NHC Affordable Housing Policy Review

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Inclusionary Zoning: Lessons Learned in Massachusetts

NATIONAL HOUSING CONFERENCE

The United Voice for Housing

NHC Affordable Housing Policy Review

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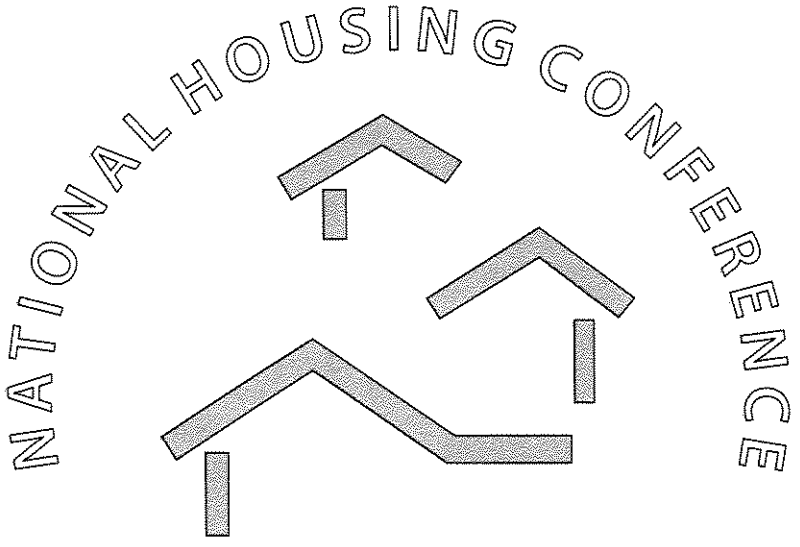
Inclusionary Zoning: Lessons Learned in Massachusetts



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NHC Affordable Housing Policy Review is published by the National Housing Conference (NHC), a nonprofit 501(c)(3) membership association dedicated to advancing affordable housing and community development causes. A membership drawn from every industry segment forms the foundation for NHC's broad, nonpartisan advocacy for national policies and legislation that promote suitable housing in a safe, decent environment. NHC members consist of nationally known experts in affordable housing and housing finance, including state and local officials, community development specialists, builders, bankers, investors, syndicators, insurers, owners, residents, labor leaders, lawyers, accountants, architects and planners, and religious leaders. **NHC is the United Voice for Housing.**

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The Massachusetts Housing Partnership (MHP) Fund is the only public agency in the United States that uses mandatory lines of credit from the banking industry to provide long-term loans for affordable housing and neighborhood development. Established by an act of the Massachusetts Legislature in 1985, MHP has helped more than 7,000 low-income families buy their first home, financed the construction or rehabilitation of more than 20,000 housing units and helped organize housing partnerships in more than 200 cities and towns across the state. Since 1990, under the provisions of an interstate banking law, MHP has secured more than $500 million in below market financing to preserve and support affordable housing in the Commonwealth.

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Preamble

In October 2000, the National Housing Conference (NHC) released a journal entitled *Inclusionary Zoning: A Viable Solution to the Affordable Housing Crisis?* That journal focused on inclusionary zoning as a tool that could be implemented at the state or local level to address affordable housing needs and described the steps taken to implement inclusionary zoning policies in Montgomery County, Maryland.

This journal, a collaborative effort between the National Housing Conference and the Massachusetts Housing Partnership Fund (MHP), once again explores the issue of inclusionary zoning, but does so this time by reviewing the experiences of select cities and towns in Massachusetts where inclusionary zoning has been used to produce affordable housing.

The authors contributing to this issue of *NHC Affordable Housing Policy Review* were selected for their experience and involvement in the use of inclusionary zoning in Massachusetts and represent some of the best thinkers and practitioners in the state on this subject. They include academics, local program administrators, and housing developers. In offering differing perspectives on this subject, we hope to present a balanced view of the strengths, weaknesses, successes and limitations this approach has had in Massachusetts.

The Board and members of NHC wish to express their appreciation to the authors and to the MHP Fund for all their efforts to broaden the base of understanding on this subject. Through this effort NHC seeks to find new ways to further assist the more than 13 million families with critical housing needs.

About the Authors:

Brian Blaesser is a partner at Robinson & Cole LLP and heads the Land Use and Development Group in the firm's Boston office. He practices in the areas of residential and commercial real estate development and leasing, land use and environmental law, planning law and condemnation law. He has extensive experience in state and federal trial and appellate courts in real estate and land use litigation, including the taking issue, impact fees, vested rights, condemnation, U.S. EPA enforcement actions and violations of Section 1983 of the Civil Rights Act. Mr. Blaesser represents real estate owners, investors and developers in analyzing and securing requisite land use and development approvals from local governments, and negotiating and drafting development agreements. In 1999, Mr. Blaesser chaired a National Task Force on Growth Management for the National Association of Industrial Office Properties (NAIOP), which produced the report, *Growing to Greatness* (1999). He is the author of the books, *Discretionary Land Use Controls: Avoiding Invitations to Abuse of Discretion* (West Group: 2001); *Condemnation of Property: Practice and Strategies for Winning Just Compensation* (Wiley Law Publications: 1994); *Land Use and the Constitution* (Planners Press: 1989). Mr. Blaesser received his B.A. from Brown University cum laude, and his J.D. from Boston College where he served as an editor of the Law Review. He also holds a masters in city planning (M.C.P.) from the Massachusetts Institute of Technology (M.I.T.) and was a Fulbright Scholar.

Mark Bobrowski is an attorney specializing in land use and municipal law. He is the author of the *Handbook of Massachusetts Land Use and Planning Law*, which is one of the state's foremost reference guides for developers, lawyers and municipal officials. In addition, Mr. Bobrowski has helped draft over 60 zoning and land use bylaws and ordinances for cities, towns and regional planning agencies in Massachusetts. Most of his firm's clients are town governments, town boards and housing authorities. He has represented scores of towns in reviewing Massachusetts General Law, Chapter 40B applications and has written and lectured extensively on the impact of the state's inclusionary zoning law.

Robert Engler has been in the affordable housing arena for 33 years as a housing consultant to both for profit and nonprofit developers, to governmental entities at the local, state and national level and as a developer himself of multifamily housing in Newton and Barnstable, Massachusetts. He is President of two nonprofit organizations which own and manage over 750 units in Newton and Framingham, MA and has been Chairman of the Newton Housing Partnership for the past eight years. Mr. Engler was aided in the preparation of his contribution from research by Whitney Rearick of the Newton Department of Planning & Community Development.

Philip Herr is a planning consultant with a practice centered on community planning, growth management, and housing primarily in the Northeast. His recent planning efforts include housing-related work in Lexington, Cambridge, Bourne and Westwood, MA. Mr. Herr serves on the Newton Housing Partnership and chaired that city's Framework Planning Committee. His most recent publication is *Zoning for Housing Affordability*, a study of inclusionary zoning practices in four New England states, which was prepared

for the Massachusetts Housing Partnership Fund. As a consultant, Mr. Herr has assisted in the design and implementation of housing strategies in a number of communities in Massachusetts and elsewhere. He is a retired Adjunct Professor in the Department of Urban Studies and Planning at MIT, having taught courses in land use, growth management, and impact assessment.

Roger Herzog brings over 18 years of experience in the affordable housing field, including work in both the public and nonprofit sectors. Mr. Herzog currently serves as the Housing Preservation Program Manager for the Massachusetts Community Economic Development Assistance Corporation (CEDAC), where he works with community development corporations (CDCs) on new affordable housing development. Mr. Herzog also assists tenants, owners, CDCs, and local communities in the development of strategies for preserving existing affordable housing (expiring use and Section 8 projects). Before coming to CEDAC, Mr. Herzog worked on affordable housing programs for the City of Cambridge Community Development Department. He also served as the City's Housing Director. Prior to joining the City of Cambridge, Mr. Herzog served as the Community Development Director of Inquilinos Boricuas en Accion, Inc. (IBA) or Puerto Rican Tenants in Action, a large Boston-based inner-city community development corporation. Mr. Herzog also worked for the Cambridge Housing Authority, administering the Section 8 and related leased housing programs.

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Jerold Kayden is a lawyer and city planner. Mr. Kayden is also an Associate Professor of Urban Planning at the Harvard Graduate School of Design (GSD), where he specializes in planning and environmental law, public and private development, and the relationship between design and law. His most recent book, *Privately Owned Public Space: The New York City Experience* (John Wiley & Sons, 2000), now in its second printing, has won national awards from the Environmental Design Research Association, the American Planning Association, the American Society of Landscape Architects, and the New York Planning Federation. His previous books include *Landmark Justice: The Influence of William J. Brennan on America's Communities* (Preservation Press, co-authored), and *Zoning and the American Dream: Promises Still To Keep* (Planners Press, co-edited). He also has written numerous articles on property rights and government regulation, land

use regulatory instruments, and real estate issues. Professor Kayden is principal constitutional counsel to the National Trust for Historic Preservation and has represented private developers, governments, and nonprofit groups in and out of court. His international consulting experience includes work for the United States Agency for International Development, the World Bank, and the United Nations, among others, and he served for two years as Senior Advisor on Land Reform and Privatization to the Government of Ukraine. Professor Kayden received his undergraduate degree from Harvard College, his Juris Doctor from Harvard Law School, and his Master of City and Regional Planning from the Harvard Graduate School of Design. He clerked for Judge James L. Oakes of the United States Court of Appeals for the Second Circuit and Justice William J. Brennan of the United States Supreme Court.

Meg Kiely is the Deputy Director of Community Development & Housing at the Boston Redevelopment Authority (BRA). This newly created division focuses on the creation of housing under the city's three-year housing strategy, *Leading the Way*, and the strategic application of resources to catalyze development in Boston's underserved areas. The division also is working to identify city-owned sites for housing development, to create housing opportunities for artists in Boston, and to assist colleges and universities in their efforts to meet housing demand through dormitory construction. Ms. Kiely serves on the city's interagency housing team and directs the BRA's housing team.

Clark Ziegler is the Executive Director of the Massachusetts Housing Partnership Fund which he helped found in 1985. The MHP was subsequently capitalized and incorporated by the Massachusetts Legislature as a quasi-public state agency in 1990. Under his leadership, MHP has secured $441 million in long-term lines of credit and $26 million in grants from 15 banking institutions including Fleet, Sovereign, Mellon, and Citizens banks. MHP uses these funds to provide long-term financing for affordable housing and neighborhood development. Since its inception MHP has provided financing or technical assistance in 282 cities and towns, including every major city in the Commonwealth. It has financed more than 20,000 units of affordable rental housing and has helped more than 7,000 low-income families buy their first home. During the 1970s, Mr. Ziegler spent five years in Washington as Legislative Assistant and then Administrative Assistant (chief of staff) to Massachusetts Congressman Robert Drinan (D-Mass.). He subsequently served as Deputy Director of Development and Public Affairs at the Massachusetts Bay Transportation Authority. Mr. Ziegler serves as Vice Chairman of the Community Economic Development Assistance Corporation, which provides technical and financial assistance to community-based nonprofits across Massachusetts. He has also served for nine years on the Finance Committee for the Town of Ipswich, Massachusetts—including three years as Chairman—where he oversees town spending on municipal government and public education.

Inclusionary Zoning: Lessons Learned in Massachusetts

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Inclusionary Zoning: Lessons Learned in Massachusetts

Introduction

By Clark Ziegler

Over the next decade inclusionary zoning may transform itself from just a novel idea with minimal impacts to a centerpiece of state and local housing strategy in Massachusetts.

No state has done as much as Massachusetts to foster the development of affordable housing—particularly in suburbs and higher-cost urban markets. We were one of the only states to establish a state-funded public housing program or a state-funded rental assistance program for tenants. We were among the first to provide state subsidies for development of affordable rental housing and we were one of the first to promote the development of mixed-income housing. And we were the first state—and for many decades the only state—to exempt affordable housing development from unreasonable local zoning requirements.

These bipartisan efforts have yielded dramatic results. More than eight percent of our state's current housing stock, or 217,066 housing units, were produced through federal and state low- and moderate-income housing programs. Virtually all cities and towns in metropolitan Boston—including the most affluent and exclusive suburbs—have now approved the construction of low-income housing.

But these gains in our affordable housing inventory, fueled by major federal and state spending in the 1970s and 1980s, have largely slowed to a crawl. And the reasons are simple: developable land is scarce, opposition to any kind of new development is extreme, and the economics for all but the largest affordable housing projects are marginal at best. The idea of addressing our housing needs primarily through large-scale publicly subsidized housing development projects, even mixed-income projects, may have outlived its usefulness.

Inclusionary zoning may change that dynamic.

Using zoning to promote affordable housing is nothing new in Massachusetts. Since its adoption in 1975, the state Zoning Act has explicitly authorized the use of special permits to grant incentives for development of low- and moderate-income housing. A survey by the Massachusetts Housing Partnership Fund in 1999 found that 118 cities and towns in Massachusetts (more than one out of every three communities in the Commonwealth) had already adopted zoning incentives for affordable housing. Yet that MHP study also estimated that local affordable housing ordinances and bylaws create just a few hundred new affordable housing units each year. Most housing development in Massachusetts is unaffected because it is allowed by right and not through special permits or other acts of local discretion.

The greatest potential may lie with true inclusionary zoning, which goes beyond voluntary incentives and requires that a small percentage of units (typically 10 percent) in every market rate housing development be kept affordable to moderate-income

families. Inclusionary zoning does not have to be an unreasonable cost burden that shifts a broader social obligation away from the general public and onto the backs of landowners, developers or consumers of new housing. Zoning powers are already used by many cities and towns to keep communities exclusive: by making it difficult or impossible to build multifamily housing, by requiring expensive amenities such as ornamental lighting and granite curbing, and by imposing dimensional rules that require oversized house lots. Inclusionary zoning uses these local zoning powers to achieve a much more legitimate public purpose: maintain a diverse population and work force by keeping housing affordable to individuals and families across a wider range of incomes.

Had inclusionary zoning policies been in place throughout Massachusetts during the 1990s, thousands of affordable housing units would have been created close to good schools, jobs and transportation. These are the areas where housing demand is greatest and where—despite the state's strong anti-snob zoning laws—conventional federal and state housing programs have had the hardest time reaching.

Inclusionary zoning is not the solution to all of our housing needs, but it is an important tool with great untapped potential. This joint publication with the National Housing Conference seeks to achieve more of that potential by highlighting the success of inclusionary zoning practices in Massachusetts and by examining the legal and policy issues behind them.

Zoning for Affordability in Massachusetts: An Overview

By Philip B. Herr

(Editor's Note: Massachusetts has both rapidly rising housing costs and substantial experience with state- and locally-adopted requirements seeking to promote affordability. In light of that, the Massachusetts Housing Partnership Fund (MHPF), a major provider of both financial and technical assistance for housing, commissioned our firm to prepare a study of the extent and effectiveness of those local affordability zoning efforts. This article is based upon that research and its resulting publications.[1])

Massachusetts' precedent-setting statute, Chapter 40B[2], allows developers of affordable housing to sidestep zoning and all other local regulations. Yet nearly a third of all municipalities in Massachusetts have gone further than this by adopting zoning provisions that are explicitly intended to promote housing affordability. Unquestionably, those state and local legislative actions have helped address the housing problems facing Massachusetts, but in recent years the state's housing problem has grown worse, not better. That's why the Massachusetts experience is instructive for those considering the use of inclusionary zoning tools.

In Massachusetts, land use is dominantly controlled at the municipal level. Local officials administer state-adopted building, sanitary and environmental codes, but localities adopt their own zoning and subdivision rules, subject to little state or regional oversight or limitations. The major exception to local land use hegemony is for affordable housing. A nonprofit or other eligible applicant may seek local approval for affordable housing under Chapter 40B of the General Laws without regard to zoning or any other locally adopted regulations. If denied or approved with burdensome conditions, the applicant may appeal to a State Housing Appeals Committee unless the proposal is in one of the handful of communities in which 10 percent or more of all housing is subsidized. Such appeals usually result in applicant approval.

In a 1988 study, we found about 20 municipalities (out of the 351 in Massachusetts) that had adopted zoning provisions with mandates or incentives for affordable housing[3]. In the 1999 MHPF study we undertook a computer-based state-wide survey of all local zoning texts, supplemented with interviews of local officials. We found that more than 100 municipalities had some form of inclusionary zoning or other zoning provisions explicitly promoting affordable housing. The most powerful ones mandate setting aside an affordable share of the units in all housing developments, regardless of location within the community, type of development or scale. Others apply inclusionary rules only to development at certain locations, only to certain types of development such as cluster housing or only to developments exceeding a certain size threshold. At the other end of

[1]See "*Zoning for Housing Affordability*," Philip B. Herr & Associates, prepared for the Massachusetts Housing Partnership Fund, Boston, 2000.

[2]See Massachusetts Department of Housing and Community Development Overview of Massachusetts Comprehensive Permit Law in Appendix.

[3]Philip B. Herr, "Partners in Housing: The Massachusetts Experience," *Journal of Real Estate Development*, Summer 1989.

the spectrum, there are communities that make affordability only one of a number of considerations in acting on discretionary incentives, such as density bonuses. In addition to the 105 communities that have "affordability zoning" provisions, another dozen communities have adopted language making housing affordability a purpose or intention for certain zoning provisions, without further substance. The Town of Lexington, for example, used just such policy provisions as the basis for a highly successful inclusionary effort over a number of years. Other communities have shaped provisions including density rules with a careful eye to avoiding imposition of extra cost, but those were too subtle for us to identify and credit.

The fact that more than 100 communities have some sort of affordability zoning indicates that there is widespread support at the municipal level for affordable housing. With no mandate, almost a third of the communities in the state have found enough support to get affordability zoning proposals onto town meeting warrants or city council dockets, and have found the votes to get them adopted. Computer searches found similar results in Rhode Island and Connecticut, both similar to Massachusetts in their housing pressures and state statutes providing zoning relief for affordable housing development. In New Hampshire, aggressive judicial support substitutes for state legislation in providing zoning relief for affordable housing. In the southern areas of New Hampshire where housing pressures are similar to those in Massachusetts, the frequency of locally adopted affordability zoning is again comparable to Massachusetts.

To be sure, in each of the states studied, some of the adopted provisions are weak tokens while others—such as exemptions of affordable housing from growth timing rules—were sometimes motivated to ward off litigation. Nevertheless, there remain a strikingly high number of communities that have made genuine efforts to promote housing affordability, however guardedly. The breadth of local affordability zoning bylaws was a startling but welcome surprise. Given that breadth, the modest impact of those provisions was equally surprising, and disappointing.

Follow-up phone calls to officials in communities with affordability zoning were monotonously consistent. Repeatedly, officials cited hopes for future effectiveness, but attributed little or no past production of affordable housing to those provisions. Exceptions were (a) where rules were tailored to an individual project, or (b) where the rules established a broad inescapable mandate, or (c) where the community was one of the exemplary exceptions to the general pattern. Data regarding results are approximate, but are illustrative. Between 1990 and 1997 about 114,000 housing units were built in Massachusetts. The inventory of units counted as "subsidized" for purposes of Chapter 40B rose by about 20,000 units over those years. About 5,000 of those units were created using Chapter 40B[4]. We estimate that during that same period only a little more than 1,000 units were created relying on local affordability zoning. Both Chapter 40B and inclusionary zoning were apparently most useful outside the largest cities, whose generous rules commonly were not an insurmountable problem for affordable housing. In that way, affordability zoning devices served to support a policy intent to let affordable development happen outside of the relatively few places to which it had been confined.

[4] Verrilli, Ann, Using *Chapter 40B to Create Affordable Housing in Suburban and Rural Communities of Massachusetts: Lessons Learned and Recommendations for the Future*, Citizen's Housing and Planning Association, Boston, 1999.

Often, the support for an affordable zoning effort lies with a relatively small number of committed people, and that support can prove to be quite fragile. Support often disappears altogether in the heat of place-specific controversies, and can be damaged if proposals are perceived as implementing an agenda imposed from "above" by state or regional authorities. However, the evidence suggests that local legislation creating broadly applicable regulatory changes benefiting housing affordability enjoys strikingly wide support as a means of accomplishing the community's own objectives. That would seem to indicate that supportive efforts by state and regional authorities might be more productive than aggressive steps by them to impose mandates on localities, which would risk polarization of interests, the opposite of the "partnership" approach that has often been successful.

The Massachusetts experience provides little encouragement about the impact of nice but avoidable provisions, such as exempting affordable housing from a few rules or mandating affordability under narrow circumstances. Such provisions help some willing developers to stretch scarce resources a bit further. They also are welcome indicators of municipal policy support, and may be stepping stones to build increased support in the future. They are, however, unlikely by themselves to make much of a difference in the total number of affordable units created. A mandate applicable to all developments of 20 or more units commonly results in developments of 19 or fewer units. Mandating affordable units in cluster developments commonly kills interest in clustering. Only a small handful of communities have adopted mandates so broad that they are not easily ignored or skirted. Incentives stronger than Chapter 40B's complete bypassing of zoning are hard to create.

Passive rules such as Chapter 40B, which come into play only at the initiative of an interested developer, have proven to be a means of getting affordable housing development to occur in reluctant localities. However, rules such as those rarely entice the reluctant developer who wishes only to maximize return. To engage the reluctant developer, only very generous incentives[5] or powerful mandates are likely to succeed. Getting reluctant localities to adopt such approaches may require either strong incentives or a mandate from a higher level of government. For example, developments of 30 or more units on Cape Cod are subject to Cape Cod Commission approval, which requires a 10 percent affordable component. Predictably, since adoption of that rule, Cape Cod only rarely has had residential developments exceeding that threshold. Beyond that, the Commission powerfully encourages and provides incentives for localities to adopt similar requirements for developments of 10 or more units. Slowly, but only slowly, such local rules are becoming effective on the Cape and are beginning to have an impact on reluctant developers in reluctant communities.

With few communities having adopted unavoidable mandates, and with only a minority of landowners or developers willing to provide affordable housing in the absence of such mandates, the not-surprising result is that these affordability zoning efforts, although widely adopted, have produced relatively little housing—perhaps one percent of housing production in Massachusetts over the past decade or so. Impacting only a small share of Massachusetts' modest housing growth rate (well under 10 percent per decade) can't be expected to cure housing affordability shortfalls. However, our

[5] See article by Mark Bobrowski, "Bringing Developers to the Table."

survey results should not be misread as documenting that local affordability zoning is ineffective. More than a thousand affordable units created in the state in the '90s through such zoning is a significant contribution. Learning about inclusionary zoning has been slow. Most of the strong inclusionary provisions are very new. The numerous cases of success illustrate that inclusionary zoning can be highly effective when crafted to its circumstance, and when used in a supportive context. Lacking either of those, the expectations are less certain. State legislation explicitly authorizing strong inclusionary zoning mandates could have a tremendous impact by removing most of the question about the legality of such provisions. Well-crafted models and training could help further.

No single tool stands out as the "silver bullet" for achieving housing objectives through such measures. The key ingredients to housing achievement instead seem to be a real community intention to do something about broadening access to housing, and ingenuity in carrying it out. Using no legal mandates or committed incentives at all, Lexington has produced substantial gains in affordable housing through a firm policy that states that discretionary approvals will happen only where there is clear community benefit, housing affordability heading the list. The Town of Wendell, without a strong housing market, used housing rehabilitation support coupled with long-term affordability commitments to leap from no affordable housing under Chapter 40B in 1990 to being third-ranked in the state in 2001, with almost 20 percent of its housing units affordable. Nantucket is turning the pressure for "tear-downs" into an affordability tool, using a "demolition delay" zoning provision to provide time for the threatened structures to be bought, relocated and rehabbed for continuing affordability. The cities of Cambridge and Somerville, with density, site shortage and market circumstances seemingly prohibitive for housing affordability, are making real progress with a broad array of tools, including but not limited to inclusionary zoning, backed by strong community support. Those lessons are persuasive. Zoning, often viewed as a primary part of the housing problem, really can be part of the housing solution.

Bringing Developers to the Table

By Mark Bobrowski

Inclusionary zoning invariably inspires the development community to fall into three camps. Some developers will be excited by the new opportunities and will work enthusiastically with municipal officials to break ground. Some developers will need to be educated as to the benefits of inclusionary zoning. They also will need to be reassured that this option will not bog down in procedural delays and that the product will be financially rewarding. If they are convinced, they will use the new tool. Finally, some developers will not voluntarily choose inclusionary zoning, even with outreach from municipal staff, because it is too "risky" or too "different" when compared to orthodox residential development.

To reach all of these developer camps, a municipal strategy for inclusionary zoning should include both "carrots" and "sticks." Incentive-based inclusionary zoning will attract some developers. The incentives need not be related to density; some models rely on reduced infrastructure costs or smaller building envelopes to create workable incentives. On the other hand, some inclusionary zoning models mandate affordable housing contributions to bring recalcitrant developers to the table. As part of an application for a special permit, developers must contribute a fixed percentage of the dwelling units as affordable. When this mandatory approach is coupled with other sticks, like those discussed below, developers "choose" to submit to the special permit process.

Thus, an inclusionary strategy necessarily involves interconnected changes to local regulations and practices. It is crucial for cities and towns to work with technical experts in making these changes. Readjusting municipal regulations can have unforeseen legal and planning consequences. The decision making process is fraught with traps for the unwary. Whether the community is amending its rules or making a special permit decision, the process is usually smoother when appropriate experts help municipal officials to make the right choices. With the general availability of technical review funds pursuant to G.L. c. 44, S, 53G, cost should not be an issue. The developer may be required to establish an escrow account to pay for all or part of the cost of such assistance.

What follows is an attempt to highlight the various components of an effective strategy to bring developers to the table. Many towns have had enormous success using a single approach, largely because the market allows for internal subsidies. Where the market housing can make such profits that the affordable units are relatively easy to assimilate, a simpler approach will work. However, in less fortunate communities, where both carrots and sticks are required, several of these devices ought to be considered.

1. **Involve the developers early in the process.** Inclusionary zoning only works when the process makes sense—financial and otherwise—to the development community. Too many noble ordinances have been shelved because developers cannot get an appropriate return on investment.

   In order to get the best results, the developers should be represented on the study committee charged with preparing the ordinance or bylaw. The developers should be carefully selected; be sure to invite not only the most local prolific firm, but also the smaller, custom firms.

It is crucial for the committee to listen to its developer-members on a host of issues. The most important are, understandably financial. A special permit option, which requires a mandatory percentage of affordable units, will sit on the shelf if developers can't make a profit, or the risk is too large. Developers and realtors also will have a good read on issues regarding lot size, building types, number of bedrooms, and a host of other design issues. If the developers get on board, they will be the best imaginable spokespersons for change.

2. **The ordinance or bylaw should consider incentives.** The use of incentives is a good way to bring the developers to the table. G. L. c. 40A, s. 9, para. 2 states that special permits [may be granted] authorizing increases in the permissible density of population or intensity of a particular use in a proposed development; provided that the petitioner or applicant shall, as a condition for the grant of said permit, provide... housing for persons of low- or moderate-income.

   The increase in density or intensity need not take the form of an increase in the number of dwelling units. For example, a reduction in the minimum lot size requirement constitutes an increase in permissible density. It has the benefit of reducing road construction, infrastructure installation, and site preparation costs. Similarly, a reduction in roadway construction standards may also create an incentive to choose the inclusionary ordinance or bylaw.

   Where the incentive will be the increase in the number of dwelling units, a municipality should carefully structure the bonus. On the one hand, the developer may need two or three market rate units to internally subsidize an affordable unit. On the other hand, the inclusionary rules should not lead to the development of housing totally out of character with the rest of the community. A safe density increase in a first draft of an inclusionary package probably authorizes no more than a 50 percent bonus in the number of units. This can be adjusted based on experience.

3. **The ordinance or bylaw should consider a mandatory approach.** As noted above, some developers will never choose the inclusionary option unless required to do so when applying for a special permit to increase permissible density of population or intensity of a particular use. Some communities require up to 15 percent of the dwelling units to be affordable whenever a developer so applies. The town of Westford, Massachusetts for example, mandates an affordable housing set-aside of five percent for low-income, five percent for moderate-income, and five percent for median-income families.

   Municipalities must be careful to stay within the limits of the law. It has not been ruled legal to require that, say, 10 percent of all lots in an orthodox subdivision be set aside for affordable housing. Affordable housing can be legally mandated only pursuant to G.L. c. 40A, s. 9, para. 2. Without statutory authorization, any other type of mandate would constitute an exaction, measured by the standards set forth in the Supreme Court's decision of Dolan v. City of Tigard, 512 U.S. 574 (1994). Without adequate studies to defend the proportionality of the exaction, the regulation is immediately suspect.

4. **Steer developers to the inclusionary option.** Developers have the legal right to subdivide a property without a special permit. Developers have the legal right to

build uses as of right within the district without a special permit. If a developer can't be required to apply for a special permit, which triggers affordable housing, how does a municipality steer the developer to the inclusionary zoning table?

Cities and towns have used various tactics to make the special permit option preferable to as of right development. The following tools have been used to steer developers to the inclusionary ordinance or bylaw:

- **Reduce as of right build-out to a defensible but low level.**
  The zoning ordinance or bylaw establishes basic dimensional requirements for each district within the community. By reducing as of right density to a low, but defensible, level, developers choose the special permit option to gain additional units or space. For example, allowing up to 10 dwelling units as of right in multifamily structures is a defensible regulation; allowing for an increase by special permit brings the developer to the table with affordable housing as a trade-off. Floor area ratio, building coverage, and height limitations may be similarly employed.

- **Toughen up the subdivision regulations.**
  Some communities have made it tougher to build orthodox development in order to promote affordable housing. Where traditional subdivisions must meet higher construction and design standards, the special permit option becomes more attractive. For example, Planning Boards use more stringent standards for right of way width, pavement width, dead end length, sidewalks, curbing, and plantings to discourage traditional development. The inclusionary option relaxes build-out requirements and creates a viable alternative. Coupled with a policy of "no waivers" this can be an effective approach.

- **Exempt inclusionary development from growth rate limitations, phasing devices, and infrastructure regulations.**
  Many communities have adopted caps on the number of building permits issued annually, scheduling relations for the build-out of new subdivisions, and rules limiting the expansion of water or sewer service. Where inclusionary developments are exempted from these regulations, developers are encouraged to apply for a special permit.

All of these options should be considered when a municipality is adopting an inclusionary zoning device. Some combination of tools will prove to be the most effective strategy to bring developers to the table.

Inclusionary Zoning and the Constitution

By Jerold S. Kayden

Introduction

Inclusionary zoning ordinances condition permission to construct private, market rate housing on the developer's agreement to provide or pay for affordable housing. Because this approach asks one group of individuals—private, market rate housing developers—rather than the public as a whole, to provide such housing, federal and state constitutional principles require a showing that it is fair to impose this obligation selectively. For many years, federal and state courts have approved subdivision exactions and impact fees imposed on developers for roads, water and sewer infrastructure, schools, and parkland, under the rationale that new development creates a need for such facilities and that the public would be harmed if development appeared without them.[1] May inclusionary zoning be analogized to subdivision exactions and impact fees and sustained under similar legal theories? Are there alternative theories that would sustain inclusionary zoning?

The Constitutional Framework

Although the federal constitution's due process, equal protection, and just compensation clauses each have relevance for examining inclusionary zoning, recent United States Supreme Court decisions have effectively rendered the just compensation clause the first among constitutional equals.[2] That provision guarantees that government may not take private property from owners for public use without paying just compensation.[3] Its purpose is to prevent government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[4] In the 1922 case of Pennsylvania Coal Co. v. Mahon, United States Supreme Court Justice Oliver Wendell Holmes wrote for the Court that, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."[5] His statement, and its endorsement decades later in numerous Supreme Court opinions,[6] have made it possible for landowners to challenge land use and environmental regulations as takings, and to seek the payment of compensation.[7]

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[1] *See, e.g., Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal.3d 633, 484 P.2d 606, *appeal dismissed*, 404 U.S. 878 (1971); *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673 (1966). *See generally* Alan Altshuler & Jose Gomez-Ibanez, *Regulation for Revenue: The Political Economy of Land Use Exactions* (1993); Jerold Kayden & Robert Pollard, "Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing," 50 *Law & Contemporary Problems* 1001 (1987).

[2] *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (involving environmental regulation allegedly denying owner all economically viable use of property); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (involving condition imposed on development of new house along the coast).

[3] U.S.Const., Am.V.

[4] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

[5] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

[6] *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. –, – (2001); *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 130-31(1978).

[7] *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

Over the past 25 years, several constitutional tests have emerged to define when a regulation has, indeed, gone too far. Regulations generally may not deny owners *all* economically viable, beneficial, productive, or feasible use of their land.[8] Regulations that fall short of denying an owner all economically viable use, but that still have a significant economic impact, especially in ways that interfere with an owner's distinct, investment-backed expectations, will be scrutinized case-by-case to determine whether a taking has occurred.[9] Almost sheepishly, the Court has conceded that there is no set formula defining the application of this test.[10]

Even if a regulation has little or no economic consequence, however, it is not out of jeopardy. To avoid a judicial declaration of a taking, a regulation must also substantially advance legitimate state interests.[11] Unfortunately, the meaning and extent of this requirement have never been certain. On its face, the test seems straightforward, if not obvious. Exercises of governmental power that interfere with individual rights, including property rights, must serve public, rather than private interests, in ways that may actually result in furthering such interests. The Court has deepened the "substantially advance" test for cases where government conditions development approval on the owner's agreement to dedicate part of his or her private property to public use. In such circumstances, the Court has held, there must be an "essential nexus" between the condition and the government's declared legitimate state interest,[13] as well as a "rough proportionality" between the impact of the proposed development and what the condition demands.[14]

In *Nollan v. California Coastal Commission*, the Nollans wanted to demolish their existing beachfront bungalow and replace it with a larger house. The California Coastal Commission said yes, but only if the Nollans would agree to allow members of the public to walk up and down their private beach along the Pacific Ocean side of their property. The Court struck down this condition, holding that there was no "essential nexus" between the declared purpose of the Commission's condition—ensuring views from points east of the Nollan house to the ocean—and the lateral north-south access easement demanded by the condition.[15] On the other hand, a viewing spot literally on the Nollans' front yard, furnishing felicitous vistas of the Pacific Ocean, would have satisfied the essential nexus test.[16]

Dolan v. City of Tigard introduced the "rough proportionality" test. Mrs. Dolan, an elderly widow, wanted to expand her 9,700-square-foot plumbing and electrical retail hardware store to 17,600 square feet and applied to the city of Tigard, Oregon, for permission. Because the additional development, including a parking lot, would increase storm water runoff and generate extra automobile trips, the city conditioned approval on Mrs. Dolan's agreement to leave untouched and allow public access to that portion of her

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[8] *Lucas*, 505 U.S. at 1015.

[9] *Penn Central*, 438 U.S. at 124. In addition, courts may consider the character of the governmental action. *Id.*

[10] *Id.* at 124.

[11] *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

[12] *See City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 704 (1999).

[13] *Nollan*, 483 U.S. at 837.

[14] *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). In *Dolan*, it is possible to read the "rough proportionality" test as a stand-alone test under the just compensation clause, rather than as a subset of the "substantially advance" test.

[15] *Nollan*, 483 U.S. at 838-39.

[16] *Id.* at 836.

one-and-two-thirds acre land parcel falling within a 100-year flood plain. She also agreed to provide an adjacent 15-foot-wide strip for a pedestrian and bicycle pathway connecting up with a nascent city pathway network. The Court found that these land dedication conditions violated the just compensation clause because there was insufficient evidence that they were roughly proportionate to the impact of the hardware store expansion.[17] The Court deemed the city's justifications too flimsy and speculative to support this sort of property rights infringement. No precise mathematical calculation is required, said the Court, but the city must make an individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.[18]

Application to Inclusionary Zoning

Because it has yet to endure a robust, comprehensive constitutional review in court, and because it selectively impinges on one class of property owners, inclusionary zoning does not enjoy as solid a constitutional grounding as some land use regulations. Nonetheless, enough legal information is available to craft ordinances that reduce the risk of judicial invalidation. For claims founded on economic impacts, inclusionary zoning ordinances are legally vulnerable only if they make it impossible for a developer to earn a reasonable return on the project as a whole. Government officials need to obtain or conduct realistic real estate financial analyses showing that the inclusionary obligation has not rendered the entire project unprofitable.[19] In some cases, it may be wise to accompany the "bitter" of an inclusionary mandate with the "sweet" of permission to construct additional market rate units whose net revenue offsets the costs associated with the below market rate units. If inclusionary zoning ordinances are structured as pure incentive zoning, meaning that developers have a "base" right to build market rate units without any affordable obligation whatsoever, and the option to provide voluntarily affordable units in exchange for the right to build additional market rate units, then the economic tests of the Constitution should have no applicability whatsoever.[20] After all, it would be the developer's choice to provide the affordable units in return for a zoning bonus. It is important, however, that cities not artificially decrease the "base" right, then allow the owner to "earn" his or her way back to the original "base" right, all the while claiming the protective mantle of voluntary incentive zoning.

Although it is debatable whether the "essential nexus" and "rough proportionality" inquiries reach beyond land dedication conditions administered in a discretionary fashion case-by-case,[21] communities planning to adopt inclusionary zoning ordinances would be prudent to

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[17] *Dolan*, 512 U.S. at 394-96.

[18] *Id.* at 391.

[19] Under the so-called "parcel as a whole" principle, courts examine the impact of the government regulation on the financial status of the entire project (market and below-market units), rather than focus exclusively on the impact on the regulated below market rate units. *See Penn Central*, 438 U.S. at 130-31. However, it must also be recognized that the Supreme Court is regularly questioning, without examining, this principle. *See, e.g., Palazzolo*, 533 U.S. at –. Its next occasion for reexamination is in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, cert. granted*, June 29, 2001, 121 S.Ct. 2589 (2001), to be argued in early 2002.

[20] *See* Jerold Kayden, *"Zoning for Dollars: New Rules for an Old Game?"* Comments on the *Municipal Art Society* and *Nollan Cases, 30 Wash. U.J. Urb. & Cont. L.* 3 (1991).

[21] *See Home Builders Association v. City of Napa*, A090437 (Ct.App. CA, June 6, 2001), *petition for review denied*, 2001 Cal. LEXUS 6166 (Sept. 12, 2001). The Supreme Court expressly noted that this rough proportionately test has not been extended "beyond the special context of exactions—land use decisions conditioning approval of development on the dedication of property to public use." *Del Monte*, 526 U.S. at 702.

NHC Affordable Housing Policy Review
Inclusionary Zoning: Lessons Learned in Massachusetts

Editor's Note:

During the editing process an error was made on Page 12, Paragraph 1, Line 1.

Page 12, Paragraph 1, Line 1 should read:

She **also would have to agree** to provide an adjacent 15-foot-wide strip for a pedestrian and bicycle pathway connecting up with a nascent city pathway network.

act as if they do. The task is to demonstrate that the construction of private, market rate housing units has impacts on declared community interests, and that such impacts are proportionally addressed by the inclusionary obligation. One argument is that the development of market rate housing creates a need for workers who can only afford below market rate housing. Specifically, new market rate housing accommodates new residents who consume services from the public and private sectors. Some of the public and private sector employees who provide such services, ranging from restaurant and maintenance workers to public school teachers and city hall clerical staff, earn incomes only adequate to pay for below-market housing. Just as communities ask developers to build new schools, roads, and water and sewer facilities required by the new residents accommodated in the developer's projects, communities may ask developers to pay for housing otherwise unaffordable for employees needed to service the new market rate residents.

A broader argument is that a community's desire for a diverse residential population, measured by income or other characteristics, may be threatened by construction of market rate housing. Diversity brings benefits, not only to those who would otherwise be excluded from a community, but to those already included who may otherwise not be exposed to a wider range of experiences. Just as proponents of affirmative action increasingly assert that such ordinances serve the interests not just of those benefited from the program but of the greater population, local communities may argue that the maintenance of a diverse housing stock advances not only the interests of those affordably housed, but the interests of the community as well. Since 100 new market rate units may accommodate new residents who, in numbers, decrease desired diversity, it is fair to ask the developer to match the community's diversity goal.

It is important to recognize that these arguments are not constitutionally bulletproof. Developers are likely to introduce studies and expert testimony about filtering, short- versus long-term equilibria, pecuniary versus non-pecuniary externalities, and other questions that undercut assertions that development of market rate housing has negative impacts on affordable housing and diversity goals. At base, they will assert that they are being asked to solve a general social problem—the lack of affordable housing—even as they are expanding the supply of housing in the community. Without carefully reasoned rationales, clearly stated assumptions, and solidly prepared economic analyses, inclusionary zoning ordinances will run the risk of failing to satisfy constitutional demands. As the Dolan Court warned in its discussion of rough proportionality, "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[22]

Conclusion

Inclusionary zoning ordinances raise constitutional concerns that are neither frivolous nor fatal. Because they ask one class of persons to solve what some would deem a broad, societal problem, they potentially trigger application of constitutional tests that require more than assertions and possibilities. Thinking and studying done before, rather than after, enactment of such ordinances will give communities the best opportunity to understand the risks and rewards of inclusionary zoning, both in and out of court.

[22] *Dolan*, 512 U.S. at 391.

Inclusionary Housing: There's a Better Way

Court rules Barnstable's good intentions place undue burden on developers

By Brian W. Blaesser

Last year, a well-intentioned effort by the Town of Barnstable, Massachusetts to impose an inclusionary zoning regulation to address affordable housing needs ran aground on Cape Cod. A Superior Court ruled that the imposition on builders of what the town called an Inclusionary Housing Fee was in fact an illegal "tax." *Dacey v. Town of Barnstable*, Superior Court, Civil Action No. 00-53 (October 18, 2000).

Under the town's Inclusionary Housing Ordinance, a developer wishing to subdivide land consisting of less than 10 *acres* was required to pay $500.00 per lot. A developer proposing a development of less than 10 *housing units* was required to pay $10 per $1000 of building permit value on any unit with a building permit value in excess of $100,000. The payments made pursuant to these provisions went into an Inclusionary Housing Fund for use by the town or the town's housing authority, or a housing trust or community development corporation "to purchase and improve land, to purchase dwelling units or to develop new or rehabilitate existing dwelling units for purchase or rental . . . or to preserve existing affordable housing in the affordable housing inventory."

The regulatory scheme devised by the Town Council was a form of "inclusionary zoning"—a technique originated in the 1970s to generate affordable housing through private development. Inclusionary zoning regulations require developers to dedicate a certain percentage of the units in their projects to low- or moderate-income housing. Except where state law, such as New Jersey's Fair Housing Act, authorizes municipalities, in some instances, to mandate inclusion of affordable units in a development, most inclusionary zoning programs have relied upon incentives such as a "density bonus" and/or an expedited approval process in exchange for the inclusion of affordable units. Therein lay the problem with Barnstable's ordinance.

State and Regional Affordable Housing Policies

The ordinance was adopted in response to affordable housing policy at two government levels: (1) the land use planning policy of the Cape Cod Commission, the regional planning body established by the voters of Barnstable County in 1989; and (2) the Comprehensive Permit Law established in 1969 as Chapter 40B of the General Laws (M.G.L., c. 40B §§ 20-23)[1].

The Cape Cod Commission's charge is to "oversee the implementation of a regional land use policy for all of Cape Cod," and "to review and regulate developments of regional impact." 1990 Mass. Acts., c. 716 § 1(b). In 1998, it approved the town's Local Comprehensive Plan, including its affordable housing element. The Inclusionary Housing Ordinance was adopted as part of the town's one-year action plan to implement the affordable housing element of the Comprehensive Plan.

[1]See Massachusetts Department of Housing and Community Development Overview of Massachusetts Comprehensive Permit Law in Appendix.

Unlike the mandatory nature of the town's Inclusionary Housing Ordinance, the Massachusetts Comprehensive Permit Law encourages the construction of state or federally sponsored low- or moderate-income housing by authorizing local Zoning Boards of Appeal (ZBA), after receiving input from other local boards and officials, to grant a single permit to an eligible developer. The ZBA may override local zoning and other requirements and regulations that are inconsistent with affordable housing needs if planning and environmental needs have been addressed. The ZBA may not override state requirements. A developer whose Comprehensive Permit application is denied, or approved with conditions that make the project "uneconomic," may appeal the decision to the state Housing Appeals Committee if less than 10 percent of the city's or town's housing stock is subsidized housing.

The 10 Percent Requirement

At the heart of the town's inclusionary housing charge, was its acknowledged effort to address the state's 10 percent statutory minimum for affordable housing stock under Chapter 40B. As the town argued to the Court, the increase in the number of new market rate homes also increased the total number of permanent year-round dwelling units on which the 10 percent calculation is made. Consequently, the town argued it was difficult to close the "gap" between the existing percentage of affordable units and the state's 10 percent requirement.

As of 1997, according to the state's statistics, the town's percentage of affordable housing units was only 4.35 percent. In order to increase that percentage, the town's ordinance was directed at ensuring that an appropriate share of the remaining undeveloped land in the town was used to meet the 10 percent criterion and "to include a fair share of the cost of the construction of affordable housing in all residential land development activity." *Dacey v. Town of Barnstable* at 3 (emphasis added).

Monetary Exaction: Fee or Tax?

The Court correctly described the town's fee as an "exaction." Webster's Dictionary states that one of the meanings of exaction is "extortion." The development community frequently describes exactions as extortion or extraction, particularly where there is no apparent legal justification for the exaction. As the Court observed, while the intention of the municipality can be expressed in part through the municipality's own characterization of the charge, and deserves judicial respect, it is its actual operation that must be the focus of judicial inquiry.

The Court then addressed whether the payment could properly be described as a "fee," noting that fees generally fall into one of two categories: (1) user fees, "based on the rights of the entity as proprietor of the instrumentalities used," or (2) regulatory fees (including licensing and inspection fees) which are based on the police power to regulate particular businesses or activities. *Dacey v. Town of Barnstable at* 7, citing *Emerson College v. Boston*, 391 Mass. 415 (1984). Relying on the Supreme Judicial Court's decision in *Emerson College*, the Superior Court noted that whether a payment is a regulatory fee or a tax depends upon whether the payment satisfies three criteria:

1) It is charged for a service that benefits the person paying the fee "in a manner 'not shared by other members of society,'" National Cable Television Ass'n v. United States, 415 U.S. 336, 341 (1974).

2) The party paying the fee has the choice not to utilize the governmental service, thus avoiding the charge, City of Vance v. FERC, 571 F.2d 630, 644 n.48 (D.C. Cir. 1977), cert. denied, 439 U.S. 818 (1978).

3) The charge is collected to compensate the government entity providing the service, not to raise revenue.

Applying the Emerson College case to the Inclusionary Housing Ordinance, the Court concluded that the ordinance failed to satisfy these three essential traits common to a regulatory fee. First, the benefits for which the payment was required—affordable housing—were not limited to homebuilders but benefited the general public. In fact, noted the Court:

> [T]he charges are intended to confer a public benefit to the Town of Barnstable by providing the community with the funding to meet its statutorily imposed affordable housing obligations. This is a public obligation and a public interest which the Town of Barnstable must bear rather then the limited population of those seeking to subdivide real estate and construct new residential units. (*Dacey v. Town of Barnstable* at 8)

Second, unlike a fee for which services are voluntarily requested, here the exaction was "compelled." Third, as the town acknowledged, the charges imposed on builders, although placed in a separate fund, were intended to raise general revenues to enable the town to meet its statutorily based affordable housing obligations under Chapter 40B. Thus, the services for which the charge was imposed were not sufficiently particularized to justify the apportionment of the costs to builders, rather than the general public.

Providing Affordable Housing: Developer or Community Burden?

Actually, the town had asserted an even broader argument, namely, that these required payments were *neither* a fee nor a tax. Rather, its attorneys argued, they were a reasonable exercise of its police power to "mitigate" the problem in Barnstable's housing market that resulted from the fact that the addition of each new market rate unit was not being met by a corresponding increase in the number of affordable housing units. This argument reveals the fundamental problem with mandatory inclusionary zoning schemes, particularly in the face of a shortage of affordable housing: Is it right to place the burden of producing affordable housing on the developer rather that the community as a whole?

The answer, in Massachusetts, and in most other states, is no.

Is There a Right to Housing?

Despite the claim of housing advocates that all persons have a fundamental right to decent housing regardless of income, the federal courts have yet to establish an individual constitutional right to housing. In *Lindsey v. Normet*, 405 U.S. 56, 74 (1971), Justice White wrote:

> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings or a particular quality. . . . Absent constitutional mandate, the assurance of adequate housing . . . [is a] legislative, not judicial, function.

In Massachusetts, the legislature has spoken through its passage of the Comprehensive Permit Law under Chapter 40B. That law follows the inclusionary zoning approach to affordable housing in only one respect, namely, the effort to expedite the permitting process by providing for the issuance of a single permit by the local ZBA that can override local zoning and other regulations that are determined not to be consistent with affordable housing needs. Expedited permitting also is one of the tenets of the "smart growth" movement—a means to induce the private real estate market to perform in ways that achieve smart growth objectives, whether those are developments based on traditional neighborhood design, infill development or affordable housing.

Better Means to Achieve Affordable Housing Goals

Unlike inclusionary zoning, the Comprehensive Permit Law does not place the burden of providing affordable housing on developers only; rather, it places the burden on the citizens of all communities in the Commonwealth. This approach is preferable to the mandatory inclusionary zoning approach to affordable housing that imposes an exaction of questionable constitutional validity on one segment of society, does not attempt to address the factors that contribute to the high cost of market rate housing, such as high land costs, and lack of available sites, and frequently leads to higher housing costs when payments such as those required by Barnstable are passed on to homebuyers.

Some Massachusetts towns feel they have accommodated more than their fair share of affordable housing units compared to other communities, or have Barnstable's problem of increasing market rate housing that dilutes their progress toward achieving the 10 percent affordable housing minimum. It is not surprising that legislation was introduced in the current session of the General Assembly to lower the 10 percent affordable housing requirement, and to allow mobile homes and mobile Section 8 vouchers to be used in a community's affordable housing count.

Whatever the outcome of such legislation in the General Assembly this year, it is preferable that cities and towns receive statewide legislative guidance on the affordable housing problem and not be encouraged to take the matter into their own hands through inclusionary initiatives that are legally questionable. In addition, whatever its flaws, the state's Comprehensive Permit Law is a unique example in this country of a state affordable housing program. Through the expedited permitting process and subsidized construction financing, the state law induces private developers to compete for appropriate sites on which to construct developments that include affordable housing. Chapter 40B places the burden of providing affordable housing on all citizens in the Commonwealth, but harnesses the private market through constitutionally permissible means to achieve the state's affordable housing goals.

An Inclusionary Housing Case Study: Newton, Massachusetts

By Robert Engler

Newton, a suburb of about 85,000 persons immediately west of Boston, has maintained a long-standing reputation for its excellent schools and liberal politics. It was the first community in the state to adopt the practice of inclusionary housing during the 1960s. What began as informal policy was turned into an ordinance in 1977, after a few years in court. This case study will review Newton's 30-plus year history with inclusionary housing from my perspective as both a for-profit and nonprofit multifamily housing developer in the city as well as a member of the Newton Housing Partnership that assisted in modifying the ordinance in the 1990s. Comprised of 14 villages and eight wards within its city limits, Newton is governed by a 24-member Board of Aldermen, a significant factor in this review of the ordinance since its size often makes the decision-making process lengthy and difficult.

To date, this ordinance has provided about 225 units of affordable housing over a 30-year period. During approximately the same time period, there were 12 developments containing about twice that number of affordable units constructed under the Massachusetts "Anti-Snob" Zoning Ordinance, known as Chapter 40B. This law allows local zoning and land use regulations to be overridden if at least 25 percent of the units in a proposed development qualify as affordable.

> Case in point: whenever an inclusionary housing ordinance is discussed in Massachusetts, its impact inevitably must be measured against housing built under 40B as developers often have the choice to do one or the other, depending on the community in question.

As background, Newton is an older suburb, which was, for the most part, built up prior to the implementation of the inclusionary housing ordinance. Moreover, the vast majority of its housing stock has always been priced at the upper end of the Boston suburban market. Its zoning ordinances reflect the predominantly single-family character of the housing stock as only 12.5 percent of the land is zoned for multifamily use. The combination of these factors—lack of sites, lack of sites for affordable housing production, lack of zoned sites which are conducive to affordable housing—means a low level of production. The Massachusetts Department of Housing and Community Development has classified only 4.4 percent of its stock as affordable.

The Ordinance

Even within these market and political dynamics, the inclusionary ordinance has functioned well enough to provide 225 units. But the question remains: Should it function better than it has? The original 1977 ordinance required all developments seeking a special permit to provide 10 percent of the units as affordable. The primary means of accomplishing this objective was to lease these units to the Newton Housing

Authority (NHA) as low-income rental units, but there also were other options available to a developer such as providing units off-site or making a cash payment in lieu of any units. In 1987, the Board of Alderman wanted to provide more consistency in how this ordinance was applied and, perhaps, increase the amount of units being provided. The board modified the ordinance to require developers to set aside 25 percent of the bonus units allowed under a special permit as compared to the number of units allowed by right. Special permits were required across residential zoning districts for any developments greater than two units (except in subdivisions which were exempt from the ordinance). Additional language expanded the period of affordability, provided tighter regulations in lieu of fees and widened the applicability of the ordinance to other developments. There have been no changes since 1987 except to make provisions for assisted elderly housing with services and to calculate how to accommodate the housing and service package within the scope of the ordinance.

However, the ordinance has its limitations. Currently, all units created under the ordinance must be rental units and leased through the Newton Housing Authority at a price established by the city or agency funding source. If there is no outside funding source available, the Aldermen can allocate the funds to purchase the units (with no methodology for establishing that price) or ask the developer to pay a fee. Pricing guidelines were established by a state-aided public housing program that no longer exists so the mechanics of this process remain vague. Moreover, there is no provision to allow for affordable homeownership units within a for-sale development and there is no provision for moderate-income homeownership units, which is a major issue that's been addressed in the city's housing plan. Only low-income units (households earning less than 50 percent of median income) are allowed. Therefore, in an upscale condominium community, for example, the developer who otherwise is not involved in the development after it is sold out, has to retain ownership of the affordable units because they have to be rented through the Newton Housing Authority (which does not want to take ownership). The developer is then responsible for heating these large units and paying the condominium dues—which may or may not be covered by the lease payments. This makes the economics of the inclusionary ordinance a long, unnecessary burden on the developer. As an alternative, the NHA should be given title to these units as it is in the business of owning and managing rental property throughout the city.

Newton's ordinance applies to all new developments, which opt for a special permit rather than a "by right" approval. In order to determine what the increase in density is under the special permit, the developer must submit a by right plan which must then be approved by the city engineer, based on a judgment of what is "buildable," not simply what can be laid out on a grid. The units allowed under the special permit that exceed that by right plan are the bonus units from which 25 percent is calculated as the affordable housing requirement—up to a maximum of 20 percent of the total units. These units must remain affordable for a period of 40 years, a longer term than the original 15 years. To date, use restrictions on 50 of the 225 units created have expired and these units have converted to market. Given the public awareness of the increasing loss of affordable units as use restrictions expire, the 40-year lock-in period should have been extended to 99 years or in perpetuity.

There is a payment formula for developments under 10 units, which is admittedly low. This formula has produced only $600,000 over 26 years. The fee structure is not tied to

inflation and is less of a burden on developers than the formula when more than 10 units are built, thus influencing developers to keep the units under 10 and pay the fees rather than increase the units and come under the ordinance's formula. As a result, cash payments are less than optimal.

Newton's inclusionary housing ordinance allows no room for negotiation. This is a deliberate policy of the Board of Aldermen. Because of perceived past abuses by developers in negotiating the terms of affordability and because a 24-member body is incapable of effective negotiations, the Aldermen want the ordinance to clearly spell out all conditions and procedures. Yet, the ordinance (or any ordinance) fails in this charge since at the time of its writing, not all circumstances can be covered and constant amendments become burdensome to the city's governing body. Inherent in the city's position is a distrust of the city's own ability to negotiate, which means that on a case-by-case basis, based on market conditions and project specific issues, more units might be obtained through negotiation. Because a two-thirds vote is required for a special permit (and that requires 16 aldermen to be persuaded), negotiation can become a daunting task. The converse however is an ordinance too rigid in some respects and too vague in others.

The ordinance provides little guidance on how the city should or must spend the funds it receives. There is no mechanism for allocating the funds so the Newton Housing Authority, the holder and dispenser of these funds, can use them as their board sees fit. This can create situations when the goals and priorities of the city, as spelled out in its comprehensive plan, are not necessarily adhered to by an independent agency. Also, since new affordable housing typically requires several layers of subsidy from local, state, federal and other sources, it only exacerbates this problem when the city controls two funding sources—Community Development Block Grant (CDBG)/HOME and the 10 percent ordinance funds. Each may have attached conflicting, or at least different, criteria which the developer has to address in order to gain approval.

Newton's ordinance is rigid with regard to the design of the affordable units. Whereas state and federal programs seek to ensure that affordable units not be stigmatized within a mixed-income development, there is usually some flexibility in the design or size standards within this overall frame of reference. This is becoming particularly important to the economics of a development when luxury units are being provided. However, Newton's ordinance requires that the affordable units be equal in size, quality and characteristics as the market units. In some instances, low-income renters receive the benefits of very large units (3,000-plus square feet) when negotiations could produce more affordable units of a smaller scale (while still keeping within the non-stigmatizing or community integration intent). Newton is prohibited from requesting more units than the formula dictates or from making exceptions to the "equal" clause (due to distrust of negotiation as stated above). Moreover, by restricting the affordable units to low-income renters within a luxury condominium rather than allow for moderate-income buyers, a greater stigma may result in the development—which is contrary to the goal of the ordinance.

The issue of integrating affordable and market units is truly a complex one as the types of developments become more diverse (55-plus age restricted communities), and more expensive. Consequently, the hope of creating a real community of mixed-income households cannot be left to the language of an ordinance created 15 years ago that is applied rigidly without the opportunity for meaningful discussion and negotiation.

One final comment on Newton's inclusionary ordinance is related more to current zoning in the city than the ordinance itself. Such ordinances are intended to produce affordable housing across the community so that every neighborhood includes all types of housing providing an opportunity for households of different incomes to live. However, the city's zoning code allows multifamily development in relatively few areas of the city and at densities which are not conducive to producing much affordability. Because the density increases allowed by special permit are not significantly higher than those densities allowed by right, the formula tied to 25 percent of the increase simply does not create very many units. In order to make it a more effective tool, zoning densities have to be increased under the special permit and the ordinance has to be made more inclusive, more flexible, with higher affordability requirements and with more administrative control in relation to city housing policy.

Cambridge Law Came After End of Rent Control

By Roger Herzog and Darcy Jameson

In the mid-1990s, the City of Cambridge faced a daunting challenge to meet the housing needs of its diverse resident population. Property owners had finally succeeded, via a statewide referendum in November 1994, in terminating the city's 25-year old rent control system, which had established rent regulation on 16,000 of the 27,000 privately owned rental units in the city. By January 1, 1995, the state had enacted legislation to implement the referendum, which provided for a two-year phase out of all rent regulation.

The city administration responded to the impending crisis by identifying local solutions to the local housing market conditions. Inclusionary zoning represented one of the most appealing policy options, for a number of reasons. The city had the authority to enact the policy without state approval, as an amendment to the city's zoning ordinance. The market was very strong, and the city was generating significant new multifamily housing production for the first time since the 1970s. Finally, the policy was designed to engage the private sector in helping to meet the affordable housing needs of low and moderate-income residents.

In 1997, the city assembled an interdepartmental working group to develop the inclusionary zoning policy. Representatives from various city departments, including community development, legal, inspectional services, and the planning board, participated in a year-long effort. This working group prepared a draft policy, which was submitted to the City Council for informational purposes. The city then commissioned a study, which was a legal requirement to determine and quantify the harms caused by market rate residential development on the city's low- and moderate-income residents. Upon completion of the study, the city council approved the ordinance, and it took effect in March 1998.

In summary, the city enacted an inclusionary zoning ordinance that established mandatory requirements for the inclusion of low- and moderate-income housing in any new residential development of 10 or more units (or 10,000 square feet or larger). Fifteen percent of new units must meet the affordable housing requirements. The policy applied citywide, in virtually all zoning districts (the one district excluded had more stringent existing inclusionary requirements). As compensation to the developers, the policy offered a density bonus that was crafted to hold the developer harmless from the significant financial cost of creating the affordable housing units. The density bonus offered a 30 percent increase in the allowable floor to area ratio (FAR), and provided the developer with the right to build two additional units for each required affordable unit. In other words, for each affordable unit, the developer could construct an additional market rate unit. Both of these units are in addition to the developer's as of right density. The ordinance created a strong priority for on-site units, but in hardship situations, a developer could apply to make cash payment to the city's Affordable Housing Trust Fund. There was no off-site option.

The final version of the inclusionary zoning ordinance was the result of extensive policy discussions on a number of key issues. A brief summary of these policy issues follows:

Voluntary vs. Mandatory Program: Cambridge decided that these inclusionary housing requirements were to be a mandatory requirement for all new residential development of 10 or more units in the city. In several zoning districts across the city,

there did exist voluntary provisions under which developers could obtain a density bonus in return for the creation of affordable housing. While such voluntary provisions had existed for up to 10 years, they had failed to create any affordable housing. The city did not want a symbolic policy gesture; rather the policy was designed to produce units. The city retained voluntary provisions for smaller projects of less than 10 units.

Citywide vs. Target Neighborhoods: The city decided to adopt a uniform citywide policy rather than select target neighborhoods. The intent was that wherever significant residential development occurs, the inclusionary provisions apply. In reality, the land use patterns of the city determine the location of residential development, but the city did not desire to exclude any neighborhood from the program. The city sought to promote mixed-income housing in all neighborhoods rather than only in historically lower income areas. This decision involved a tradeoff between fewer affordable units in high market areas rather than a greater number of units in lower price areas.

On-site vs. Off-site Units: Similar to the issue above, the city sought to create mixed-income projects rather than income-segregated projects. The same tradeoff existed as stated above–the city could have required a greater number of affordable units off-site, but chose to only allow on-site units.

Cash Payment vs. Hardship Payment Option: Another key policy decision is whether to allow developers to make cash payment in lieu of providing affordable units. In Cambridge, a historic, largely built-out city, there is a scarcity of developable sites for new housing construction. There was a concern that the city could accumulate a large fund yet be stymied in its efforts due to the unavailability of sites. The city decided therefore not to provide a cash payment option. The city realized, however, that there might be sites that are physically inappropriate for the additional density allowed by the ordinance. In these cases, the ordinance established a process under which the planning board, at the request of the developer, would review and determine whether a hardship exists. If the board determines that a hardship would prohibit the developer from using the allowable density, the city would negotiate a cash payment in an amount imputed to be the cost of providing the on-site affordable units.

Percentage of Affordability: The city realized that inclusionary zoning was one tool to meet the need for affordable housing, but that it could not be the only tool. In some cases, developers have options as to whether to develop a particular site into a residential or commercial project. If the city's inclusionary requirements were too onerous, developers would not undertake new residential projects and the policy would prove ineffective at generating new affordable housing units. The percentage requirement also needs to be consistent with the findings of the study relative to the impact of market rate development on the availability and cost of low-income housing.

Density Bonus: There is no free lunch when it comes to the provision of affordable housing. Based on recent land use decisions of the U.S. Supreme Court, cities need to be very careful in crafting inclusionary zoning policies to avoid litigation around the taking of private property rights. The purpose of the density bonus is to hold the developer harmless financially from what they could develop by right. An alternative to allowing the developer

to build at a higher density is to provide capital subsidies to produce affordable housing, as is the case with federal and state housing programs. Cambridge decided that, rather than use its scarce public affordable housing funds in these otherwise market rate developments, it would compensate owners with a density bonus. The density bonus allows for an automatic increase in density without triggering a zoning process (projects that need zoning relief otherwise still must obtain such public approvals). The density bonus affects two zoning factors, the floor to area ratio, and the minimum lot area per dwelling unit. Based on an economic analysis of the costs and returns of developing market and below market rate housing, the city determined that the profit earned from one additional market rate unit would offset the cost to the developer to create an affordable unit. Therefore the city offered a 30 percent floor to area ratio bonus and an adjustment to the minimum lot area per dwelling unit to allow two additional units for each required affordable unit.

There were concerns from some citizens about the impact of increased density on the quality and character of residential neighborhoods. To mitigate these concerns, the city established a minimum project size of 10 units to trigger the inclusionary requirements. Based on an analysis of development potential in the city, very few larger sites are located in existing residential neighborhoods and therefore the increased density associated with the policy would not affect these neighborhoods.

Level of Affordability: The pricing of the affordable units is an important issue in policy design. The city intended to establish pricing mechanisms that would provide, in rental projects, opportunities to both low- and moderate-income residents. It accomplished this goal by establishing a target income level of 65 percent of the area median income (high HOME rents, for those familiar with the federal HOME program), adjusted for family size. Rents set at this income level would be affordable to moderate-income tenants, or alternatively, to low-income tenants with a Section 8 voucher. Similarly, for homeownership projects, the sales price needs to be affordable to the same target income group.

Implementing the Ordinance: Since the ordinance was enacted in 1998, the city has secured an affordable housing deed restriction on 89 units, including a mix of rental and homeownership housing. The restriction is recorded as a senior interest in the title, ensuring the long-term affordability of the units. These developments are in various stages of development, ranging from complete and occupied to under construction. As units are competed, the city's Community Development Department (CDD) assists developers to market and identify qualified renters or buyers. Given the high cost of acquisition and construction costs over the last three years, challenges with siting affordable housing, and the challenge of securing public subsidies, the inclusionary zoning ordinance has been a successful addition to the city's multifaceted approach to creating and preserving affordable housing.

Once the ordinance was adopted, the city developed policies and procedures for implementing the ordinance. The following briefly outlines several of the major procedures that have ensured that the ordinance is implemented fairly and consistently. This process takes between four to six weeks and can be completed in tandem with other city requirements. A developer may not however seek a building permit until all requirements have been satisfied and they receive a letter from CDD certifying their compliance with the ordinance.

Staff Technical Assistance and Review: Housing staff meet with prospective developers to explain the ordinance and the process for compliance. Developers are required to complete an application with information about the development and submit schematic drawings of the development. These plans must identify the size and location of the designated inclusionary units. Staff reviews the plans for comparability to other units, including the size, finishes, and distribution of these units throughout the development. Once the application is approved, an affordable housing deed restriction is executed by the city and owner and recorded.

Marketing and Resident Selection: Owners are required to submit a marketing and tenant selection plan. The goals of the plan are to attract and identify qualified households, follow any preferences (such as preference for Cambridge residents), and fully inform prospective buyers or renters about the benefits and responsibilities of buying or leasing an inclusionary unit. To date, the city has assisted developers with their marketing and selection plan by identifying qualified applications and referring them to the developer. This is another element of technical assistance that has helped to ensure that the program is implemented consistently and expeditiously.

For example, the CDD recently assisted a developer in identifying qualified applicants and this ultimately gave a single mother the opportunity to buy a three-bedroom unit for herself and her three children. The unit is part of a 10-unit development of beautifully restored historic buildings between Central and Kendall Squares. Units in this neighborhood were selling between $500,000 and $700,000. The inclusionary unit was sold for $130,000 and enabled this family to remain in the neighborhood and close to transit lines, shops, schools, friends and jobs.

A similar process is underway in the heart of Central Square, where a new 72-unit rental development was just completed. Of these units, 11 are affordable thanks to the inclusionary ordinance. Right now, the CDD is working with the developer on the marketing and selection of tenants to occupy the 11 units, two of which are wheelchair accessible and were marketed to households with disabilities. Rents in this desirable neighborhood run above $2000 for a two-bedroom unit. The rents on the 11 affordable units will be below $1000.

Post-Occupancy Monitoring and Reporting Requirements: The city has monitoring and compliance requirements to ensure that rental units continue to be rented to eligible households and that upon resale homeownership units are resold to income-eligible households. For rental units, the owner is required to submit an annual income certification of all tenants in inclusionary zoning rental units.

In summary, the inclusionary zoning ordinance has successfully created mixed-income rental and homeownership units throughout the city. City staff has worked closely with developers by providing technical assistance in designating the inclusionary units and recording the affordable housing deed restriction, marketing tenant selection and post-occupancy monitoring. Overall, the inclusionary zoning ordinance has been effective addition to the city's multifaceted affordable housing production program.

Boston's Policy Gives Developers Choice

By Meg Kiely

Boston has been one of the nation's most prosperous cities over the past economic boom of the 1990's. While this has been a great benefit to the city and its people, it also has allowed the price of housing to increase at a double digit pace. Many of Boston's new residents hold high-paying jobs in Boston's leading industries, and are bidding up the price of housing in the city and in the surrounding communities. Furthermore, high construction and land costs favor the development of high-end housing at the expense of moderately priced and affordable units.

In February 2000, the city implemented an inclusionary development policy to help Boston meet its housing needs across all economic levels. The policy is aimed at two types of developments:

- Any residential project financed by any agency of the City of Boston or the Boston Redevelopment Authority (BRA), or to be developed on a property owned by the city or the BRA that includes 10 or more units.
- Any project that includes 10 or more units of housing and requires zoning relief.

The housing option

Under Boston's inclusionary policy, projects that fall into either of these two categories are required to make no less than 10 percent of the total number of units affordable to moderate-income households (those earning below 80 percent of the area median income) and middle-income households (those earning between 80 and 120 percent of the area median income). Furthermore, of the 10 percent affordable units, 50 percent of the units shall be affordable to households with earnings below 80 percent of area median income. No more than 50 percent shall be affordable to households with earnings between 80 percent and 120 percent of area median income, provided that on average these middle-income units are affordable to households earning 100 percent of area median income.

The affordability restrictions must be written into the deed and are guaranteed for no less than 30 years with an extension of 20 years, for a total of 50 years. There also must be provisions restricting the price of subsequent sales of the unit to a maximum of approximately five percent increase per year, adjusted for approved improvements and other miscellaneous fees. However, each unit must be sold to a household in the same income category as the seller.

Other options for developers

Under the discretion of the director of the Boston Redevelopment Authority, a developer has two other options to meet the inclusionary development policy: 1) an off-site production option, or 2) a cash contribution to the city's affordable housing efforts.

If the off-site production option is utilized, the developer is required to provide a number of affordable units equal to 15 percent of the total number of market rate units, at affordable levels as outlined above. The cash contribution option requires the developer to make a payment to the Boston Redevelopment Authority in an amount

equal to 15 percent of the total number of market rate units times an affordable housing cost factor. The affordable housing cost factor, initially established at $52,000 and derived from the average subsidy needed to develop a unit of affordable housing over the previous year, is adjusted annually on July 1. These funds are used to subsidize other affordable housing developments in Boston.

Results so far

The overall goal of this policy is to foster the economic integration of Boston. As such, the city and the Boston Redevelopment Authority encourage developers to meet their inclusionary development obligations through on-site construction of affordable units, although several projects have met their obligation through a cash contribution. In the year following the implementation of the inclusionary development policy, there were eight privately financed housing projects permitted in Boston of 10 or more units requiring some sort of zoning relief. These were predominantly high-end housing in some of Boston's more desirable neighborhoods. To date, developers have contracted to contribute over $4 million for affordable housing construction and 72 affordable units have been constructed as a result of this policy. It is clear that this new policy is showing immediate and positive results.

The inclusionary development policy has not had a negative effect upon the pace of housing construction in the city. In fact, the policy has allowed the city to meet its affordable housing production goals while still meeting the goals for market rate housing set out in Boston's three-year housing strategy. Overall housing production numbers do not compare with other jurisdictions across the nation that are still experiencing "greenfield" development and permitting large residential subdivisions. Boston is a very dense city, with a scarcity of buildable lots, but it is this density that makes Boston's inclusionary development policy both necessary and effective.

Creating diverse neighborhoods

The small number of buildable sites requires that the City take extraordinary efforts to include housing opportunities for households of all economic strata. Inclusionary development in Boston, therefore, serves two functions:

- It acts to facilitate the construction of affordable units in a period of declining federal and state resources for affordable housing programs.
- It provides a way to ensure that there is a place for households of all incomes to find homes in the city.

This policy, along with other programs such as the city's linkage program which requires that large commercial projects pay $5.49 per square foot into the Boston's Neighborhood Housing Trust, along with the disbursement of federal, state and local dollars, allows the city to create and preserve economically diverse neighborhoods accommodating both existing and future Bostonians.

The waterfront project, housing and funding

In addition to the inclusionary development policy, Boston is taking other action to address the need for affordable housing. The BRA is planning the South Boston

Waterfront to have one-third of the space devoted to residential uses—20 percent of which shall be affordable to families earning up to 120 percent of area median income, with one-third for commercial uses and the remaining third dedicated to open space. Boston's extensive public transportation system allows the development of urban villages near transit nodes and a BRA initiated planning process for Transit-Oriented Development is investigating how to encourage an appropriate density of housing and commercial activity in these areas. The conversion of underutilized space above ground-floor retail into residential use is creating vibrant, mixed-use districts able to support a higher density. Furthermore, the city is renovating formally abandoned public housing so that the units can be brought back on line. The inclusionary development policy, along with other city policies and initiatives will ensure that affordable housing and economic diversity are part of any such developments and help the city meet its affordable housing goals.

To support the various initiatives around housing, a variety of sources of funds are necessary. Proceeds from the sale of city-owned land are being used to subsidize the construction of affordable units, and money from the city's linkage program is available to developers of affordable housing in Boston. Another funding source comes through the linkage program, the most successful of its kind in the nation, that has raised over $60 million for affordable housing construction since its inception in 1983. There is legislation pending that will raise the rate to $7.18 per square foot, helping the city create even more housing for Boston residents.

Clearly, Boston's inclusionary development policy has helped provide affordable housing to moderate- and middle-income households. This policy, combined with other programs, has enabled the construction and preservation of 1,795 affordable units since 1999. As part of a comprehensive housing strategy of production, preservation, and protection of affordable units, inclusionary development is an excellent tool to ensure the inclusion of households of all incomes in Boston or any other city.

APPENDIX

Overview of The Massachusetts Comprehensive Permit Law

see G.L. c. 40 B, §§ 20-23

Effective Date: November 21, 1969 (Chapter 774 of the Acts of 1969, H5681)
Purpose: To increase the supply and improve the regional distribution of low and moderate income housing by allowing a limited suspension of existing local regulations which are inconsistent with construction of such housing.

Who May Apply for a Comprehensive Permit?

A public agency
A non-profit organization
A limited dividend organization

How is an Application Made?

Prior to applying for a comprehensive permit, a proposal to build affordable housing must receive preliminary approval (normally a Project Eligibility or Site Approval letter) under a state or federal subsidy program. The application, containing the eligibility letter and preliminary development plans, is then filed with the local zoning board of appeals. The board then notifies and seeks recommendations from other local boards, including, as appropriate, the following:

Planning Board
Survey Board
Board of Health
Conservation Commission
Historical Commission
Water, Sewer, or other commission or district
Fire, Police, Traffic, or other department
Building Inspector or similar official or board

The zoning board of appeals holds a public hearing to ensure that local concerns are properly addressed. Local concerns include health, safety, environmental, design, open space, and other concerns raised by town officials or residents. In making its decision, the board acts on behalf of all other town boards and officials, but only with regard to matters where local restrictions are more stringent than state requirements. The board can issue a single comprehensive permit, which subsumes all local permits and approvals normally issued by local boards. It can also issue a comprehensive permit with conditions or deny the permit. If a comprehensive permit is granted, the applicant, prior to construction, must normally present final, detailed construction plans to the building inspector or similar officials to ensure that the plans are consistent with the comprehensive permit and state requirements.

What if the Comprehensive Permit is Denied?

If an application for a permit is denied or granted with conditions which would make building uneconomic, the applicant may appeal the board's decision to the Housing Appeals Committee, which consists of three members appointed by the Massachusetts Secretary of Communities and Development (one of whom must be an employee of Department of Housing and Community Development), and a city councilor and a selectman, both appointed by the Governor.

Hearing and Appeals Procedure:

The local zoning board of appeals must open a hearing within thirty days of receiving an application, and render a decision within forty days after termination of the hearing. Any appeal of the local decision to the Housing Appeals Committee by the applicant must be taken within twenty days of the notice of the decision. A decision of the Housing Appeals Committee may be appealed to the Superior Court.

Consistency with Local Needs:

The general principle governing hearings before the local board and the Housing Appeals Committee is that all local restrictions, as applied to the proposed affordable housing, be "consistent with local needs." General Laws c. 40B, § 20 defines consistency with local needs as being reasonable in view of the need for low and moderate income housing balanced against health, safety, environmental, design, open space, and other local concerns. If less than ten percent of municipality's total housing units are subsidized low and moderate income housing units, there is a presumption that there is a substantial housing need which outweighs local concerns. See 760 CMR 31.07(1)(e); Board of Appeals of Hanover v. H.A.C., 363 Mass. 339, 367, 294 N.E.2d 393, 413 (1973).

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LP4S
MC 2/4/70, rev. 6/8/93, 3/23/94

This overview of the Massachusetts comprehensive Permit Law was provided by the Massachusetts Department of Housing and Community Development. For more information, visit the Massachusetts DHCD Web site at http://www.state.ma.us/dhcd/components/hac/4summ-mc.htm.

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