton, Massachusetts also had to face this “age-out” problem. Newton implemented its Inclusionary Housing Ordinance in 1977 (amended in 1987) with an affordability period of 15 years. When affordable units began to age-out of the program, the municipality acted and extended the affordability period to 40 years. Newton is addressing the time period again and action may be taken to extend the affordability period until perpetuity, thus protecting the supply of affordable units that have been produced.

107. Brown, Karen Destorel. “Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area,” The Brookings Institution Center on Urban and Metropolitan Policy, October, 2001.

Several cities have chosen to have permanent affordability periods for a variety of reasons. Cities and municipalities that are experiencing extensive gentrification have used permanent affordability periods. A cycle of gentrification may begin rapidly, but the economic effects of the gentrification continue over a significant number of years. Without longer affordability periods, affordable units may reach the end of the control period while a neighborhood is still booming. This end of the affordability period could force a family in an affordable rental unit to be displaced or make it impossible for an eligible family to purchase an affordable unit in their neighborhood. A longer affordability period creates stability in these neighborhoods and allows families to continue to live within the municipality. An example of this reasoning is seen in Boston, Massachusetts, where the city is experiencing a renaissance in the downtown area as well as significant gentrification in surrounding working class neighborhoods. A longer term affordability period allows moderate income families to continue to live in the city and prosper over time from the economic boom by being closer to jobs and economic development.

*A longer affordability period creates stability in these neighborhoods and allows families to continue to live within the municipality. Longer affordability periods protect the public and private sector's investment in affordable units.*

Longer term affordability periods are extremely important for municipalities that have little developable land. Under an Inclusionary Housing Program, as development slows, so does the construction of new affordable units. Because of this development slow-down, eventually more affordable units will age out of the program and move into the market than will be constructed, resulting in a net loss of available affordable housing for a community. Municipalities occur scramble to amend their affordability time periods but units are still lost. In contrast, those municipalities that have perpetual affordability periods create a permanent supply of affordable housing under their Inclusionary Housing Programs and thus protect their supply of affordable housing from being lost to the market.

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Finally, longer affordability periods protect the public and private sector's investment in affordable units. Private developers have invested in the affordable units by foregoing market prices for these units. The public sector has invested in these units through fee waivers, density bonuses, other developer incentives and possible direct subsidizes in the construction and management of the affordable units. If an eligible family is able to sell their sub-market priced affordable unit at market price within a short period of time, the public and private investment in that unit is lost and the eligible family disproportionately benefits from the sale of the unit.

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## How do you keep affordable units affordable over time?

The vast majority of inclusionary housing ordinances use some sort of resale restriction to preserve the affordability of the set-aside for-sale units over time. The purpose of these restrictions is to keep the units affordable for an extended period of time, creating a supply of affordable units in the housing market.

Resale restrictions can take many forms: deed restrictions, covenants that run with the land, contractual agreements, and land trust arrangements. Resale restrictions usually are structured such that if a certain condition or conditions occurs, the ownership of the unit reverts back to the original grantor or a third party (usually a municipality, a public housing authority, a not-for-profit housing agency, or an affordable housing land trust). The conditions that usually trigger the reversion are the sale of the unit to an ineligible buyer (i.e. one whose household income is above the affordability limit), the sale of the unit at a price above the “affordable” level, or the failure to give the municipality the right of first refusal.

While some inclusionary housing ordinances give significant leeway to the form that a resale restrictions can take, most municipalities are very detailed in the ordinance and/or the supporting regulations as to the form of the resale restriction. For example, in Fairfax County, Virginia, the Inclusionary Housing Ordinance explicitly states that at the original sale of the affordable unit, the owner or developer of the unit must provide within the sales contract, as well as record with the deed, a covenant in favor of the Fairfax County Redevelopment and Housing Authority. This covenant must expressly provide a price control period of 15 years, a right of first refusal on purchase for the Fairfax County Department of Housing and Community Development, the seniority of the covenant to all instruments securing permanent financing, and the binding of the covenant upon all assignees, mortgagees, purchasers and other successors of interest.<sup>108</sup>

Another form of resale restriction used by municipalities is second mortgage liens on affordable units. In Santa Fe, New Mexico, the administrative procedures for the inclusionary housing ordinance requires that each unit sold below market value (which, by definition, is every affordable unit) shall have a second mortgage that is payable to the City. This gives the City an enforceable lien on the property if the affordability covenant is ever broken.<sup>109</sup>

108. Fairfax County Ordinance, 2-812(2)

109. Santa Fe Administrative Procedures, 14.2.1

Cambridge, Massachusetts uses a similar second mortgage enforcement mechanism, whereby each buyer of an affordable housing unit enters into an “Affordable Housing Agreement” that is recorded with the deed and includes a right of first refusal on all sales of the unit. This requirement is enforced through the second mortgage on the property that is held by the City of Cambridge and remains on the property with each subsequent owner.<sup>110</sup>

Municipalities usually include two items in resale restrictions for inclusionary housing affordable units: a right of first refusal and price controls. A right of first refusal allows a municipality or its designee the right to decide whether to purchase or not purchase an affordable unit before the owner places the unit on the market. Municipalities can structure a right of first refusal under an inclusionary housing ordinance several different ways.

*A right of first refusal allows a municipality or its designee the right to decide whether to purchase or not purchase an affordable unit before the owner places the unit on the market.*

For example, in Montgomery County, the Department of Housing and Community Development has a right of first refusal for 60 days to purchase the affordable unit from the seller at the affordable price. If the Department chooses not to purchase the unit, the seller must sell the unit to an eligible household that meets the affordability income criteria.<sup>111</sup>

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In contrast, in Barnstable, Massachusetts, the right of first refusal in the inclusionary housing ordinance kicks in at a later point in the selling process. If the seller of an affordable unit cannot find a qualified affordable purchaser, the Town has the right of first refusal to purchase the unit at the affordable price. If the Town chooses not to purchase the unit, it is then placed for sale on the open housing market.<sup>112</sup> In most municipalities, this right lasts anywhere from 30 to 60 days. The right of first refusal is used by several municipalities across the country.<sup>113</sup>

110. Cambridge Affordable Housing Deed Restriction Summary  
111. Montgomery County Ordinance, 25A-9(b)(1)  
112. Barnstable Ordinance, Article LXII, Sec. 8.3  
113. See, e.g., Cambridge Ordinance, 11.200; Santa Fe Administrative Procedures, Section 14.2; Montgomery County Ordinance, 25A-9(b)(1); Fairfax County Ordinance, 2-812(2)

However, right of first refusal is rarely, if ever, used alone. Municipalities pair the right of first refusal with price control mechanisms within a resale restriction vehicle. Most municipalities are quite general in the inclusionary housing ordinance itself as to how price controls are calculated. Many municipalities have general language similar to Brookline, Massachusetts: “Th[e] recorded covenant will limit both subsequent sales prices and the incomes of subsequent buyers, in order to guarantee the permanent affordability to Eligible Households in the same Targeted Income Tier.”<sup>114</sup> Municipalities place the specifics for these price control mechanisms in the administrative regulations, the deed for the affordable unit, or in a covenant that runs with the property. Price controls within the resale restriction vehicle, such as income limits and calculations, price formulas, enforcement mechanisms, etc., are explained in detail with the applicable assumptions and formulas.

*Most municipalities are quite general in the inclusionary housing ordinance itself as to how price controls are calculated.*

An excellent example of this detail is in the administrative regulations for Boulder, Colorado: “Restrictive covenants intended to secure the permanent affordability of designated units...shall include, without limitation, the following: the qualifying household income necessary to purchase or rent the dwelling unit; the method by which the maximum allowable purchase price or rent shall be calculated; the amount by which the resale price or rent may increase each year; affirmative marketing requirements; and enforcement remedies.”<sup>115</sup> Municipalities structure these various price control mechanisms to run with the land and apply to all successors of the property for time periods ranging from 10 years to perpetuity.

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## Who owns and manages the affordable rental units?

While some municipalities actually purchase or rent affordable units and then manage the affordable rental units themselves, others leave the ownership and the management of the affordable rental units to the developers and the landlords. The model used depends upon the goals of the program as well as the size of the municipality.

Some of the larger and older Inclusionary Housing Programs are structured so the municipal housing authority purchases or leases the affordable units and then leases the units to eligible families, thus administering the program themselves. In Montgomery County, Maryland, the public housing authority or any other designated housing development agency or not-for-profit organization has

114. Guidelines for Developers of Condominium Housing with Affordable Units, Brookline Zoning By-Law, Section 4.40(E)  
115. Boulder Administrative Regulations, Section 10.2 (referring to Sec. 9-6.5-10(c) of Ordinance)

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the option to buy or lease up to 40% of all set-aside units in a development for the first 90 days.<sup>116</sup> If the Commission decides to exercise its right and purchase some or all of the affordable units, the Commission then leases the units to households they have already certified as eligible. The Commission manages the affordable units permanently and they remain as part of the supply of public housing units in the county.

In Virginia, the Fairfax County Redevelopment and Housing Authority has the right to purchase or rent up to one-third of the available affordable units in a development for the first 90 days.<sup>117</sup> The housing authority can then manage the units through the administrative system that is already created and lease or sell the affordable units to families they certify as eligible.

Some municipalities do not purchase the affordable units but only lease the units on a long-term basis. In Newton, Massachusetts, the Newton Housing Authority may lease the affordable rental units in developments for up to 40 years. During this time period, the Newton Housing Authority subleases the units to Section 8-eligible households and manages the units.

Other municipalities choose not to purchase and manage affordable units and instead require the developers, owners and landlords of the affordable units to report on a regular basis to the municipality the number of affordable units and the income levels of the owners or renters. While these monitoring systems make it so a municipality need not create a separate administrative agency to manage the affordable units, the municipality still needs some sort of administrative system to monitor the privately-run program.

In Santa Fe, New Mexico, the ordinance calls for an annual monitoring and certification program for the affordable units created under the Inclusionary Housing Program. Under this program, the City has the right to inspect all accounting and occupancy records of the affordable units; to interview any tenant of an affordable unit; and to have access to financial and tenant information records. Each year, the City shall certify that the landlord is in compliance with the program. If not in compliance, the City will order certain steps that the landlord must take, such as renting additional units as affordable the following year, etc.<sup>118</sup>

116. Montgomery County Ordinance, 25A-8(b)(1)

117. Fairfax County Ordinance, 2-810(2), 2-811(11)

118. Santa Fe Administrative Procedures, 9.15



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## How are Affordable Units treated within a Condominium Complex?

Condominium complexes usually charge a monthly assessment fee to unit owners to cover the costs of common elements in the building such as lighting in the hallways, trash pick-up, building insurance, etc. Municipalities with Inclusionary Housing Programs are concerned with how to treat the monthly assessments of affordable units within condominium complexes. While the goal of Inclusionary Housing Programs is to keep units affordable, households in affordable units also need to be equal contributors to the condominium community.

Most municipalities that address the issue of condominium assessments in their Inclusionary Housing Programs tackle the issue in a similar manner. When determining the sale price for the affordable unit, the proposed condominium assessment fee is taken into account in the pricing formula, along with the other factors of pricing (mortgage payment, utilities, etc.).

*The rationale for considering the condominium assessment fee in the pricing of the affordable unit is to avoid stigmatizing the households within the affordable units.*

In Boulder, Colorado, in calculating the price for an affordable unit, mortgage principal and interest, taxes, insurance, as well as the monthly condominium assessment, are taken into account.<sup>119</sup> Santa Fe, New Mexico has similar language in their ordinance.<sup>120</sup> Thus, the sales price of the affordable unit is lowered so that the resulting monthly mortgage payment is also lower, with the assumption that the resulting savings would go towards the household's monthly condominium assessment fee.

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The rationale for considering the condominium assessment fee in the pricing of the affordable unit is to avoid stigmatizing the households within the affordable units. The alternative of requiring condominium developments to have lower assessment fees for the affordable units could have detrimental effects on the family in the affordable unit, as well as the Inclusionary Housing Program as a whole. Especially in smaller developments, developers may perceive that a lower assessment fee for the affordable unit will affect the marketability of the market rate units, for buyers would perceive they were “subsidizing” the affordable units. By lowering the sales price of the affordable unit instead, and calculating the monthly assessment fee the traditional way (such as by square footage of the unit), the owner of the affordable unit is treated the same as the other owners within the development.

119. Boulder Ordinance, 17190.020

120. Santa Fe Administrative Regulations, 8.4.6

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Another issue with affordable units in condominium complexes is special assessments, one-time fees determined by the condominium association to pay for capital improvements. Examples of the types of projects covered by special assessments are landscaping upgrades or common element capital improvements. Advocates recommend that condominium documents such as condominium association by-laws, state that owners of affordable units not be required to pay for capital improvements they cannot afford.<sup>121</sup>

## What enforcement mechanisms do municipalities have under Inclusionary Housing Programs?

Municipalities take advantage of several enforcement mechanisms, ranging from revoking building permits or plan approvals to fines and legal action. Penalties can be either civil or criminal. Municipalities also use different methods when addressing the actions of developers versus landlords versus families attempting to become eligible for affordable units.

Several municipalities use front-end enforcement mechanisms with developers to make sure they participate in the program from the beginning. Mechanisms such as the denial of building permits and site plan approval are popular “sticks” used to make sure developers are involved before the development even starts.<sup>122</sup> Some municipalities, such as Fairfax County, Virginia, do not allow all the building permits for the market rate units to be issued until all the permits for the affordable units are issued and construction has begun.<sup>123</sup>

Once the affordable units are constructed, municipalities create enforcement mechanisms to make sure the units are sold or leased to eligible low- and moderate-income households. For rental units, Fairfax County requires the landlord to certify monthly the number of affordable units vacant, the number of units rented to eligible families and the certification of eligibility for all households in the affordable units.<sup>124</sup> Denver, Colorado requires that landlords make a semi-annual compliance report on the affordable rental units in the development.<sup>125</sup> In Longmont, Colorado, the landlord must submit an annual rental compliance report that shows the number of affordable units rented and at what price.

121. Netter, Edith. “Inclusionary Zoning: Guidelines for Cities and Towns,” prepared for the Massachusetts Housing Partnership Fund, September, 2000.

122. See, e.g., Boulder Ordinance, 9-6.5-4; Denver Ordinance, 27-115(e); Montgomery County Ordinance, 25A-10(b); Sacramento Ordinance, 17.190.130(B); Santa Fe Ordinance, 14-96.9, Administrative Procedures 7.14

123. Fairfax Ordinance, 2-808(1,2)

124. Fairfax Ordinance, 2-811(4)

125. Denver Ordinance, 27-113(i)



Similar, but somewhat stricter, requirements also exist for the for-sale affordable units. In Montgomery County, Maryland, the Director of the Inclusionary Housing Program can stop or cancel any transfer of an affordable unit if the transfer does not comply with the Inclusionary Housing Program.<sup>126</sup>

Enforcement mechanisms are also in place to make sure the households who want to purchase or lease these affordable units are also following the rules. Fairfax County, Virginia, in particular has strong mechanisms to ensure the households who buy or rent the affordable units are eligible. Purchasers and renters of affordable units must provide an affidavit as to income eligibility on an annual basis. If an owner of an affordable unit does not submit the affidavit, the household will be fined \$50 per day and will be subject to a lien on the property. A tenant of an affordable unit who does not submit an annual affidavit will automatically have their lease terminated.<sup>127</sup> If a household submits a false affidavit, the household will be subject to a \$1,000 fine and lease termination.<sup>128</sup>

*Enforcement mechanisms are also in place to make sure the households who want to purchase or lease these affordable units are also following the rules.*

If the owner of an affordable unit falsely swears that the unit is the primary residence for the household, the household is subject to suit and will be forced to sell the unit.<sup>129</sup>

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126. Montgomery County Ordinance, 25A-10(d)  
127. Fairfax County Ordinance, 2-813(5-6); 2-817(1)  
128. Fairfax County Ordinance, 2-817(1)  
129. Fairfax County Ordinance, 20817(3)

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# The Legal Issues



## What is a “nexus study”?

A nexus study is an analysis done by a municipality to show the connection between the municipality’s interest in providing affordable housing for its residents and the Inclusionary Housing Ordinance. Specifically, it provides data to show how the continued construction of market-rate housing creates a need for affordable housing in the municipality and how the Inclusionary Housing Ordinance will meet this need. A municipality will usually compile the study as part of its effort to implement the ordinance, and will usually publish its findings in an attached memo or an appendix to the ordinance or the comprehensive plan of the municipality. The nexus study should highlight the specific needs of the municipality and should take into account the diverse reasons a community would want an Inclusionary Housing Ordinance, with emphasis on the particular goals the municipality wishes to achieve through the ordinance itself.

*The nexus study should highlight the specific needs of the municipality and should take into account the diverse reasons a community would want an Inclusionary Housing Ordinance.*

A municipality should complete a nexus study for several reasons. First, a nexus study gives a municipality concrete data to use as justification for the Inclusionary Housing Ordinance. This information can help a municipality explain why the ordinance is needed in a way that abstract ideas about the value of affordable housing cannot. Second, in order to hold a zoning ordinance valid, courts have required that governments show a connection or “nexus” between the interest or need the government is trying to address and the Ordinance. By completing a nexus study, a municipality may avoid a legal challenge to its Inclusionary Housing Ordinance by showing this connection before any disputes arise. Third, if the ordinance is challenged in court, the municipality can turn to the nexus study as justification for the Inclusionary Housing Program.

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The specific information to be gathered in the nexus study and published in the nexus memo will vary from city to city due to the variety of reasons for implementing an Inclusionary Housing Ordinance.<sup>130</sup> Fortunately, a number of cities have already completed nexus studies that can be used as guides.<sup>131</sup>

130. This requirement arises when an ordinance is challenged as a “taking without just compensation” under the federal Constitution or a state’s Constitution. For a further explanation of this requirement and takings law, see section of this workbook entitled “What is a ‘taking’ and what effect does it have on Inclusionary Housing?”

131. For example, see nexus memos for the Cities of Cambridge, MA, and Santa Fe, NM, included as part of this workbook.

First, a nexus memo should begin with an introduction that outlines the specific municipality's interests that the Inclusionary Housing Ordinance is designed to address, the City's rationale for implementing the ordinance and a general explanation of the findings of the nexus study. For example, the City of Santa Fe focused on the need for affordable housing in the city for low- and moderate-income service employees. It supported its rationale by explaining how the development of market-rate housing brings new residents to the city who place increased demands on the Santa Fe's service industries. This demand increases the need for service employees, many of who cannot afford market-rate housing.<sup>132</sup> In this way, the City quickly explained the need for affordable housing and its link to the creation of market-rate housing.

Second, the nexus study should include an outline of the methodology used to conduct the study. This outline can be limited to a listing of the specific steps used; however, it should show the progression from the development of market-rate housing to the need for affordable housing to meet the legitimate municipal interest.

For instance, the City of Cambridge went through six steps to complete its study, including (1) the determination of the proportion of current housing stock that can be maintained as affordable in the future, (2) the determination of the typical cost of new market rate housing being developed in the city, and (3) the determination of the amount of affordable housing units necessary to meet the City's legitimate interest – preservation of economic diversity.<sup>133</sup> These steps – and those included in between – show how Cambridge linked the development of market-rate units to its interest of preserving diversity in the city.

Third, the municipality should detail the method used to complete each step and the specific data found. This account should include exact numbers if available. For example, to show how the creation of market-rate housing increased the need for consumption-related public and private sector employees who could not themselves afford the market-rate residences, the City of Santa Fe used data on “personal consumer expenditures” compiled by the U.S. Departments of Commerce and Labor<sup>134</sup> and data on consumer-related employment from three specialized Census series: the *Census of Service Industries, the Census of Retail Trade, and the Census of Utilities*.<sup>135</sup>

132. Jerold Kayden and David Listokin, *Draft Report for Proposed Affordable Housing Program, City of Santa Fe, New Mexico 2* (Oct. 1995) [hereinafter *Santa Fe Report*].

133. Stockard & Engler & Brigham, LLC, *Cambridge Inclusionary Housing Study 2* (Feb. 1998) [hereinafter *Cambridge Study*].

134. *Santa Fe Report* at 13-14.

135. *Id.* at 15-16.

Through the combination of this data, the City determined that the construction of 100 *High Market* units (affordable to those with 120 – 200% of the area median income (“AMI”)) would require the addition of 38.27 consumer-related employees, while the construction of 100 *Very High Market* units (over 200% of the AMI) would require the addition of 57.42 employees. Combining this data with the number of employees needed to construct the market-rate housing, the City of Santa Fe determined that of the 124.78 employees needed to serve 200 high and very high market residents, 40.33 of these employees would be in low- and moderate-income households.<sup>136</sup> Through this determination, the City was able to show that it would need to provide 29.97 low- and moderate-housing units for these employees, or approximately one affordable-housing unit for every eight high or very high market-rate units.<sup>137</sup> The City organized this information into two tables, one of which is illustrated below:

### Summary of Impacts for Development of 100 High Market Housing Units<sup>138</sup>

Employment Category	Total Employment	Low- & Moderate Income Employees	Gross Number of Low- & Moderate-Income Housing Units Needed	Net Number of Low- & Moderate-Income Housing Units Needed*
1. Public Sector	9.68	3.35	2.81	2.25
2. Private Sector-Consumption	38.27	12.12	10.24	8.19
3. Private Sector-Construction	3.69	1.10	0.93	0.74
Total	51.64	16.57	13.98	11.18

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\* Equals gross need multiplied by 0.8

The municipality should explain as clearly as possible how the numbers are derived, showing each step of its calculations if possible, and identify the specific sources of its data. Appendixes may be attached if the City chooses not to include the complete computation of each step in its study, as was done by the City of Cambridge, which included only its final data in the nexus study. For

<sup>136</sup> *Id.* at 23.

<sup>137</sup> *Id.* at 25-26.

<sup>138</sup> *Id.* at Table 12.

example, although there were a number of preliminary steps in compiling the information on the minimum income required to purchase existing properties in the city, Cambridge chose to include only the final conclusion in an easy-to-read table:

## Minimum Income Required to Purchase Existing Cambridge Properties<sup>139</sup>

Housing Type	Median Price	PITI*/Month	Minimum Income
Single Family	\$321,000	\$2,628	\$105,124
Two Family	\$279,000	\$2,284	\$91,369
Three Family	\$284,000	\$2,325	\$93,007
Condominium	\$170,000	\$1,546	\$61,837

\*PITI = Principal, Interest, Taxes and Insurance

The City followed this table with an explanation of how these numbers relate to the goal of maintaining diversity within its communities and how these numbers show that the existing properties will be unable to fulfill Cambridge’s need for affordable housing<sup>140</sup>.

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A nexus study helps the municipality articulate the objective reasons for an Inclusionary Housing Ordinance. Although a nexus study will not guarantee that legal questions about the ordinance will not be raised, it will give the municipality a good head start in answering these concerns.

## What is a “taking” and what effect does it have on Inclusionary Housing?

The Fifth Amendment of the Constitution provides that no private property can be taken for public use without just compensation; this provision is known as the “Takings Clause.” This clause applies most generally to the eminent domain power of the government – where the government actually acquires title to real property that had been privately owned in order to promote some public purpose. However, the Supreme Court has also long maintained that certain government

<sup>139</sup> *Cambridge Study* at 10.

<sup>140</sup> *Id.*

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regulations on land use may violate the Takings Clause, even though the private property is not physically taken. These are known as “regulatory takings.”

Opponents to Inclusionary Housing Programs sometimes argue that the application of an Inclusionary Zoning Ordinance can result in a regulatory taking. This section will address that argument by first explaining the U.S. Supreme Court decisions on “takings” and then by outlining the opposition’s arguments against Inclusionary Zoning Ordinances and possible responses. Of course, any municipality creating an Inclusionary Housing Program should work with its corporation counsel to make sure the ordinance is in accordance with the law of that state. This section will give a general introduction to the basics of a takings argument.

### **The Decisions of the U.S. Supreme Court**

Justice Oliver Wendall Holmes stated in *Pennsylvania Coal Co. v. Mahon* that “[w]hile property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.”<sup>141</sup> The question is how far is too far? In the last 25 years, the Supreme Court has handed down four cases that sought to define when regulations go too far – *Lucas v. South Carolina Coastal Council*,<sup>142</sup> *Agins v. City of Tiburon*,<sup>143</sup> *Nollan v. California Coastal Commission*,<sup>144</sup> and *Dolan v. City of Tigard*.<sup>145</sup>

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In *Lucas*, the Supreme Court held that government regulations that deny all economically beneficial or productive use of the land would be classified as regulatory takings. Speaking for the Court, Justice Scalia wrote, “When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”<sup>146</sup> In other words, if the government regulation has made it impossible for the private owner to make any money off the land, then it is a taking and the government must compensate the owner.

But what if the regulation does not take away *all* economically beneficial use of the land? The Supreme Court has stated that some regulations may cause such excessive loss to a property owner that they will also amount to a taking. *Agins*, along with an earlier Supreme Court case, sets

141. 260 U.S. 393, 415 (1922).

142. 505 U.S. 1003 (1992).

143. 447 U.S. 255 (1980).

144. 483 U.S. 825 (1987).

145. 512 U.S. 374 (1994).

146. *Lucas*, 505 U.S. at 1019.

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out two factors that are particularly relevant to the analysis of whether a regulation will fall into this category: (1) whether the regulation “substantially advances a legitimate state interest,”<sup>147</sup> and (2) whether the regulation allows a landowner to obtain a “reasonable return” on his/her investment.<sup>148</sup> If the answer to both these inquiries is yes, the regulation will *not* constitute a taking.

The last two cases speak directly to the issue of conditions on local building permit approvals, which brings us closer to what an Inclusionary Zoning Ordinance does. *Nollan* and *Dolan* articulate a two-step test to determine if a government regulatory action produces an obligation to compensate the private landowner. First, the government must show that a “nexus” exists between a legitimate state interest and the requirement.<sup>149</sup> Second, the requirement imposed by the government must be “roughly proportional” to the nature of the proposed development and to the possible impact of the development. This requirement is known as the “rough proportionality” standard.<sup>150</sup> If either of these two steps is not met, the requirement imposed by the government will be considered a taking, and the government must give just compensation to the landowner.

### Challenging the Takings Argument

There are three takings arguments that objectors to inclusionary zoning could use to challenge a Inclusionary Housing Program. The first argument focuses on economic viability of the land, specifically that the set-asides required under inclusionary zoning ordinances diminish the economic value of private land to such an extent that it constitutes a taking. The second argument is that the set-asides do not have the required “nexus” in that they do not substantially advance a legitimate state interest. The third argument focuses on the “rough proportionality” test in *Dolan*, arguing that the required set-aside is not roughly proportionate to the impact of the development. This claim reasons that the lack of affordable housing was an already existing problem and not a need created by the planned development. Therefore, the argument goes, the set-asides force some people, namely the private landowners, to bear public burdens that should fairly be borne by the community at large. While these arguments should not be taken lightly, there are answers to each of them that can serve to protect Inclusionary Housing Ordinances.

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147. *Agins*, 447 U.S. at 260, citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928).

148. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 138 (1978).

149. *Nollan*, 483 U.S. at 837.

150. *Dolan*, 512 U.S. at 394-96.



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## The Economic Value of the Land Argument

The first argument is that an Inclusionary Zoning Ordinance will diminish the economic value of the land. However, the general rule in takings, as set out in *Agins* and *Penn Central*, is that as long as a landowner can earn a reasonable return on his/her investment, a taking will not have occurred. Most zoning laws cause some decrease in value of private property. It can be argued that Inclusionary Zoning Ordinances should not be treated differently from any other valid zoning law that alters the land value.

This economic argument favoring Inclusionary Zoning practices has been recognized as valid by at least one court. In the case *In re Egg Harbor Associates*, the New Jersey Supreme Court held that a 20% set-aside mandated by an Inclusionary Zoning Ordinance did not constitute a taking because the developer had not shown that he would not obtain a “just and reasonable” return on his investment.<sup>151</sup>

Also, municipalities seeking to implement an Inclusionary Zoning Ordinance may be able to protect themselves from the economic takings argument by providing benefits to developers who follow the set-aside, including density bonuses and expedited permit processes. These city-provided benefits can reduce the amount of economic loss a developer could suffer from the set-asides and possibly decrease the likelihood of success of a takings claim. For example, in Cambridge, Massachusetts, developers of more than ten units are automatically granted a 15% market-rate density bonus contingent upon a 15% affordable unit density bonus. By making the number of bonus market-rate units and affordable units equal, Cambridge ensures that developers obtain compensation for the affordable units they must provide, which protects the municipality from a judicial challenge.



## The Nexus Argument

The second argument – that the ordinance does not have the required “nexus” to a legitimate state interest – may be answered by explaining the main purpose behind the ordinance. The government could argue that it has a legitimate interest in providing affordable housing for its residents with lower and moderate incomes (who include police officers, firefighters, and teachers), in diversifying its community, and in minimizing socio-economic segregation. These state interests are advanced

151. 464 A.2d 1115, 1123 (N.J. 1983).

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by the ordinance because it protects the City’s finite land resources from being developed with residences that only more affluent community members could afford. Again, the New Jersey Supreme Court has provided support for municipalities in this argument by finding that it was a proper exercise of government power in the *Egg Harbor* case to create housing opportunities for poorer residents.<sup>152</sup>

Many municipalities that have already instituted an Inclusionary Housing Ordinance have also conducted a “nexus study” to address this particular argument before any challenges arise. For more information on this subject, see the section titled, “What is a ‘nexus study’?”

### **The Rough Proportionality Argument**

The third argument – rough proportionality – poses perhaps the strongest takings challenge to Inclusionary Housing Programs. However, an important counter-point is that the developer must show that the set-aside is a condition attached to a site-specific permit rather than a generally applicable regulation. In *City of Monterey v. Del Monte Dunes, Ltd.*, the Supreme Court expressly limited the “rough proportionality” standard to specific permit conditions, emphasizing that the standard will not apply to land use regulations generally.<sup>153</sup>



If a set-aside requirement is treated as a condition that a developer must meet in order to obtain a building permit, it can be argued that the set-aside is analogous to valid dedications that, in many places, are already imposed on developers of new subdivisions. For example, in many municipalities, developers are required to dedicate land for streets and sidewalks, and, in more recent years, city governments have required developers to dedicate land or pay in-lieu fees for the construction of parks, recreational facilities, and schools. However, for a set-aside requirement to be an acceptable condition for a building permit, the set-aside requirement must be roughly proportional to the needs created by the new development, as required by *Dolan*. While the argument for streets, sidewalks, and even schools is fairly obvious in this respect – more developments mean more people requiring more facilities – the argument may not be as obvious in the case of set-asides. It could be argued that the municipality must impose the set-aside requirement on new developments because land is a limited resource. Therefore, all new developments that do not include affordable housing diminish the amount of space available for the state to meet its legitimate interests in providing

<sup>152</sup>. *Id.* at 1120.  
<sup>153</sup>. 526 U.S. 687, 702.

affordable housing for its lower-income residents, in diversifying its community, and in minimizing socio-economic segregation.

A second and perhaps stronger response is that *any* new development that does not include affordable housing will exacerbate the problems that the ordinance was passed to address. For example, it can be argued that the development of the high-income subdivision will perpetuate socio-economic segregation within the city and limit diversification and, therefore, the ordinance is needed to ensure integration in all future developments. However, a municipality that seeks to use this argument should realize that this argument is weakened if the ordinance allows fee in-lieu payments or affordable housing to be built off-site.

Finally, while the Supreme Court stressed in *Dolan* that there was no mathematical formula for determining the proportionality of the set-aside to the need created by the development, it did state that the City must make “some sort of individualized determination” to quantify its findings in support of the dedication.<sup>154</sup> How much information is required to meet this standard is unclear but municipalities should be aware of its existence and make every effort to back up its arguments with concrete data and findings. Cities such as Santa Fe, New Mexico and Cambridge, Massachusetts have presented such data through their nexus studies.<sup>155</sup>



**The Standard in Illinois**

The Illinois Supreme Court has found that the Illinois Constitution requires a degree of connection higher than the “rough proportionality” between the requirement on a permit approval and the impact of the development that is required by the federal constitution. Under Illinois law, the government must show that the requirement is tailored to a need “specifically and uniquely attributable” to the planned development.<sup>156</sup> Due to this higher standard, it is likely that developers who seek to challenge Inclusionary Zoning Ordinances in Illinois will attack them by arguing the set-aside requirement is not addressing a need that is “specifically and uniquely attributable” to the development.

154. *Dolan*, 512 U.S. at 391

155. To review the nexus studies for Santa Fe, New Mexico and Cambridge, Massachusetts, see the “Case Studies” section at the end of the workbook.

156 *Pioneer Trust & Savings Bank v. Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961). In 1995, the Illinois Supreme Court also applied this standard in assessing the constitutionality of two state enabling statutes that allowed municipalities to impose transportation impact fees on new developments. *Northern Illinois Home Builders Ass’n, Inc. v. County of Du Page*, 649 N.E. 384 (Ill. 1995). The Court held that the second enabling statute was constitutional because it expressly mandated that the fees imposed must be “specifically and uniquely attributable” to the transportation demands caused by the new development. *Id.* at 390.

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There are two possible responses to this type of challenge. The first encompasses the argument on socio-economic integration and diversification set forth above. If these goals are accepted as legitimate state interests, supporters of the ordinance may have an easier time meeting its burden of proving that the need to ensure future integration is “specifically and uniquely attributable” to the new development.

The second response overlaps with the economic loss argument outlined above. The municipality can argue that unlike land dedication requirements, an Inclusionary Housing Ordinance does not require the developer to relinquish land completely to the City.<sup>157</sup> Rather the developer can continue to build on the land and obtain some return on his investment by selling or renting the affordable units. This argument again is stronger if developers are given benefits such as density bonuses for complying with the ordinance.

## What legal challenges have there been to Inclusionary Zoning Ordinances?

Since 1973, four different Inclusionary Zoning Ordinances have been challenged in different state courts – Virginia, New Jersey, Massachusetts, and California. Two of the cases held the statutes invalid, and two of the cases held the statutes valid. Each of these cases was strongly influenced by the particular state’s enabling statute. Therefore, differences in state law make it difficult to apply the results of these cases generally. A municipality should examine the law in its state and confer with legal counsel when drafting an Inclusionary Zoning Ordinance.

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This section will summarize each of the four challenges to Inclusionary Zoning Ordinances and will discuss some possible lessons from these four cases.

**Virginia: *Board of Supervisors of Fairfax County v. Degroff Enterprises, Inc.*** The first case, *Board of Supervisors of Fairfax County v. Degroff Enterprises, Inc.*,<sup>158</sup> was heard in the Supreme Court of Virginia in 1973. In this case, Fairfax County had issued an amendment to its zoning ordinance that required property developers to set aside at least 15 % of their residential units for affordable

<sup>157</sup> For example, see *Pioneer Trust*, 176 N.E.2d at 799-780 (city required the dedication of 6.7 acres of developer’s land for elementary school as condition for permit approval); *Krughoff v. City of Naperville*, 369 N.E.2d 892 (Ill. 1977) (building permit conditioned on land dedication or fee in-lieu payments for city parks); *Amoco Oil v. Schaumburg*, 661 N.E.2d 380 (Ill. App. Ct., 1st Dist. 1995) (village government conditioned permit approval on developer’s dedication of 20% of land for highway expansion).

<sup>158</sup> 198 S.E.2d 600 (Va. 1973).

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housing. This amendment applied to developers of 50 or more residences in five specific zoning districts in the county. The amendment did not provide any benefits to the developers such as density bonuses or expedited permitting. Although the court found that providing low and moderate income housing serves a legitimate state purpose,<sup>159</sup> it still held the ordinance amendment invalid for two reasons:

- The amendment was improper because it constituted “socio-economic zoning.” According to the court, the county had been enabled by statute to control only traditional zoning requirements directed to physical characteristics of the land.<sup>160</sup>
- The amendment was improper because it violated the Virginia Constitution, which states that no property can be taken for public purposes without just compensation. The court stated that this violation arose because the amendment required rental and sale prices that were not fixed by the free market.<sup>161</sup>

Although the amendment was held invalid, two important parts of the decision should be noted. First, the amendment provided for no benefits whatsoever to the developers for complying with the amendment. Without density bonuses or any other incentives, developers were not receiving any compensation for setting aside 15% of the units as affordable. Second, the court limited its opinion to the zoning authority given to the county under a Virginia enabling statute and the Virginia Constitution. Therefore, a municipality needs to look at the particular requirements and limits of its state’s zoning enabling statute.



Since Degroff, Fairfax County has implemented another Inclusionary Housing Program that includes incentives for developers such as density bonuses. This program has not been challenged in court. Fairfax County’s present program is featured in the Case Studies section of this workbook.

**New Jersey: *In re Egg Harbor Associates***

The second case, *In re Egg Harbor Associates*,<sup>162</sup> was decided by the New Jersey Supreme Court in 1983. This case involved a condition on a development permit imposed not by a municipality or county but rather by the Division of Coastal Resources, an environmental agency, under the New

159. *Id.* at 601.  
160. *Id.* at 602.  
161. *Id.*  
162. 464 A.2d 1115 (N.J. 1983).

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Jersey Coastal Area Facility Review Act. This Act gave the agency authority to approve proposed developments within the coastal zone of New Jersey, as defined in the statute. By this authority, the Division required the specific developer, Egg Harbor Associates, to set aside 20% of its proposed 1,530 residential units for low- and moderate-income housing. The court upheld this condition for two reasons:

- The court held that the Act gave the Division authority to require set-asides because the Act, as expressly stated, was passed to promote the public health, safety and welfare and to advance the best long-term interest of all people in New Jersey. The court found that the set-asides fell within this purpose.<sup>163</sup>
- The court found that the set-aside did not constitute an unconstitutional taking of private property without just compensation because it still allowed the developer to obtain a “just and reasonable return” on his investment.<sup>164</sup>

This case appears to be directly contradictory to *Degroff*. However, one important distinction should be noted – the authority granted to the agency or county by the underlying statute. Whereas the Virginia court held that Fairfax County had exceeded its authority under the Virginia enabling act, the New Jersey court found the Division was authorized by a specific New Jersey legislative act. Once again, the underlying enabling act determines the power of the municipality or county to require set-aside affordable units.

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### **Massachusetts: *Dacey v. Town of Barnstable***

The third case, *Dacey v. Town of Barnstable*,<sup>165</sup> came before the Barnstable, Massachusetts, Superior Court in 2000. The case focused on the specific provisions of an Inclusionary Zoning Ordinance. The Barnstable Ordinance required that all applicants for a subdivision of land under 10 acres, or for a building permit for developments under 10 units, to pay a fee to Barnstable’s Inclusionary Housing Fund. If the development was to have 10 or more units, the developer had to set-aside 10% of the units as affordable. As in *Degroff*, developers did not receive any benefit for complying with the ordinance.

The 10% set-aside requirement was not challenged in court and thus still exists as part of the Barnstable Ordinance to this day. Instead, the focus of the court’s decision was on the fee applied to developments with fewer than 10 units or less than 10 acres. The court stated there was a

163. *Id.* at 1122.

164. *Id.* at 1123.

165. No. 00-53 (Barnstable Sup. Ct. 2000), available at [http://www.mhpfund.com/termsheets/dacey\\_vs\\_barnstable.pdf](http://www.mhpfund.com/termsheets/dacey_vs_barnstable.pdf).

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difference between a fee, which the municipality could legally apply, and a tax, which the municipality could only apply if granted the specific authority by the state legislature. The court held that the ordinance was not a permissible fee, rather it constituted an illegal tax on applicants for three reasons:

- The applicants were not the sole or primary beneficiaries of affordable housing and therefore should not, as a limited group, have to share this cost.<sup>166</sup>
- The charges were not associated with optional services and benefits which developers could voluntarily pursue.<sup>167</sup>
- The charges were not intended to compensate Barnstable for services provided, but to fund affordable housing.<sup>168</sup>

Again, there are two important aspects specific to the facts of this case that should be noted. First, the court focused on the specific nature of one of the requirements in the ordinance – the required payment of a “tax” by some developers, a tax which the municipality did not have the power to levy. Once again, the specifics of underlying state law determined this issue. Second, as in Degroff, no benefits were provided to applicants for contributing to the affordable housing fund. This lack of any benefit to the applicants seemed to play a large part in the court’s reasoning.

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**California: *Home Builders Association of Northern California v. City of Napa.***

Finally, the fourth and most recent case, *Home Builders Association of Northern California v. City of Napa*,<sup>169</sup> was decided by a Court of Appeals in California in 2001. In this case, the City of Napa enacted an Inclusionary Zoning Ordinance, requiring that 10% of all residential units be used for low- and moderate-income housing. The ordinance applied to all development in the city, including non-residential, and offered the developers two choices: either set aside affordable units or pay a fee in-lieu of a set aside. The money paid would be placed in a Housing Trust Fund to be used for the development of affordable housing. The ordinance also provided developers who complied with the 10% requirement a number of benefits: expedited permit processing, fee deferrals, loans or grants, and density bonuses. Most significant to the court’s decision here, the ordinance also

166. *Id.* at 7-8.  
167. *Id.* at 8.  
168. *Id.*  
169. 90 Cal. App. 4th 188 (Cal. C.A., 1st Dist. 2001).

permitted a developer to appeal to the city for a reduction, adjustment, or even a complete waiver of the requirements “based upon the absence of any reasonable relationship or nexus between the impact of the development and... the inclusionary requirement.”<sup>170</sup> The court upheld the ordinance for four reasons:

- The ordinance did not constitute a taking without just compensation because it provided significant benefits (as listed above), and it gave the city the opportunity to waive the requirement if there was no nexus between the development and the requirement.<sup>171</sup>
- Creating affordable housing is a legitimate state interest, and the ordinance substantially advances this interest because the requirement of a 10 % set aside or fee in-lieu will “necessarily increase [the city’s] supply of affordable housing.”<sup>172</sup>
- The test set up by the *Supreme Court of the United States in Dolan v. City of Tigard*<sup>173</sup> does not apply because the Napa ordinance is “economic legislation that is generally applicable to all development in the city,”<sup>174</sup> not a condition placed on one specific developer, as in *Dolan*.
- The ordinance did not violate the due process clause of the Federal Constitution because it allows for a waiver or other administrative relief from the city upon appeal by the developer. The court presumed that this waiver would mitigate any possible due process damage to a specific developer.<sup>175</sup>



This case again focuses on the specific provisions and wording of the ordinance involved. As noted above, the court upheld the ordinance due in large part to its allowance of a waiver for developers who showed a lack of nexus between their developments and the inclusionary requirement, as well as the benefits developers receive for setting aside affordable units.

### Lessons Learned

Since each of these four cases was decided on its specific ordinance provisions, municipalities should study and consider what each court found important in upholding or invalidating each ordinance. However, there are three overall lessons which provide guidance for municipalities writing their own Inclusionary Zoning Ordinances.

170. *Id.* at 192 (internal quotations omitted).

171. *Id.* at 194.

172. *Id.* at 195.

173. 512 U.S. 374 (1994). See section in this workbook entitled “What is ‘takings law’ and what effect does it have on inclusionary housing?” for a further discussion of *Dolan’s* requirements.

174. *Home Builders Association*, 90 Cal. App. 4th at 197.

175. *Id.* at 199.



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## The Importance of Incentives

First, the inclusion – or lack – of incentives or cost off-sets for developers who comply with the ordinance played an important part in the courts’ determination of the validity of each ordinance. This fact is most clearly seen when comparing the *Napa* and *Barnstable* cases. In *Napa*, the developers were offered a number of potential benefits, whereas, in *Barnstable*, the ordinance offered no benefits whatsoever to the residents on whom the fee was imposed; these facts were specifically emphasized by each court in making its decision.

## The Nexus Requirement

Second, these cases illustrate how important it is that a municipality show the nexus between the need for affordable housing and the set-aside requirement. In *Napa*, the court stressed the significance to its decision of the city’s ability to waive the set-aside requirement if the developer demonstrated a lack of a reasonable relationship between his/her development and the inclusionary requirement. Also, underlying the court’s reasoning in *Egg Harbor* is the notion that the set-asides bore a strong relationship to authority granted to the Division of Coastal Resources to promote the public health, safety, and welfare within its jurisdiction. To address this issue specifically when promulgating its own ordinance, a municipality can complete a “nexus study” and report its findings.<sup>176</sup>

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## Across the Board Application

Finally, the cases show that it is important that an Inclusionary Zoning Ordinance be applied across the board so that the burden of affordable housing is not shouldered by only one developer or only a group of developers. The *Barnstable* case speaks most directly to this point, as the application of the ordinance only on applicants for small developments was one of the primary reasons the court found the ordinance invalid. Likewise, the invalid ordinance in the *Degroff* case was applied only in five zoning districts in the county. By contrast, the *Napa* ordinance applied to all development in the city – both residential and non-residential – and this provision ensured that all developers in the area were involved in the development of affordable housing.

<sup>176</sup> For more information on this topic, see section in this workbook entitled “What is a nexus study?”

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## PART 2: THE CASE STUDIES



## CASE STUDY: Boston, Massachusetts

Boston, a city of over half a million people, benefited significantly during the economic boom of the 1990s.<sup>177</sup> Area incomes increased, but they failed to keep pace with housing prices that soared at a double-digit pace. As construction and land costs increased, gentrification spread from the central downtown areas to surrounding neighborhoods, causing the displacement of moderate-income families. In response to these changes and pressure from community-based organizations and housing advocates, Mayor Thomas Menino signed an Executive Order in February, 2000 that created an inclusionary development policy.

### The Program

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

The Boston policy requires qualifying developments to set-aside 10% of the units as affordable. While Boston does provide for off-site development of the affordable units, a developer who exercises this option must provide even more affordable units – five percent more for a total of 15% of the total number of market rate units. This creates an incentive for developers to construct the affordable units on-site. Boston also allows for a fee in-lieu option, where the developer is required to make a payment to the BRA equal to 15% of the total number of market rate units times an affordable housing cost factor. The affordable housing cost factor was initially established at \$52,000, derived from the average subsidy needed to develop a unit of affordable housing, and is adjusted annually.<sup>178</sup> The funds collected from the fee in-lieu option are used to subsidize other affordable housing developments in Boston.

Unlike the vast majority of other municipalities, Boston does not provide a density bonus for developers. However, developers do qualify for various tax breaks as well as increased height and FAR allowances.

<sup>177</sup> U.S. Census Bureau, 2000 Census.

<sup>178</sup> For the process for the annual determination, see City of Boston, Department of Neighborhood Development web site, <http://cityofboston.gov/dnd>.

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

The affordable units are required to stay affordable for at least 30 years, with the ability to extend the affordability period for an additional 20 years, for a total of 50 years. The resale price of the affordable units are also restricted to a maximum increase of approximately five percent increase per year, adjusted for approved improvements and other miscellaneous fees.

## The Political Landscape

Prior to Mayor Menino's Executive Order, Boston had an informal inclusionary housing requirement. In 1999, affordable housing advocates investigated the enforcement of this requirement and discovered that two high-profile luxury developments had been approved that year without any affordable housing set-asides. Pressure from affordable housing advocates on the Mayor increased, requesting that he make the inclusionary policy a real policy with teeth. Soon thereafter, Mayor Menino issued his Executive Order.<sup>180</sup>

The Executive Order's off-site construction and fee in-lieu construction options reflect the policy preferences of many affordable housing advocates in Boston. Many advocates are more concerned about the quantity of affordable housing in Boston than the dispersal of the units among market-rate homes. In fact, many advocates expressed a preference for having the units in neighborhoods rather than in downtown where much of the new residential development is occurring. These preferences, paired with a distrust of developers to produce the units off-site, influenced the advocates' push for strong off-site and fee payment options that will produce more affordable units than if the units were built on-site.<sup>181</sup>

Boston benefited from a receptive Mayor, a supportive City Council, positive media, lack of an organized effort by developers and the examples of surrounding nearby towns that already had

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

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

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

successful inclusionary housing policies. These factors created the positive political environment for the creation of an inclusionary housing program.

## The Impact of the Executive Order

In the initial year of implementation of the Executive Order, eight privately financed housing developments fell under the requirements of the policy. These developments were predominantly high-end luxury developments. As of January of 2002, developers have contracted to contribute over \$4 million for affordable housing construction and over 125 affordable units have been constructed as a result of the policy, with many more in the pipeline.<sup>182</sup> At the same time, new housing development continues to boom in Boston and development projects continue to be quite lucrative, even with the affordable unit set-aside requirement.<sup>183</sup>

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

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

## CASE STUDY: Boulder, Colorado

Prior to the present Inclusionary Zoning Ordinance, Boulder, a city of almost 95,000, had a voluntary inclusionary housing ordinance in effect during the 1980s and 1990s.<sup>184</sup> In the late 1990s, in response to growing housing costs and the ineffectiveness of the voluntary program, Boulder began to explore other policy options to address the affordable housing issue. To determine the most effective policy response and to create an Inclusionary Zoning Ordinance, the City of Boulder went through a public planning process.

Starting in 1998, a “citizens’ strategy group” met to generate ideas and options to address Boulder’s affordable housing needs. This strategy group hosted two community workshops to gain feedback from residents about the need for affordable housing in Boulder. The work of this strategy group culminated in a report entitled, “A Tool Kit of Housing Options,” which outlined various policy alternatives for Boulder. At the same time, a planning group consisting of two City Council members, two Planning Board members, and a Housing Authority Commissioner submitted a “Comprehensive Housing Strategy” to City Council. As the City Council considered these reports, they called upon a consulting firm to conduct an economic analysis of the cost of affordable housing production in Boulder. Based upon these public hearings and these various reports, the City Council drafted and enacted an Inclusionary Zoning Ordinance that went into effect in the year 2000. To date, The Boulder Inclusionary Zoning Ordinance has led to the creation of 56 units of affordable housing, with a much larger number in the construction pipeline.<sup>185</sup>

## The Program

### Developer Requirements

The Boulder Inclusionary Zoning Ordinance is extremely comprehensive. The Ordinance applies to all residential development in the city, regardless of type or number of units. The only development exempt from the ordinance is the development of a single-lot whose owner will use the unit as a primary residence for at least one year after construction, and the floor area of the home is not greater than 1,600 square feet.

If the proposed development has four or fewer units, the developer has to create either one

184. U.S. Census Bureau, 2000 Census.

185. City of Boulder, HHS Department, November, 2002.

affordable unit on-site, one affordable unit off-site, dedicate land for one affordable unit, or pay a cash in-lieu payment. Two different formulas exist under the Ordinance to determine the cash in-lieu payment.<sup>186</sup> If the development proposes detached market-rate units, the cash in-lieu payment is either \$13,200 or \$55 multiplied by 20% of the total floor area of a market-rate unit, whichever payment is lower. If the development proposed attached market-rate units, the cash in-lieu payment is either \$12,000 or \$50 multiplied by 20% of the total floor area of a market rate unit, whichever is the lower amount.<sup>187</sup> The cash in-lieu amount may be adjusted on an annual basis by the City Manager using information from the Boulder County Assessor’s records.<sup>188</sup> The money generated from these cash in-lieu payments fund the Affordable Housing Fund for the city.<sup>189</sup>

If the developer proposes five or more units in the development, the developer must set-aside 20% of the units as affordable. If the development is a rental development, any or all of the affordable units can be developed off-site.<sup>190</sup> However, if the development is a for-sale development, at least half of the affordable units must be on-site, unless off-site units will accomplish “additional benefits consistent with the ordinance,” and if zoning, environmental or other legal restrictions make a particular number of on-site affordable units not feasible.<sup>191</sup>

If a developer wants to construct the affordable units off the site of the market-rate development and has met the above standard, the developer has three options:

### **Existing Unit Dedication**

The developer can take a unit that he or she already owns at another site and convert that unit to an affordable unit. However, the unit must be inspected and approved by the City, and a Covenant of Affordability must be recorded against the property.

### **Cash in-lieu payment**

The developer may contribute a cash in-lieu payment, calculated by the formula discussed above, to the Affordable Housing Fund.<sup>192</sup>

### **Land Dedication**

186. Boulder Ordinance, 9-6.5-5(a)(b)

187. Boulder Ordinance, 9-6.5-6(a)

188. Boulder Ordinance, 9-6.5-6(c)

189. Boulder Ordinance, 9-6.5-6(d)

190. Boulder Ordinance, 9-6.5-8(a)

191. Boulder Ordinance, 9-6.5-7(b); Boulder Regulations, 7.1

192. Boulder Ordinance, 9-6.5-7(c)

The developer may provide land that is equivalent in value to the cash in-lieu payment plus an additional 50% to cover transaction costs. Another option is for the developer to provide land that is equivalent in value to the land of the original development and is appropriately zoned to allow at least the same number of affordable units that would have been constructed on-site.

Boulder does not provide a density bonus or little else as a developer's incentive. The only incentive Boulder provides is a waiver of development excise taxes.

In order to stop developers from creating substandard sizes of affordable units in an attempt to cut costs, Boulder has a minimum unit size. For detached affordable units, the total finished floor area must equal 48% of the total floor area of the market-rate units, up to 1,200 square feet per affordable unit. If the affordable units are attached, the total finished floor area must equal 80% of the total floor area of the market rate units, up to 1,200 square feet per affordable unit.<sup>193</sup>

### **Income Targeting**

The rental units created under the Ordinance must be priced affordable, on average in the development, for household's whose incomes are 10% below the HUD definition of low-income for the Boulder Primary Metropolitan Statistical Area (PMSA),<sup>194</sup> with no rent unaffordable to a household making 10% above HUD's definition of low-income for the Boulder PMSA. When calculating the rental payment, Boulder includes all customary charges and fees to manage the units such as water, sewer and trash service. The rental payment does not include all other utilities.<sup>195</sup>

The for-sale units created under the Ordinance must be priced, on average in the development, to be affordable to a household making HUD's definition of low-income for the Boulder PMSA, with the maximum price for an affordable unit priced for a household making 10% above HUD's definition of low-income for the Boulder PMSA.<sup>196</sup>

In order to determine the "average" price for the affordable units in a development, the developer submits to the City Manager for each affordable unit: the legal description; the total square footage; the number of bedrooms and bathrooms; the price; the targeted income; the estimated

193. Boulder Ordinance, 9-6.5-5(c)

194. Boulder Ordinance, 9-6.5-8(b)

195. Boulder Regulations, 8.2

196. Boulder Ordinance, 9-6.5-9(b)



construction schedule; and the title commitment within 30 days of the restrictive covenant.<sup>197</sup>

Prices for the for-sale affordable units are calculated on a quarterly basis to take into account interest rate changes, while rental prices are calculated annually when HUD publishes new area median income (AMI) figures.<sup>198</sup>

When a household in a for-sale affordable unit wants to resell the unit, Boulder uses a specific formula to calculate the resale price. The resale price cannot exceed the original purchase price except for closing costs and costs of sale (such as title insurance, half of the real estate settlement fee, the document review fee, and the tax service and certificate fee); real estate commissions; permanent capital improvements;<sup>199</sup> and an inflationary factor that is set by City Manager based upon the Consumer Price Index (CPI) or the AMI.<sup>200</sup>

In order to determine which households are eligible for the affordable units, Boulder requires a significant number of documents. An interested household must submit: a letter from an employer indicating annual gross wages or an employer verification form;<sup>201</sup> verification of all benefit payments; a copy of the most recent federal income tax and W-2 forms; bank verification documenting the six-month average balance on all checking accounts or six-months of checking account statements; bank verification of all savings accounts; a current statement from all assets (including balance, interest rate, and annual dividend); a copy of a pre-approval letter from a lender; and, if divorced with minor children, a copy of the divorce decree with custody arrangements.<sup>202</sup>

The City Manager reviews these documents, makes an income determination, and decides whether to approve or deny the household. If the City Manager approves the household, the household is placed on a list. This list is provided to developers upon request.<sup>203</sup> Developers or owners of affordable units may select low-income households on their own, as long as the City can verify their income and assets.<sup>204</sup>

If more than one eligible household demonstrates interest in an affordable unit during the initial

197. Boulder Regulations, 9.2

198. Boulder Ordinance, 9-6.5-9(a)

199. A list of eligible capital improvements is published annually by the City Manager. Boulder Regulations, 0.7.

200. Boulder Ordinance, 9-6.5-9(g); Boulder Regulations, 9.7

201. If an applicant is self-employed, they must submit a year-to-date profit/loss statement plus the last three years of federal income tax forms and 1099 forms. (Boulder Regulations, 8.3).

202. Boulder Regulations, 8.3

203. Boulder Ordinance, 9-6.5-3

204. Boulder Ordinance, 9-6.5-9(d)(f)

30 days the unit is available, certain factors go into effect to help rank the households. For example, a preference is given to households who live or work in Boulder. A preference is also given to eligible households who have been certified and have been waiting for over a year for an affordable unit.<sup>205</sup>

### **Affordability Controls**

Boulder requires that each affordable unit record a deed restriction or covenant against the property that includes the qualifying household income to purchase or rent the unit, the method to determine the maximum affordable price for the units, the amount the resale or rent price can increase each year, the affirmative marketing requirements, and the enforcement remedies. This deed restriction or covenant makes the unit permanently affordable, which guarantees a supply of affordable units for the City.<sup>206</sup>

205. Boulder Regulations, 10.3  
206. Boulder Regulations, 10.2

## CASE STUDY: Cambridge, Massachusetts

Cambridge, Massachusetts is a small, densely populated city of approximately 100,000.<sup>207</sup> Over time, housing prices have increased drastically in Cambridge, outpacing increases in income. Advocates and residents had grown concerned that Cambridge would become a community of wealthy homeowners, thus decreasing the diversity of this dynamic municipality. While the median income for a household in Cambridge is only \$47,979, the median sale price for a single-family home is \$398,500.<sup>208</sup> To address this growing affordability crisis, in 1999 the Cambridge City Council created an Inclusionary Housing Program.

### Background

A 1994 statewide referendum eliminating rent control provided the impetus for Cambridge's enactment of an inclusionary housing program. This referendum affected 56% of the City's rental stock, a total of 15,000 units.<sup>209</sup> An internal committee was formed to protect Cambridge residents reliant on affordable housing. Comprised of representatives from the City's legal department, inspectional services department, building commissioner, zoning and land use commission, community development department, planning board, city manager's office, and housing division, the internal committee commissioned a nexus study and, in March 1998, proposed an inclusionary zoning ordinance to the City Council.

Cambridge's nexus study sought to establish the negative relationship between market rate development and availability of affordable housing. Cambridge found this nexus difficult to establish convincingly due to basic economic principles dictating that production of additional housing results in an overall decrease in prices. Cambridge ultimately relied upon a nexus study designed and researched by Jerold Kayden, Associate Professor of Urban Planning at the Harvard Graduate School of Design. This study framed Cambridge's policy goal of maintaining the City's current level of affordable housing at 15% of the housing stock. As every new market rate development would alter this ratio, each development must include 15% affordable units. In addition, market rate developments diminish the City's already limited supply of available land, further hindering the City's ability to maintain this ratio of affordable units.<sup>210</sup>

Prior to presenting the ordinance to the City Council, the internal committee informally solicited input from developers. At the request of a City Council member, the committee also convened a

207. Population: 101,355. U.S. Census Bureau, 2000 Census.

208. U.S. Census Bureau, 2000 Census; Cambridge Community Development Department, 2000.

209. Because Cambridge always maintained a housing stock with more than 10% affordable units,

Chapter 40B never produced additional units in the City.

210. Telephone Interview with Roger Herzog, former Cambridge Planning Director, July 12, 2001.

formal focus group, conducting outreach to every Cambridge property owner. The developers articulated no substantial objections to the ordinance, indicating that if the ordinance affected all developers uniformly, provided predictability in the zoning process, and permitted a density bonus to compensate for affordable units, they could “live with it.” The only significant opposition to the ordinance came from community members concerned about density increases. The internal committee responded to this concern by reminding community members that affordable housing necessarily came with a price tag, in the form of either tax dollars or density bonuses. Ultimately, however, the committee placated these opponents by limiting the ordinance to developments of 10 units or more, which generally would not affect density in existing residential neighborhoods.

## The Program

### Set-Aside Requirements

The Cambridge program applies to developments that contain ten or more units. If a development has fewer than ten units, the ordinance and its requirements still apply if the development contains more than 10,000 square feet, with the assumption that an affordable unit will be 1,000 square feet.<sup>211</sup>

### Developer Incentives

The City’s ordinance mandates that developments above ten units automatically receive a 15% market rate density bonus contingent upon a 15% affordable units density bonus. By equalizing these density bonuses, the City ensures that developers can obtain full compensation for affordable units by constructing an equal number of market-rate units, beyond those permitted by-right.<sup>212</sup>

Because density bonuses generally do not apply to rehabilitation of older units, Cambridge’s zoning ordinance applies only to new construction and conversions. Developers engaging in rehabilitation seek only building permits, not density increases; thus, the set-aside requirement could not equitably be enforced against them. In establishing the set-aside trigger, the committee created by City Council studied Cambridge development trends and found that most new residential units resulted from conversion of commercial and/or industrial structures. In selecting a ten-unit trigger, Cambridge targeted this new phase of development and avoided placing density pressure on smaller-scale developments in highly built-up neighborhoods.

211. Cambridge Ordinance, 11.201

212. Cambridge conducted economic modeling prior to drafting the ordinance, to ensure that one market rate unit would fully cover the costs associated with one affordable unit.

Cambridge also provides a variety of other incentives besides the density bonus. The minimum lot area requirement may be decreased for affordable units in order to permit up to two additional units on the lot for every affordable unit, which significantly decreases land costs. Also, the FAR may be increased by up to 30% for the affordable units and the developer does not need to seek a variance for the construction of the affordable units.

### **On-site Construction**

From the outset, Cambridge pressured developers to build affordable units on-site.<sup>213</sup> The ordinance generally does not permit off-site construction because of three reasons. First, off-site construction diminishes economic integration. Affordable units would not be side-by-side with market-rate units, and concentration could occur. Second, off-site units tend to be of lower quality. By not having to make the affordable units visibly compatible with nearby market-rate units, developers tend to use lower-quality materials. Third, developers would purchase cheaper land to build these units, exerting further pressure on the affordable housing market.

Nevertheless, Cambridge included a limited cash-out option to avert the possibility of developers seeking a variance from the entire inclusionary zoning ordinance. Developers may only access this option, however, if they demonstrate “significant hardship.” The ordinance mandates an intentionally arduous process, requiring that developers bear the burden of proof regarding their hardship, undergo extensive financial disclosure, and seek the independent approval of both the Affordable Housing Trust and the Planning Board. To date, the City has granted no developer the cash-out option.

### **Income Targets**

Cambridge targets the affordable units to moderate income families. The total income for a family seeking an affordable unit cannot exceed 80% of the area median income (AMI) for the Boston MSA. Cambridge uses the income-averaging method to determine income targets for affordable units within developments. In order to create an incentive for a range of incomes and to not have all the affordable units priced at the 80% AMI income limit, Cambridge requires that the price points for the affordable units within a development must be affordable, on average, to a household making 65% AMI. The affordable rental units that are constructed under the program

213. Herzog, Roger and Darcy Jameson. “Cambridge Law Came After End of Rent Control,” in *Inclusionary Zoning: Lessons Learned in Massachusetts*, NHC Affordable Housing Policy Review, VI. 2, Issue 1, January, 2002.

are made affordable for 50 years, while the affordable for-sale units are permanently affordable through a deed restriction and a second mortgage on the property held by the City.<sup>214</sup>

## **The Impact of the Inclusionary Housing Program**

Developers have exerted little opposition to the ordinance, due to the desirability of development in Cambridge and the City's efforts to minimize developers' burden in complying with the ordinance. Most developers see the set-aside simply as a cost of doing business in a highly desirable community with little available developable land. The high cost of land and associated need to maximize land use discourages developers from constructing nine-unit structures to avoid the set-aside requirement. The City relieves developers of responsibility for filling the affordable units by maintaining a waiting list of qualified homebuyers who have completed a mandatory City-sponsored homeownership course.

Qualified homebuyers may also benefit from financing assistance provided by the City. Thus far, no occupants of set-aside affordable units have defaulted on their mortgages. The use of City-controlled criteria for selecting affordable unit occupants has diminished developers' concerns regarding their fulfilling the requirement, generated public support for the program, and addressed concerns expressed by the City Council that developers would fill the affordable units with friends and relatives, rather than the intended occupants.

Since the program's inception, the Cambridge Housing Division has received just one call expressing concern regarding the impact of inclusionary zoning on property values. Other homeowners have identified the inclusion of affordable units in their development as an incentive for purchasing a unit, due to their commitment to living in a diverse community. The Cambridge program can be credited with the creation of 94 units of affordable housing.<sup>215</sup>

214. Cambridge Ordinance, 11.204(d)

215. Telephone Interview with Chris Cotter, Cambridge Community Development Department, November, 2002.

## CASE STUDY: Davis, California

Davis, California, a city of only 62,200 has created over 1,500 units of affordable housing since the implementation of its Inclusionary Housing Program in 1990. A combination of Davis' income-averaging scheme for the pricing of affordable units plus the significant percentage of set-aside units required, has resulted in a significant percentage of affordable units priced for very-low income households, a phenomenon not seen in other municipalities. Over 70% of the multi-family affordable units created in Davis are affordable to very-low income households.<sup>216</sup>

### The Program

#### Set-Aside Requirements

The Davis Ordinance applies to both for-sale and rental developments with five or more units.<sup>217</sup> The set-aside requirements in Davis are some of the highest percentages in the country.<sup>218</sup> At the same time, developers have flexibility under the program, where they can meet the set-aside requirement through a combination of on-site development, off-site development, fee in-lieu payments, and land dedication.

In rental developments with 20 or more units, 35% of the units must be set-aside as affordable. In the rental units, income-tiering occurs, as well, for that 35% is split between units priced for low-income households<sup>219</sup> and units priced for very-low income households:<sup>220</sup> at least 25% of the market-rate units must be set-aside to be priced affordable for low-income households, and at least 10% of the market-rate units must be set-aside to be priced affordable for very-low income households. Similar income-tiering occurs in rental developments with five to 19 units. In these developments, a total of 25% of the units must be set-aside as affordable: 15% affordable to low-income households, and 10% affordable to very-low income households.<sup>221</sup>

In for-sale developments, 25% of the units must be set-aside as affordable.<sup>222</sup> Of those affordable units, at least half of those that are developed on-site must, on average, be affordable to households making 90% of Area Median Income (AMI). The remaining on-site affordable units must, on average, be affordable to households making 100% of AMI.<sup>223</sup>

216. California Coalition for Rural Housing Project, "Creating Affordable Communities: Inclusionary Housing Programs in California," November, 1994.

217. Davis Ordinance, 18.05.050, 18.05.060

218. California Coalition for Rural Housing Project, "Creating Affordable Communities: Inclusionary Housing Programs in California," November, 1994.

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

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

221. Davis Ordinance, 18.05.060

222. Davis Ordinance, 18.05.050

223. Davis Ordinance, 18.05.050(a)(1)(C)

## Off-Site Options

For rental developments, all affordable units must be constructed on-site. A developer is not allowed to cluster all the affordable units together but must disperse the affordable units throughout the development to ensure economic integration.<sup>224</sup>

For-sale developments have a bit more flexibility. At least 40% of the required affordable units must be on-site, making the affordable units 10% of the total units on-site. The remaining units can be developed off-site or can be met through land dedication.<sup>225</sup> If the developer dedicates land, Davis assumes 15 affordable units may be developed per acre.<sup>226</sup>

Fee in-lieu payments are allowed in Davis for developments that have under 30 units or if the developer can demonstrate a “unique hardship.” As of 2001, all projects under 30 units who have requested the option have been permitted to make fee in-lieu payments but not a single development with over 30 units has been allowed the fee in-lieu option.<sup>227</sup>

## Density Bonuses

Under California state law, developers are entitled to a 25% density bonus if 20% or more of the total units in a housing development are affordable to lower-income households or 10% are affordable to very-low income households.<sup>228</sup> Davis goes above and beyond that bonus by giving developers a one-for-one density bonus in for-sale developments. In other words, a developer receives the permission to construct an additional market-rate unit for every affordable unit constructed.<sup>229</sup> For rental developments, developers receive a 15% density bonus.<sup>230</sup>

If a developer of a for-sale development dedicates land to meet part of the affordable unit set-aside requirement, the developer receives the same one-for-one density bonus for that dedicated land. Davis awards the bonus assuming 15 affordable units can be developed per acre.<sup>231</sup> Therefore, if a developer dedicated an acre of land, the developer would receive a bonus of 15 market-rate units.

224. Davis Ordinance, 18.05.060(a)(1)

225. Davis Ordinance, 18.05.050(a)(1)

226. Davis Ordinance, 18.05.060(a)(1)(D)

227. Interview with Katherine Hess, Planning and Redevelopment Administrator, City of Davis, November, 2002.

228. California Density Bonus Law, Government Code 65915-65918.

229. Davis Ordinance, 18.05.050(a)(1)(A)

230. Davis Ordinance, 18.05.060(a)(1)(C)

231. Davis Ordinance, 18.05.050(a)(2)(A)



## Unit Price Determinations

In determining a price for an affordable for-sale or rental unit, Davis uses specific formulas. The sale price of an affordable for-sale unit is determined by a mortgage payment that would be 30% of the gross monthly income of an eligible family, less insurance and property taxes, adjusted for family size.<sup>232</sup> If the eligible household wants to resell the unit, they must wait 24 months and the resale price cannot increase more than 5.5% per year of ownership.<sup>233</sup> The Director of the Community Development Department determines the maximum sale prices for the affordable for-sale units on an annual basis.<sup>234</sup> The monthly rent on an affordable rental unit would equal 30% of the gross monthly income of an eligible family, less utilities and adjusted for family size.<sup>235</sup>

## Period of Affordability

While there is not an affordability control period for affordable for-sale units, the rental units are permanently affordable, creating a permanent supply of affordable rental housing.<sup>236</sup>

## Eligibility Determinations

To determine whether a household is eligible to purchase an affordable unit, the household must complete a lender certification process or a developer process that has been approved by the City.<sup>237</sup> At the time of the actual purchase, the household must submit an owner-occupancy declaration, stating that they are income-eligible and that the unit is their only residence, and submit the declaration to the Community Development Department along with a filing fee.

For rental units, the owner of the rental development must submit an annual report to the City identifying which units are affordable, monthly rent on those units, vacancy information on each affordable unit for the prior year, and the monthly income of each household in an affordable unit.<sup>238</sup>

232. Davis Ordinance, 18.05.020

233. California Coalition for Rural Housing Project, "Creating Affordable Communities: Inclusionary Housing Programs in California," November, 1994.

234. Davis Ordinance, 19.05.050(a)(1)(C)

235. Davis Ordinance, 18.05.060

236. Davis Ordinance, 18.05.060(a)(1)(B)

237. Davis Ordinance, 18.05.050(a)(1)(D)

238. Davis Ordinance, 18.05.060(a)(1)(D)

## CASE STUDY: Denver Colorado

Denver, a city of 554,636 people, has one of the newest Inclusionary Housing Programs in the country, just passed by the City Council in August of 2002.<sup>239</sup> While regulations are yet to be drafted and the program has not yet been implemented, the ordinance itself is detailed in its requirements and incentives. The three bills passed amend the Housing and Zoning codes to create a “moderately priced dwelling unit” (MPDU) program.

### The MPDU Program

#### The Requirements

Unlike many municipalities that do not cover rehabilitation work, Denver’s new program covers not only new residential construction but also existing buildings that are being substantially rehabilitated or remodeled to provide dwelling units. “Substantially” is defined as more than 50% of the existing building being rehabbed or remodeled.<sup>240</sup> The program is mandatory for for-sale developments of 30 or more units. Rental developments may voluntarily participate in the program, as limitations on rent levels on private residential property are not allowed under Colorado law.<sup>241</sup>

For-sale developments are required to set-aside 10% of the units in the development to be priced affordable for households earning 80% of Area Median Income (AMI) or below. However, if the development is to be greater than three stories, has an elevator, and has over 60% of its parking as structured, the affordable units are to be priced affordable for households earning 95% AMI or below.<sup>242</sup> Rental developments can voluntarily set-aside 10% of the units as affordable to households earning 65% AMI, less a utility allowance. If the rental development is greater than three stories, has an elevator, and has over 60% of its parking as structured, the rental set-aside units should be priced affordable for households making 80% AMI.<sup>243</sup>

#### The Incentives

In addition to the usual incentives provided by municipalities, Denver also provides a cash subsidy to developers for the affordable units. For-sale developers can receive a \$5,000 reimbursement for each affordable unit produced, up to 50% of the total units in the development.<sup>244</sup> Rental

239. U.S. Census Bureau, 2000 Census.

240. Denver’s Ordinance, 27-103(v), 27-103(bb)

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

242. Denver Ordinance, 27-105(a)

243. Denver Ordinance, 27-113(a)

244. Denver Ordinance, 27-107(a)

developers can receive a \$10,000 reimbursement per affordable unit if the units are priced for households making 50% AMI or below, less a utility allowance.<sup>245</sup> Only developments that provide at least the minimum number of affordable units required by the ordinance can receive the cash subsidies.<sup>246</sup> Also, these cash subsidies are only available if there are the required funds in the “special revenue fund.” This special revenue fund is funded by fee in-lieu payments and allocations by the City Council.

Denver also reduces the parking requirements up to 20% of the required zoned parking if the developer produces at least one additional affordable unit for every 10 parking spaces reduced.<sup>247</sup> Denver provides an expedited review process, allowing developers to have their review by the Community Planning and Development Agency completed within 180 days.<sup>248</sup> Finally, Denver provides a density bonus of 10% to developers.

### **Off-Site Development**

Denver allows for off-site development but the standard is somewhat vague. The ordinance states that the Director of Denver’s Community Planning and Development Agency (CPDA) may allow a developer to build the affordable units off-site if the developer builds “more” affordable units than originally required.<sup>249</sup> However, “more” is not defined in the ordinance.

Instead of constructing the affordable units, developers may also contribute a fee in-lieu to the “special revenue fund” in an amount equal to 50% of the price per affordable unit not provided. The price of the affordable unit is the maximum sales price provided by the CPDA without homeowners’ association fees.<sup>250</sup>

### **Income Verification**

Households interested in the affordable units must provide documentation of income eligibility to the CPDA. Households must provide a copy of the proposed sales contract; a copy of the proposed settlement cost document; “all documentation necessary for CPDA to determine eligibility of the buyer;” and affidavits from the buyer and the seller on the truth of the documents,

245. Denver Ordinance, 27-113(a)

246. Denver Ordinance, 27-107(a)

247. Denver Ordinance, 27-108(c)(1,2)

248. Denver Ordinance, 27-108(d)

249. Denver Ordinance, 27-106(b)(1)

250. Denver Ordinance, 27-106(b)(1)(B), 27-105(a)

as well as a signed memo of acceptance of the affordability covenants.<sup>251</sup> The CPDA then reviews these documents and verifies the income levels of the household and their eligibility for an affordable unit.<sup>252</sup>

## **Period of Affordability**

Both the affordable for-sale and rental units are required to stay affordable for 15 years.<sup>253</sup> The ordinance requires that a covenant be recorded against the property that binds the owners and all other parties with interest to the property for the entire control period. Also, within 10 years of the end of the control period, the CPDA still has a right to purchase at the fair market rate if the unit is placed on the market.<sup>255</sup>

The Denver Ordinance also creates a formula for the City to receive some of the market proceeds from the affordable unit, after the end of the control period, once the unit is sold on the open market. When an owner of an affordable unit sells the unit after the end of the control period, the owner must pay the special revenue fund one-half of the excess of the total resale price over the sum of: the prior maximum sales price; a percentage of the affordable unit's prior purchase price with the cost of living increase since last sold; the fair market value of documented capital improvements; and a reasonable sales commission. If the amount remaining is less than \$20,000, the amount due to the special revenue fund will be adjusted so the seller receives \$10,000. If the amount is less than \$10,000, the seller will receive the entire amount.<sup>256</sup>

## **Enforcement**

Denver has several tools for enforcement for the various stages of development. If the developer violates the ordinance in any way, including not constructing the required affordable units, the City may deny, suspend or revoke any and all building or occupancy permits.<sup>257</sup> The City can also withhold any later building permits until the affordable units are built.<sup>258</sup> If the ordinance is violated by the sale of an affordable unit, the Director of the CPDA can enjoin or void any transfer of the affordable unit and require the owner to sell the unit to an eligible household.<sup>259</sup>

251. Denver Ordinance, 27-109(f)(1-5)

252. Denver Ordinance, 27-109(a)

253. Denver Ordinance, 27-103(h), 27-103(u)(2)(C), 27-113(b)(1)

254. Denver Ordinance, 27-111(a)(b)

255. Denver Ordinance, 27-111(b)(4)(A)

256. Denver Ordinance, 27-111(b)(4)(B)(i-v)

257. Denver Ordinance, 27-115(d)

258. Denver Ordinance, 27-115(c)

259. Denver Ordinance, 27-115(f),(g)(1-2)

## CASE STUDY: Fairfax County, Virginia

Fairfax County is a wealthy, quickly-growing county. As of 2000, Fairfax County is the wealthiest county in the country, with a median household income of almost \$91,000. Fairfax County is also the most populous county in the greater Washington, D.C. area, growing over 18% in the last 10 years to over 900,000.<sup>260</sup>

Modeling its program after Montgomery County, Maryland, Fairfax County implemented an inclusionary housing program in 1990. Named the Affordable Dwelling Unit Program (ADU), this program has produced over 2,000 units of housing. However, there are some significant limitations to the program that were implemented to mitigate political opposition.

### The Political Background

Fairfax County passed an inclusionary zoning ordinance before Montgomery County, Maryland. However, this original ordinance, which did not contain a density bonus, was struck down by the Virginia courts as a “taking.”<sup>261</sup>

After this original ordinance was struck down, a coalition of community business leaders, citizens, developers, housing advocates and employee unions formed “AHOME” (Affordable Housing Opportunity Means Everyone) to pass another ordinance. In order to pass the ADU Program, AHOME lobbied to amend the state-enabling act to grant local jurisdictions the authority to pass inclusionary zoning ordinances. At the local level, AHOME proposed a density bonus and other cost off-set measures in the ordinance in order to gain support from developers.<sup>262</sup>

### The Affordable Dwelling Unit Program (ADU)

#### Requirements of the Program

The ADU Program applies to new residential construction and condominium conversions that are developments of 50 units or more and are subject to a rezoning, special exemption, site plan, or subdivision plat application. Multi-family buildings of four stories or more with at least one elevator are exempt from the Program.<sup>263</sup>

260. U.S. Census Bureau, 2000 Census.

261. See 214 Va. 235, 198 S.E.2d 600. For a more detailed discussion of the takings issue, see the section entitled, “What is a ‘taking’ and what effect does it have on Inclusionary Housing?”

262. Brown, Karen Destorel. “Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area,” The Brookings Institution Center on Urban and Metropolitan Policy, October, 2001.

263. Fairfax Ordinance, 2-802, 2-803

In single-family detached or attached developments, the developer must reserve up to 12.5% of all units as affordable. In non-elevator multi-family developments or elevator multi-family developments under three stories, a developer must reserve up to 6.25% of all units as affordable. To determine the exact percentage of set-aside a development must have, Fairfax County uses a complex ratio of approved density, adjusted density, and percentage of single family and multi-family units.<sup>264</sup>

The affordable units are priced for households making 70% of area median income (AMI) or below.

When the ADU Program was originally passed, the period of affordability for the affordable units was 50 years. In 1998, the period of affordability was amended to 15 years for for-sale units and 20 years for rental units.<sup>265</sup> Fairfax County is the only municipality that has *decreased* the length of the control period.

In multi-family developments, the affordable units must be comparable in bedroom number and amenities to the market rate units. However, in single family developments, the affordable units do not have to be comparable. In fact, the affordable units can be a cluster of townhomes in one section of a single-family home development.<sup>266</sup>

### **In-lieu Options**

Developers can request a fee in-lieu of constructing the affordable units in “exceptional cases.” In order to be granted a fee in-lieu the developer must show that construction of the affordable units on-site are physically and/or economically infeasible; the overall public benefit from not constructing the units outweighs the benefit constructing the affordable units on-site; and the fee in-lieu will still achieve the objective of providing a broad range of housing opportunities.<sup>267</sup> The fee amount is the fair market value for the lot on which the affordable units were supposed to be built within the development and is paid to the Fairfax County Housing Trust Fund for the construction of affordable housing.<sup>268</sup>

Developers, under the same standard, can also dedicate land to the Fairfax County Redevelopment and Housing Authority (FCRHA) in-lieu of construction. The amount of land must be equivalent to the amount that would have been necessary to construct the affordable units.<sup>269</sup>

264. Fairfax Ordinance, 2-804

265. Fairfax Ordinance, 2-812(1)

266. Interview of Gordon Goodlett, Mary Eagan, Fairfax County Department of Housing and Community Development, February, 2000.

267. Fairfax Ordinance, 2-815(3)

268. Fairfax Ordinance, 2-815(B)

269. Fairfax Ordinance, 2-815(A)

## Incentives

Developers of single-family units may receive up to a 20% density bonus while developers of multi-family units may receive up to a 10% density bonus. A developer's density bonus and corresponding set-aside requirement may decrease depending upon the capacity of the construction site. No other incentives are provided.

## Income Verification

In order for a household to purchase an affordable unit created under the ADU program, the household must obtain a Certificate of Qualification from the FCRHA.<sup>270</sup> In order to be certified a household must submit income tax returns, W-2 forms and copies of paycheck stubs.<sup>271</sup>

For a household to rent an ADU unit, the landlord of the building must determine if they meet the criteria of the FCRHA.<sup>272</sup> The landlord of a development with ADU units must submit on a monthly basis to the FCRHA the number of affordable units vacant, the number of units rented to eligible households, and evidence that the certified households are eligible.<sup>273</sup>

## Pricing of Units

The sales price for the for-sale affordable units is set by the Fairfax County Executive. The prices are set such that the developer will not suffer an "economic loss" as a result of building the affordable units. In other words, the developer must be able to recoup construction costs and other certain allowances.<sup>274</sup> The for-sale price includes the cost of marketing the unit, a commission allowance of one and one-half percent of the sales price, mortgage placement cost and buy-down fees, and closing costs. The sales price does not include land costs<sup>275</sup> and are reviewed by the County Executive on a semi-annual basis.<sup>276</sup>

To set the rental prices on the affordable units, Fairfax County uses a formula that takes into account the target area median income and an adjustment factor for the number of bedrooms. However, the pricing does not include the cost of utilities.<sup>277</sup>

270. Fairfax Ordinance, 2-813(1)

271. Fairfax Ordinance, 2-813(2)

272. Fairfax Ordinance, 2-813(2)

273. Fairfax Ordinance, 2-811(4)

274. Fairfax Ordinance, 2-810(9)

275. Fairfax Ordinance, 2-810(7)

276. Fairfax Ordinance, 2-810(8)

277. Fairfax Ordinance, 2-811(6)

If an owner of an affordable unit would like to sell the unit, the sales price is limited to the original sales price plus a percentage of the original sales price adjusted by the Consumer Price Index, the current fair market value of any structural improvements to the unit, and an allowance for closing costs.<sup>278</sup>

**Administration**

The Fairfax County Redevelopment and Housing Authority (FCRHA) administers the ADU Program. The FCRHA may purchase up to one-third of all the affordable units in a project to make them permanently affordable.<sup>279</sup> The FCRHA rarely takes advantage of this option because it is so politically unpopular with surrounding residents.

The affordable sale and rental prices are determined by the County Executive, under the advice of the Affordable Dwelling Unit Advisory Board. The Advisory Board is made up of nine members appointed by the Board of Supervisors. Of these nine members, two are architects, one is a lending institution, two are builders, one is from the Office of Comprehensive Planning, one is from a not-for-profit housing group and one is a resident of the county.<sup>280</sup>

278. Fairfax Ordinance, 2-812(5)  
279. Fairfax Ordinance, 2-810(2)  
280. Fairfax Ordinance, 2-814(1)



## CASE STUDY: Irvine, California

Irvine is one of the nation's largest planned urban communities, with a population of over 143,000.<sup>281</sup> Irvine's move to adopt inclusionary housing grew out of the settlement of a lawsuit in the late 1970s that required the Irvine Company, which controls virtually all of the developable land in the city, to construct 700 units of affordable housing. While all the other programs examined in this workbook are mandatory, Irvine's inclusionary housing program is voluntary. However, it is credited with producing 3,400 units of low- and moderate-income housing by setting a 15% set-aside goal for affordable units in all new developments.

Although California has a density bonus law, passed in 1979, that required municipalities to provide developers of affordable housing a 25% density bonus,<sup>282</sup> developers in Irvine have relied more on local incentives such as fee waivers and expedited permitting.

### **The Set-Aside Goal and Income Targeting**

Irvine's 15% set-aside goal is split into three income categories: 5% of the units should be set-aside as affordable rental units for households earning less than 50% of area median income; 5% of the units should be set-aside as affordable for-sale or rental units for households earning 50-80% of area median income; and 5% of the units should be set-aside as affordable for households earning 80-120% of area median income.<sup>283</sup> This tri-level income targeting is to promote economic integration within the development.

### **Off-Site Development**

The affordable units may be developed off the site of the market rate development but the affordable units "should be located within the [market-rate development] whenever feasible."<sup>284</sup>

A maximum of 50% of the affordable units can be constructed off-site. A developer can construct all the affordable units off-site only if governmental monetary assistance is not given for the construction of the affordable units or developer incentives such as relaxation of design standards, fee waivers, or density bonuses, are not granted.<sup>285</sup> A developer can also construct all the affordable units off-site if the area of the market-rate development is "predominantly developed," the area does not have a city-approved affordable housing program, and the area is zoned estate, low or medium density.<sup>286</sup>

281. U.S. Census Bureau, 2000 Census.

282. California Government Code 65915-65918.

283. Irvine Ordinance, Sec. 2-3-3

284. Irvine Ordinance, Sec. 2-3-4(A)

285. Irvine Ordinance, Sec., 2-3-4(B); 2-3-4(A); 2-3-8; 2-3-9

286. Irvine Ordinance, Sec. 2-3-5(A)(1)

## Other Development Options

In Irvine, a developer has a menu of options to use to meet Irvine’s affordable housing goals. A developer need not set-aside units to be affordable and can instead do a combination of other actions. For example, the developer could convert existing market-rate units to affordable; transfer units to a local not-for-profit housing agency; provide alternative housing, such as a homeless shelter or a single-room occupancy hotel; or dedicate land to the City for affordable housing development.<sup>287</sup> To ensure that these alternatives are the same value as creating on-site affordable units, the city conducts an annual “affordability gap study” to give a numerical value to each of these alternatives.<sup>288</sup>

<sup>287</sup> Irvine Ordinance, Sec. 2-3-5(A)(2); (C)(1-8)

<sup>288</sup> Irvine Ordinance, Sec. 2-3-5(B)

## CASE STUDY: Longmont, Colorado

Longmont, a city of 71,093 people, is located in Boulder County just 40 miles northwest of Denver.<sup>289</sup> The town experienced a tremendous population boom between 1960 and 1980 and continues to grow (though at a somewhat slower rate), fueled by job growth in high-tech firms locating in the region. In the 1990s, the town began to grapple with the problems of an increasingly expensive housing market that was putting housing out of reach for long-time residents and workers at local facilities. In 1995, the City Council passed the Annexation Program, Longmont's inclusionary housing program. To date, 545 affordable units have been created under the program with 444 more units proposed.<sup>290</sup>

### The Political Background

In reaction to the rapid growth and escalating prices of housing in Longmont, in 1995 the City Council issued a "white paper" identifying the need for affordable housing in Longmont. As a result a task force of citizens, for-profit and not-for-profit developers, banks real estate agents and a title company was convened by the City Council to evaluate various programs designed to increase the supply of affordable housing. Out of this task force came the push for an inclusionary housing program.<sup>291</sup>

### The Annexation Program

#### The Requirements

The Annexation Program requires that all for-sale and rental residential development on land annexed by the city, regardless of the number of units in the development, set aside 10% of the developed units as affordable. The Program also requires that all new for-sale residential development of five or more units anywhere in Longmont must set aside 10% of the developed units as affordable.<sup>292</sup>

The affordable for-sale units must be priced affordable for households making 80% of Area Median Income (AMI) for the Boulder-Longmont area, adjusted for household size.<sup>293</sup> The affordable rental units must be priced affordable for households making 60% AMI, adjusted for

289. U.S. Census Bureau, 2000 Census.

290. Interview with Kathy Fedler, Affordable Housing Programs Manager & Community Development Block Grant Coordinator for Longmont, November, 2002.

291. Interview of Kathy Fedler, Affordable Housing Programs Manager & Community Development Block Grant Coordinator for Longmont, January, 2000.

292. Longmont Ordinance, 15.05.220(C)(1), (D)(1)

293. Longmont Ordinance, 19.04.036

household size.<sup>294</sup> Prices and rents are set by the Colorado Housing and Finance Authority. The affordable for-sale units must stay affordable for at least 10 years and the affordable rental units must stay affordable for at least 20 years.<sup>295</sup>

Longmont also has requirements for developers as to the type and phasing of the affordable units. The 10% set-aside requirement applies across housing-types.<sup>296</sup> In other words, 10% of each type of housing in the development must be affordable. For example, if the development is a mix of single-family homes and townhomes, 10% of the single-family homes must be affordable and 10% of the townhomes must be affordable. This is to give a variety of affordable units and to integrate them into the community. As to the timing of the construction of the units, 10% of the units in each phase of the development must be affordable.<sup>297</sup> This is so the affordable housing is not concentrated into one phase of the development or is not held up until the end of the development project.<sup>298</sup>

## Off-site Development Options

Longmont does allow for developers to construct the affordable units off the site of the market rate units but only on a case-by-case basis.<sup>299</sup> The off-site location must be approved by City Council and the affordable units must be constructed concurrently with the development of the market rate units on the other site.<sup>300</sup>

On a case-by-case basis, a developer may be able to pay a fee in-lieu of constructing the affordable units. The fee funds Longmont's Affordable Housing Fund. Longmont sets fee amounts based upon the type of market rate units in the development. For example, if the development consists of single-family detached homes, the fee is \$108,423 for each affordable unit not built. For multi-family rental housing, the fee is between \$48,797 and \$63,188 per unit, depending upon the size of the multi-family development. For townhomes and condominiums, the fee is \$62,312 per unit.<sup>301</sup> Longmont uses the funds collected through the fee in-lieu to construct units of affordable housing through partnerships with not-for-profit organizations. For example, one developer made a cash payment to the Affordable Housing Fund instead of constructing five units of affordable housing.

294. Longmont Ordinance, 19.04.037

295. Longmont Ordinance, 15.05.220(E)(2)(a, b)

296. Longmont Ordinance, 15.05.220(C)(2), (D)(2)

297. Longmont Ordinance, 15.05.220(C)(2), (D)(2)

298. Interview of Kathy Fedler, Affordable Housing Programs Manager & Community Development Block Grant Coordinator for Longmont, January, 2000.

299. Longmont Ordinance, 15.05.220(C)(2)

300. Longmont Ordinance, 19.20.090(A)

301. Longmont Ordinance, 19.20.090(B)(1-3)

The Affordable Housing Fund then lent the funds to a not-for-profit, who constructed 24 units of affordable rental housing. These units will remain permanently affordable to residents earning 50% or less of the area median income.<sup>302</sup> To date, Longmont has received \$73,243 in fee in-lieu payments, but anticipates over \$3.5 million in fees from present proposed development projects.<sup>303</sup>

## **Incentives**

If a developer constructs more than the required 10% set-aside for affordable units or targets the units to households making lower than the 80% and 60% AMI income-targets, that developer may receive expedited development review processing, modified development standards (such as reduced lot size requirements, setback requirements, etc.); increased fee waivers, assistance in marketing and a negotiated density bonus. However, the amount of each of these incentives is negotiated on a case-by-case basis. Surprisingly, not very many developers have taken advantage of these incentives.<sup>304</sup>

302. Interview of Kathy Fedler, Affordable Housing Programs Manager & Community Development Block Grant Coordinator for Longmont, January, 2000.

303. Interview with Kathy Fedler, Affordable Housing Programs Manager & Community Development Block Grant Coordinator for Longmont, November, 2002.

304. Interview of Kathy Fedler, Affordable Housing Programs Manager & Community Development Block Grant Coordinator for Longmont, January, 2000.

## CASE STUDY: Montgomery County, Maryland

Montgomery County, Maryland, the nation's sixth richest county, is located immediately north and northeast of Washington, D.C. With more than 800,000 residents, it is the most populous county in Maryland.<sup>305</sup> During the 1970s and 1980s, Montgomery County grew from a Washington, D.C. bedroom community to the region's second largest employment center. Now more than 60% of residents work and live in the county.

Montgomery County is notable for its integrated neighborhoods – by racial and ethnic group, and by income. Most attribute this to the Moderately Priced Dwelling Unit Program passed over 25 years ago.<sup>306</sup>

### The Political Background

As Montgomery County began to grow in the late 1960s and early 1970s, new housing prices moved beyond the reach of low- and moderate-income families in the County. As demand for residential lots exceeded supply, prices increased at rates higher than general inflation. Builders saw a reduction in their housing output and began constructing the largest and most profitable houses they could on virtually irreplaceable lots. Increases in new housing costs caused the price of existing houses to increase, making it difficult for young families to find housing in the County.

By 1967, the League of Women Voters, Suburban Maryland Fair Housing, and other housing advocacy groups set out to secure county policies to diversify the local housing supply. Their persistent efforts led to the Inclusionary Zoning and Density Allowance legislation. However, opposition to the ordinance was strong. The County Executive was against the ordinance and originally vetoed the legislation. Developers thought the program was cost-prohibitive and fought for a voluntary program. Existing property owners were scared their property values would suffer and that the density bonuses would destroy the single-family home character of their neighborhoods.

In response to this opposition, advocates built a coalition with teachers and municipal employees who worked in the county but found it increasingly difficult to afford a home there, parents whose grown children could not afford to live in the area where they grew up and civil rights activists who favored economically and racially integrated communities. The result was a successful enactment of the program in 1974.<sup>307</sup>

305. U.S. Census Bureau, 2000 Census.

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

307. Brown, Karen Destorel. "Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area,"

## **The Moderately Priced Dwelling Unit Program (MPDU)**

In 1974, Montgomery County implemented the country's first mandatory inclusionary zoning law. Since its inception, over 11,500 units of affordable housing have been created.

### **Requirements of Program**

The MPDU Program applies to every new subdivision or high-rise with 50 or more housing units. At least 12.5% of the units in these developments must be set-aside as affordable, but up to 15% can be set-aside, with a sliding-scale density bonus given as an incentive.<sup>308</sup> The affordable units are targeted toward households making under 65% of area median income (AMI). Priority is given to people who work or already live within the county.

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

### **Incentives**

Montgomery County has a sliding-scale density bonus connected to the set-aside in order to create an economic incentive for developers to construct more affordable units. For every tenth of a percentage point increase in set-aside by the developer, the density bonus increases by one percent to a maximum density bonus of 22%. For example, if a developer only sets-aside the minimum 12.5% of units, the developer receives no density bonus. If instead the developer sets aside 15% of units, the developer will receive the maximum 22% density bonus.

In order to help developers decrease the costs of the development of the affordable units, some construction of attached housing in single family zoning is permitted. Developers may build up to 40% of the housing in the proposed development as attached. However, in general, the program encourages affordable units that are compatible with neighboring market rate units.

In order to promote the integration of the affordable units in the market rate development, Montgomery County allows for a 10% compatibility allowance. This allowance allows the developer to charge 10% more on the affordable units in order to fund amenities that will make the affordable units visually compatible with the market rate units. The compatibility between the

<sup>308</sup>. Montgomery County Ordinance, 25A-5(b)

market rate and the affordable units is one of the strengths of the Montgomery County program.

### **Off-site Options**

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

In order to be considered an “exceptional case,” a developer must show that the package of residential services proposed for the development would make the affordable units unaffordable. The developer must also show that the proposed alternative will produce “significantly” more affordable units than would have been produced on the market rate site, and that the public benefits from the alternative will outweigh the benefit of constructing the affordable units on the market rate site.<sup>309</sup>

In order to be considered an “exceptional case,” a developer must show that the package of residential services proposed for the development would make the affordable units unaffordable. The developer must also show that the proposed alternative will produce “significantly” more affordable units than would have been produced on the market rate site, and that the public benefits from the alternative will outweigh the benefit of constructing the affordable units on the market rate site.<sup>310</sup>

### **Period of Affordability**

When the Program was originally passed, the period of affordability was only five years for for-sale units and ten years for rental units. However, the affordable units were quickly aging out of the program faster than new units were being produced. To address this problem, in 1981 the program was amended to extend the period of affordability to ten years for for-sale units and 20 years for rental units. Even with this extension of the time period for affordability, Montgomery County is still losing affordable units at an alarming rate. As of 1999, while over 11,000 units of

309. Montgomery County Ordinance, 25A-5(e)(1)

310. Montgomery County Ordinance, 25A-5(e)(2); Montgomery County Executive Regulations, 7-94



affordable housing had been created under Montgomery County's program, only 3,800 of those units remained. In the next ten years, over 2,000 for-sale affordable units will be lost.<sup>311</sup>

## **Pricing of Units**

In order to determine the initial sales price for an affordable unit, the County Executive consults general market trends, the building industry and area employers. The resulting price must be affordable to households making 65% of the area median income, including closing costs and brokerage fees.<sup>312</sup> For rental units, the resulting rent must include the cost of parking but exclude utilities when paid by the tenant.<sup>313</sup> Prices for the affordable units are set every five years and are increased in the intervening years by the Consumer Price Index. Presently, a detached three-bedroom affordable unit is \$135,000; a three-bedroom townhouse is \$115,000; and a two-bedroom garden condominium is \$95,000.<sup>314</sup>

When an owner of an affordable unit wants to sell their unit, the resulting resale price is calculated by the original sales price for the unit plus the increase in the sales price as indexed by the Consumer Price Index, the fair market value of any improvements made to the unit, an allowance for closing costs not paid by the initial seller and a reasonable sales commission if the unit is not sold during the priority marketing period.<sup>315</sup>

## **Administration**

The Moderately Priced Housing Office, a part of the Division of Housing and Code Enforcement of Montgomery County, falls under the auspices of the Department of Housing and Community Development (DHCD). The Moderately Priced Housing Office is responsible for program administration, participant eligibility, the lottery system for participant selection and enforcement of ordinance requirements. The County Executive sets the maximum income limits adjusted for household size, and rent and sale limits. The Director of the DHCD determines when a developer may agree to an alternative to on-site development.

The MPDU Program gives the County's public housing authority, the Housing Opportunities Commission (HOC), the right to purchase one-third of the affordable housing units for rental to very low- and low-income households. These units are used by HOC's programs to assist

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

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

313. Montgomery County Ordinance, 25A-7(b)

314. Eric Larsen, Program Administrator, Montgomery County, January 2002.

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

low-income families and to ensure that subsidized housing is dispersed throughout Montgomery County – and not concentrated in a few areas – to avoid segregation by race and income.

**Enforcement of the Program**

If the developer does not meet all the requirements of the MPDU program, there are several steps Montgomery County will take. The County will not issue any building permits to the developers, and will not give preliminary subdivision plan approval, development plan approval or site plan approval. Also, the Environmental Protection Agency for the County may deny, suspend or revoke any building or occupancy permits.<sup>316</sup>

If the sale or rental of an affordable unit does not comply with the MPDU program, the Director of the Housing and Community Development Department can take legal action and can even stop or void any transfer of an affordable unit.<sup>317</sup>

316. Montgomery County Ordinance, 25A-10(b)  
317. Montgomery County Ordinance, 25A-10(d)

## CASE STUDY: Newton, Massachusetts

Newton, Massachusetts is an upper-income suburb of Boston with a population of about 83,000 people.<sup>318</sup> Most of Newton has been built up and is of a single-family character. In fact, only 12.5% of the land in Newton is zoned as multi-family. At the same time, Newton is known for its liberal politics and began an informal inclusionary housing policy as early as the 1960s. This policy was formalized in an ordinance in 1977.<sup>319</sup>

### The Ordinance

#### The Requirements

The Newton Ordinance applies to all residential new construction and rehab that requires a special permit. Under Newton's zoning ordinance, all developments with greater than two units require a special permit. When originally passed in 1977, the ordinance required that all residential development projects seeking a special permit had to provide 10% of the units in the development as affordable. In 1987, the ordinance was amended so that a developer had to set-aside 25% of the bonus units allowed under the special permit as affordable, up to 20% of the all the units in the development. This change was made to increase the number of affordable units provided under the ordinance, as well as bring more consistency in its application.<sup>320</sup> Under this process, a developer can receive up to a 20% density bonus.

All the affordable units created under the program are rental units, regardless if the market rate units are rental or for-sale. The affordable units are leased through the Newton Housing Authority, which then leases the units to eligible households. If the Housing Authority does not have adequate funds to lease the units, the Board of Aldermen for the City of Newton may purchase the affordable units or ask the developer to pay a fee. The drawback to this leasing model is that even when the developer has sold all the market rate units, the developer still owns the affordable units and thus must manage them, pay the common fees, etc. over the period of affordability.

The affordable units are required to be equal in size, quality and characteristics to the market rate units. While this provision was placed in the ordinance to help the affordable units blend in with the market rate units, the requirement has had a somewhat perverse effect. In several luxury

318. U.S. Census Bureau, 2000 Census.

319. Engler, Robert. "An Inclusionary Housing Case Study: Newton, Massachusetts," *Inclusionary Zoning: Lessons Learned in Massachusetts*, NHC Affordable Housing Policy Review, vl. 2, Issue 1, January, 2002. At the time of this writing, Newton was reviewing possible amendments to their Inclusionary Housing Program. This case study does not reflect those suggested amendments. The proposed amendments address the expansion of the definition for eligible households, expansion of affordable units to include for-sale units, expansion of the affordability time period, simplification of administration, and increased flexibility on unit design. (Interview of Elizabeth Sternberg, Housing Development Coordinator, Newton, Massachusetts, November, 2002).

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

developments in Newton, enormous affordable units, some greater than 3,000 square feet, have been constructed. Without this requirement, smaller but more numerous affordable units may have been negotiated that could still be integrated into the development.

### **Fee in-lieu**

If a development is below 10 units, a developer can make a fee in-lieu payment. However, since the payment level is low and is not indexed to inflation, the fee is less burdensome than building the affordable units on-site. The result of this policy is many nine-units-and-under developments and only \$600,000 in funds over the 26 years of the program.<sup>321</sup> Also, the ordinance does not give guidance as to how the City should spend these funds nor does it create an administrative structure for fund allocation. Therefore, the Newton Housing Authority just holds the funds and they are rarely allocated.

There is also a fee in-lieu formula for developments with 10 or more units if the developer can show that the affordable units physically cannot be built on-site, which is more onerous and thus the larger developments have not taken advantage of the fee in-lieu option as much.<sup>322</sup>

### **Period of affordability**

Originally, the ordinance called for a period of affordability of 15 years. Soon Newton saw the affordable units aging out of the system faster than they were being created. In 1987, the period of affordability was extended to 40 years. Discussions are currently underway to expand that period of affordability again. To date, 50 of the 225 units created have aged out of the system and have been sold on the open market.

### **Unit Pricing**

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

If the Board of Aldermen want to purchase the units, there is presently no system to establish the purchase price. The original pricing formula was based on a Massachusetts state public housing program – Chapter 667 and 705 – that no longer exists.

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

322. The formula for the fee in-lieu payment for a development with 10 or more units = {average unit sales price x [# of extra units from the special permit/(10 # of units allowed by right)] x .15.

## CASE STUDY: Sacramento, California

During the 1990s, Sacramento, a city of over 400,000, saw a significant growth in residential and commercial development commence on the outer-edges of the city.<sup>323</sup> While the commercial development created new jobs at a variety of income levels, the majority of the residential development was geared towards upper-income households. In order to provide housing affordable to low and moderate-income families near or within these job-rich areas, an inclusionary housing program was explored as an option by the City Council. Through the work of a broad coalition of affordable housing advocates, labor unions, neighborhood associations, environmental groups, minority communities, the faith community and the Chamber of Commerce, the Sacramento City Council passed the Mixed-Income Housing Ordinance in 2000.

### The Political Background

The diversity of the coalition built to support an inclusionary zoning ordinance was key to its passage in Sacramento. Not only were the traditional supporters of affordable housing on board, such as advocates for the homeless and for affordable housing, but some non-traditional players as well. Labor unions became involved, especially since Sacramento is a strong union town and the building trades groups saw the advantage of such a program. Environmental organizations supported the ordinance as a smart growth measure, for the ordinance gives incentives for efficient housing near transportation hubs and job growth. Even the Chamber of Commerce became involved because they realized that affordable housing was necessary to attract employers and remain economically competitive. The majority of job growth in Sacramento has been in lower income support jobs for Silicon Valley, such as customer service call centers and accounting centers. Housing needed to be created for these workers.

Advocates were able to neutralize some of the opposition to the ordinance. Advocates responded to neighborhood organizations and their “not in my backyard” sentiment by having the ordinance apply only in new growth areas and not in existing neighborhoods. By the time private developers had become organized on the issue, the coalition of supporters had grown too large. Instead of opposing the entire ordinance, the developers worked to modify certain aspects of the ordinance, such as not having it apply to projects already in the pipeline.

323. U.S. Census Bureau, 2000 Census.

In order to respond to developers' arguments that the ordinance was too costly for them, City Council members supportive of the ordinance commissioned a real estate economist to do an analysis of a developer's likely returns under the proposed ordinance. After looking at a variety of scenarios, adjusting for land cost, number of multi-family units, and absorption rates, the study concluded that a developer required to set-aside 15% of their units as affordable could make a reasonable return on their equity. Proponents of the ordinance say this study that was able to "talk to the developers in their own language" was key to buying support for the program and silencing opposition.<sup>324</sup>

## The Mixed-Income Housing Ordinance

### The Requirements

The Mixed-Income Housing Ordinance applies to all residential development over nine units in "new growth areas," i.e. large undeveloped areas of land at the city's margins, newly annexed area, and large interior redevelopment project areas.<sup>325</sup> The vast majority of development in Sacramento is happening in these "new growth" areas.

The set-aside requirement under the Mixed-Income Housing Ordinance is 15% of all units,<sup>326</sup> though the affordable units can be of whatever type. For example, the proposed development may be a single-family detached subdivision, but the affordable units can be multi-family units. This flexibility in the type of units helps developers determine a cost-effective way to construct the affordable units.<sup>327</sup>

The Mixed-Income Housing Ordinance specifically tiers the affordable units to create more units targeted to the lowest-income families. Of the affordable units that are produced within the development, one-third of the units must be priced for households making between 50 and 80% of area median income (AMI), while the remaining two-thirds of the units must be priced for households making less than 50% AMI. The affordable units must remain affordable for 30 years.<sup>328</sup>

### Incentives

Sacramento provides a density bonus of 25%, which tracks the density bonus required under California state law.<sup>329</sup> This density bonus is not utilized often, for developers have tended toward

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

325. Sacramento Ordinance, 19.190.070(A-H)

326. Sacramento Ordinance, 17.190.030

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

328. Sacramento Ordinance, 17.190.080; 17.190.090

329. Sacramento Ordinance, 17.190.020, 17.190.040(E). California state law entitles developers to a 25% density bonus if 20% or more of the total units of a housing development are affordable to lower income households or 10% are affordable to very low-income households.

single-family sub-division developments where density bonuses do not generate as much economic return.

Besides the density bonus, developers may also receive expedited permit processing for the affordable units, fee waivers, and relaxed design guidelines.<sup>330</sup> The fee reductions can be significant, up to \$1,000 per unit for low-income units and up to \$4,000 per unit for very-low income units.<sup>331</sup> Developers of inclusionary projects may apply and receive priority for all available subsidy funding, including funds for the city’s housing trust fund, tax increment funds from redevelopment areas, and federal and state subsidies.

### **Off-Site Options**

If the proposed development is an exclusively single-family development, the developer can dedicate land off-site or build the affordable units off-site only if there is insufficient land zoned multi-family at the development site. However, the alternative land or placement of the affordable units must be within the “new growth” area.<sup>332</sup> If the proposed development is multi-family, the affordable units must be constructed on-site.

If the developer decides to take the land dedication option, the land is dedicated to the Sacramento Housing and Redevelopment Agency (SHRA) or a not-for-profit developer. After the dedication, the responsibility is on SHRA to construct the housing. The amount of land the developer must dedicate is determined by the number of affordable units that can be reasonably developed on the land, given the mix of the affordable units, the densities permitted on the land, and site, infrastructure, environmental and other physical and planning constraints.<sup>334</sup>

For off-site development or land dedication, the developer must show that the off-site option is more cost-efficient for the production of affordable units than affordable units on the development site, or that the off-site location would be superior to on-site development as to transportation access or other residential planning criteria.<sup>335</sup> The off-site option also must be suitable in size and physical characteristics as the original development site. The developer is then required to own the proposed land, obtain all the required permits for the affordable units no later than the market

330. Sacramento Ordinance, 17.190.040(A-D)  
331. Sacramento Developer’s Guide  
332. Sacramento Ordinance, 17.190.060(a)  
333. Sacramento Ordinance, 17.190.060  
334. Sacramento Ordinance, 17.190.060(C)  
335. Sacramento Ordinance, 17.190.060(B)

rate units, and record the Inclusionary Housing Agreement against both the affordable and the market rate units.<sup>336</sup>

Sacramento does not have a fee in-lieu option. Advocates for the ordinance did not want developers to be able to “buy out of” their responsibility, especially since integration was one of the key goals of the program.

### **Administration**

The Mixed-Income Housing Ordinance is implemented by the Sacramento Housing and Development Agency (SHRA). SHRA has a right to repurchase affordable for-sale units, may receive land dedications from developers, administers sale and rental prices on affordable units, and enforces policies.

336. Sacramento Ordinance, 17.190.060



## CASE STUDY: Santa Fe, New Mexico

Santa Fe is a city of 62,000 people that is feeling the growth effect of being a tourist and retirement location.<sup>337</sup> In order to address this growth's effect on housing prices in Santa Fe, the Santa Fe City Council adopted an inclusionary housing program, the Housing Opportunities Program (HOP) in 1998.

### The Political Background

In the 1970s, Santa Fe had more mixed income neighborhoods, but a gentrification process segregated wealthy residents from the less well-off. Since 1992, city officials, working with the Santa Fe Affordable Housing Roundtable, a group of not-for-profit organizations interested in affordable housing, had discussed an inclusionary affordable housing program. By early 1995, the combination of strong support from City staff and a progressive mayor who had placed a priority on affordable housing created an atmosphere ripe for action. They contracted with the Enterprise Foundation for assistance with background research and drafting legislation.

Strenuous objection from developers discouraged City Council from acting on such a program in early 1996. Developers objected that such a program constituted a taking and they hired property rights advocates from California to represent them.

In response, the mayor of Santa Fe convened a working group of City staff and local developers to meet periodically over one year. The group discussed the developers' grievances with the City's present development code and development plan. The City staff also had the opportunity to educate local developers on the HOP program and how the developers would benefit from such a program.

At the same time, the City engaged Jerold Kayden and David Listoken of Harvard University to conduct a "nexus study" to show that the construction of high end market rate housing created a need for affordable housing. The study concluded that the influx of wealthy residents that accompanies construction of new luxurious housing creates a need for additional municipal services and consumer opportunities. Further, the employees who staff new government and service sector jobs need affordable housing.

The next time the HOP ordinance came before the City Council, most developers approved of HOP and some even testified before the Council. The program passed unanimously.

337. U.S. Census Bureau, 2000 Census.

## The Housing Opportunity Program (HOP)

### Developments Covered

While the HOP Program applies to all new developments, the level of obligation on the development to produce affordable units is based upon the “type” of development proposed. Santa Fe divides new developments into four categories:

“Type A” developments already have at least 75% of the proposed units priced affordable to households with incomes below 80% of Area Median Income (AMI). Type A developments have no mandatory set-aside requirements. The developments only have to verify that they sold the units to income-eligible households.<sup>338</sup> These developments receive a 16% density bonus.<sup>339</sup>

“Type B” developments have all of their units priced affordable to households with incomes under 120% AMI. Once again, these developments only have to verify the income-eligibility of the purchasers.<sup>340</sup> Type B developments do not receive a density bonus.

“Type C” developments have one or more of the units priced for households with incomes greater than 120% AMI and the average price for a unit is for households with incomes less than 200% AMI.<sup>341</sup> Type C developments must set-aside 11% of the units in the development as affordable.<sup>342</sup> These developments will receive an 11% density bonus if they provide the required set-aside units and have all affordable units be for-sale.<sup>343</sup>

“Type D” developments have units that, on average, are priced for households with incomes above 200% AMI.<sup>344</sup> Type D developments must set-aside 16% of the units in the development as affordable.<sup>345</sup> Type D developments, if they provide the required set-aside units and have all affordable units for-sale, will receive a 16% density bonus.<sup>346</sup>

The HOP Program only imposes affordable housing obligations on Type C and D developments. Santa Fe officials feared that placing such obligations on lower priced homes would discourage the production of moderately priced housing, which would defeat one of the purposes of the ordinance.

338. Santa Fe Ordinance, 26-1.4(A)

339. Santa Fe Ordinance, 14-96.8(A)

340. Santa Fe Ordinance, 26-1.4(B)

341. Santa Fe Ordinance, 26-1.4(C)

342. Santa Fe Ordinance, 14-96.7(B); 26-1.18

343. Santa Fe Ordinance, 14-96.8(A)

344. Santa Fe Ordinance, 26-1.4(D)

345. Santa Fe Ordinance, 14-96.7(B), 26-1.18

346. Santa Fe Ordinance, 14.96.8(A)

The HOP Program imposes a 30-year period of affordability. Yet the effect of the affordability period is permanent, as the 30-year period starts anew with each new occupant of the unit.

## Incentives

Developers receive either an 11% or a 16% density bonus, based upon the type of development. The density bonus is directly proportional to the set-aside requirement. For example, if the developer is required to build 16% affordable units, he or she will receive a density bonus of 16% over the otherwise allowable density, subject to traffic and water drainage constraints. These traffic and drainage constraints often keep the developer from realizing the maximum density allowable.

Developers may also request waivers of Plan Submittal Fees for annexation, rezoning or subdivision fees, or building permit fees for the affordable units, though these are relatively minor fees.<sup>347</sup>

Developers may also request variances to decrease their obligations to provide minimum setbacks, landscaping and other similar requirements, but developers of affordable units are given the same consideration as anyone else in seeking a variance.<sup>348</sup>

## Fee in-lieu

A fee in-lieu of constructing the affordable units on-site is not permitted unless the developer can show “extreme hardship.” Extreme hardship is defined by the ordinance as “[a] condition occurring as a direct consequence of the HOP ordinance which a) deprives a property owner of all economically viable use of the subject property taken as a whole or b) would require the property owner to lose money on the development taken as a whole and the property owner can demonstrate to the HOP coordinator’s satisfaction that said loss will be an unavoidable consequence of the HOP requirements for construction of affordable housing.”<sup>349</sup>

If extreme hardship is demonstrated, the developer may either contribute cash, land, labor or materials that equal the in-lieu contribution value for each affordable unit not provided, plus a two percent processing fee.<sup>350</sup>

## Income Targeting

Santa Fe utilizes the income-averaging method of income targeting. For a household to be eligible for an affordable unit, their household income must be at or below 80% AMI. The affordable

<sup>347</sup> Santa Fe Ordinance, 14.96.8(B)

<sup>348</sup> Santa Fe Ordinance, 14-96.8(C)

<sup>349</sup> Santa Fe Administrative Regulations, 6

<sup>350</sup> Santa Fe Ordinance, 26-1.30; Santa Fe Administrative Regulations 12, Appendix D

units in a development must be priced between 50 and 80% AMI, with the average price of an affordable unit in the development affordable to a household with an income at 65% AMI.<sup>351</sup>

### **Administration**

Once the affordable units are built, a not-for-profit organization finds buyers who are income-qualified from a waiting list of interested households. The developer sells the unit directly to the buyer.

<sup>351</sup>. Santa Fe Administrative Regulations, 8.1

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# PART III: RESOURCES



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## GLOSSARY

### **Affordability Controls**

Mechanisms used by municipalities to require the for-sale or rental prices of the set-aside units to stay at a price affordable to households making a certain percentage of area median income.

These controls are in effect over a specified period of time. Examples of affordability controls are deed restrictions and covenants.

### **Affordable Housing**

Under an Inclusionary Housing Program, a municipality determines what it considers affordable housing. Most municipalities define affordable housing as units that are affordable to households earning a certain percentage of area median income. For example, a municipality may define affordable housing as units that are affordable to households making at or below 80% of area median income.

### **Area Median Income (AMI)**

The median income level for the Metropolitan Statistical Area (MSA) or the Primary Metropolitan Statistical Area (PMSA) as defined by the U.S. Department of Housing and Urban Development (HUD). HUD lists the MSA or the PMSA that every U.S. municipality falls within in the Income Limit Area Definitions tables at [www.huduser.org](http://www.huduser.org).

### **Condominium Conversion**

When a residential building that has had one owner and been rental housing is changed to individual-owner condominium units. Most municipalities have ordinances that directly address the steps a developer must take in order to change a building from a rental building to a condominium building.

### **Covenant**

An agreement or promise in writing that is recorded with the deed of the property and applies to all future owners of the property or for the time period specified. Municipalities use covenants to enforce affordability controls. These covenants state that the property can only be sold or rented to households that meet the income eligibility criteria of the municipality's Inclusionary Housing Program. Covenants should "run with the land," i.e. to all successive owners of the land.



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## **Deed**

A written instrument that is signed by the seller of the property that transfers the title of the property from the seller to the buyer.

## **Deed Restriction**

A restriction or requirement that must be met by both the buyer and the seller before the property can be transferred to the buyer. Municipalities use deed restrictions to enforce affordability controls. These deed restrictions say that the property can only be rented or sold to households that meet the income eligibility criteria of the municipality's Inclusionary Housing Program.

## **Density Bonus**

A percentage of units that the municipality permits the developer to construct above and beyond what the zoning designation for that piece of property would otherwise allow.

## **Design Standard**

Standards within a municipality's zoning code to control appearance. Examples of design standards are landscaping requirements, requirements for the distance the building must be from the street, and minimum side yard requirements.

## **Developer Incentives**

Bonuses, waivers, cash subsidies, etc. given to developers to either entice them to build affordable units within their development or to compensate them for selling the set-aside units for below market price. Examples of developer incentives are density bonuses, expedited permit processes, fee waivers, and relaxed design standards and requirements.

## **Executive Order**

A directive by the mayor of a municipality within the governing powers of that mayor. An executive order is in contrast to an ordinance that is voted on and passed by a city council or a similar legislative body that is then signed into law by the mayor.

## **Expedited Permit Process**

When a municipality reviews and processes a developers application for building permits, zoning permits, etc., on a faster time schedule than usually. A municipality may offer an expedited permit process to a developer if that developer includes affordable units within their development.

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## **Fee in-lieu**

When a municipality allows a developer to make a cash payment instead of constructing the required set-aside affordable units within the proposed development. Usually these payments are deposited in an affordable housing trust fund or a similar instrument to fund the construction of other affordable units within the municipality.

## **Fee Waiver**

When a municipality does not require a developer to pay certain municipal fees, such as for infrastructure development, municipal services, etc., in exchange for the developer constructing a certain number of affordable units as part of the proposed development.

## **Floor-to-Area Ratio (FAR)**

The ratio of gross floor area of a building (the sum, in square feet, of the gross horizontal areas of all floors of a building) to the total area of the lot. FAR is used to measure the density of a project.

## **For-sale Unit**

A unit that a household can purchase to own and be the sole name on the deed and title.

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## **Gentrification**

When a municipality or an area of a municipality sees a sudden increase in construction and rehabilitation of residential units that causes a substantial increase in housing prices and property values beyond normal market conditions. Gentrification can also include a change in the type of housing available in an area, from rental to ownership, that contributes to the displacement of families currently living in the area.

## **Inclusionary Housing**

When a municipality requires residential developers to set aside a certain percentage of the housing units in a proposed development to be priced affordable to low- and moderate-income households. An Inclusionary Housing Program can be either a mandatory requirement on developers to create a certain number of units, or a voluntary goal with built-in incentives to encourage developers to include affordable units in their developments.

### **Income Averaging**

When affordable units within a development are priced so that the average price of a unit is affordable to a certain income level. For example, when affordable units in a development are priced so that the average price of a set-aside unit is affordable to a household earning 65% of area median income.

### **Income Targeting**

The income level of households that will benefit from the pricing of the affordable units. Most municipalities determine the income level target by looking at the needs and demands within the community. For example, a municipality may determine there is a need for housing for moderate-income level households, such as municipal employees, and thus income target the affordable units to households that make 80% of area median income.

### **Income Tiering**

When a municipality creates categories of income levels for which affordable units must be appropriately priced. For example, a municipality may decide that the set-aside affordable units in a development must be priced affordable for households that earn between 50 and 80% of area median income.

### **Market Rate**

The price that a residential unit, without any subsidies or price restrictions, would sell for on the open real estate market.

### **Off-site Construction**

The construction of affordable units at a different physical location as the market rate residential units in the proposed development.

### **On-site Construction**

The construction of affordable units at the same physical location as the market rate residential units in the proposed development.

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## **Period of Affordability**

The length of time a set-aside affordable unit is required to be sold or rented at a price affordable to the income level determined by the municipality. Periods of Affordability are usually outlined and enforced through affordability controls such as deed restrictions or covenants.

## **Price Point**

The price or range of prices a developer determines a unit, based on design, location and size, would sell for on the open real estate market.

## **Rehab / Gut Rehab**

When a developer purchases an existing residential building and updates the interior aspects of the building, such as the electricity, water, lighting, appliances, etc. and then resells the units in the building for a higher price.

## **Rental Unit**

A unit owned by an entity and then leased to a household.

## **Resale Restriction**

A requirement on the title of the property that must be met before the property is sold to another owner. An example of a resale restriction is an affordability control, where a unit cannot be sold to another owner unless that potential owner meets certain income requirements outlined in the municipality's Inclusionary Housing Program.

## **Right of First Refusal**

When a residential property cannot be sold until a designated party is offered the opportunity to purchase the property first. For example, a municipality may have a right of first refusal, where an affordable unit cannot be sold unless the municipality has been offered the opportunity to purchase the property first and has refused the offer.

## **Second Mortgage Lien**

A claim or charge on a property for payment on a debt that is second in priority to the first mortgage. Some municipalities use second mortgages to enforce affordability controls so if the owner attempts to sell the affordable unit to an ineligible household, the municipality can enforce the lien and recapture the property.

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### **Set-Aside Requirement**

The percentage of units in a development that an Inclusionary Housing Program requires the developer to price as affordable. For example, a “10% set-aside” means a developer is required to construct one affordable unit for every ten market-rate units within a proposed development.

### **Taking**

When private property is taken away from a private owner for public use without just compensation from the public entity.

### **Variance**

Permission from the municipality to depart from the literal requirements of a zoning ordinance.

### **Zoning Ordinance**

The legislative regulations created by a municipality to divide the municipality into districts and regulate the structure and design of buildings, and the uses of those buildings, within each district.

