

## Zoning Affordability: The Challenges of Inclusionary Housing

By Lynn M. Ross

In this era of federal cutbacks, municipalities have been forced to do more with less. The provision of affordable housing is no exception. Localities are relying on a number of tools and programs to ensure that the national epidemic of inadequate affordable housing does not overwhelm their communities. Among them is inclusionary zoning. Inclusionary zoning is not a new tool in the provision of affordable housing—the first such ordinances appeared in the early 1970s in California, Maryland, and Virginia. However, in recent years inclusionary zoning has gained popularity across the nation. Boston, San Francisco, Boulder, San Diego and Santa Fe, New Mexico have adopted programs within the last five years. Although no definitive survey of these programs exists, available literature suggests that today there are between 50 and 100 jurisdictions nationwide with some type of inclusionary housing program. Even in the absence of a comprehensive survey, one point is clear about these programs: they are not without challenges.

### Challenge 1: Surviving a Takings Claim

The Fifth Amendment to the U.S. Constitution prohibits the taking of private property without just compensation. Although the takings clause generally refers to the use of eminent domain, the U.S. Supreme Court has identified other types of taking that do not involve the physical appropriation of private property. Certain types of regulation, including inclusionary zoning, can be deemed regulatory takings. Opponents of inclusionary programs have long argued that these ordinances fall into the regulatory takings category because the regulations deprive owners of the most economically viable use their land. In a workbook developed for the Chicago-based Business and Professional People for the Public Interest, author Mary

Fairfax County Department of Housing and Community Development



(Above) Characteristic rowhouses in Fairfax County, Virginia, available through a first-time homebuyers program. (Right) Founders Ridge, in Fairfax County, Virginia, is a unique public/private effort to provide a model of high-quality, affordable housing to moderate-income residents of Fairfax County. Founders Ridge was conceived through a partnership of Fairfax County and the Northern Virginia Building Industry Association focusing on an available piece of land and an idea to provide first-time home ownership opportunities for families. The development is by one of the area's premier builders, and was built at below-market cost. The project consists of 80 three-level, three-bedroom, 2½ bath, garage townhomes ranging in price from \$106,990 to \$119,990. These homes were marketed to first-time homebuyers who either live or work in Fairfax County and have moderate incomes with a minimum income of \$30,000. (Top) An affordable home in Fairfax County, Virginia, available through a first-time homebuyers program.

**SURVEY OF SELECTED INCLUSIONARY HOUSING**

Municipality	Year	Units Produced to Date	Applicability	Set-aside	Control Period	Density Bonus	Additional Developer Incentives	In-Lieu-of Payment/Of Development
Boulder, Colorado	2000: Amended March 2002	70 units	No threshold; applicable to all residential development	20 percent	Permanent affordability by deed restriction	Not offered	<ul style="list-style-type: none"> <li>• Waiver of excise tax</li> <li>• Eligible for local housing subsidy grants</li> <li>• Waiver of development review application fees</li> </ul>	<ul style="list-style-type: none"> <li>• Fees in lieu of offsite allowed developments units and less</li> <li>• Half of owner units; many to constructed of more flexibility rental units</li> </ul>
Fairfax County, Virginia	1990: Amended July 2002	759 rental units; 971 owner units	Developments greater than 50 units	12.5 percent minimum for owner units; 6.25 percent minimum for multifamily units	15 years for owner units; 20 years for rental units	Sliding scale of up to 20 percent for owner units; up to 10 percent for rental units	Reduced bulk regulations	<ul style="list-style-type: none"> <li>• May request in lieu based on design feasibility</li> <li>• Offsite not permitted</li> </ul>
Irvine, California	1995: Amended 2003	390 units	No threshold; applicable to all residential development	15 percent	30–40 years	25 percent for 20 percent low income or 10 percent very low income	<ul style="list-style-type: none"> <li>• Reduction in fees</li> <li>• Eligibility for CDBG and HOME funds</li> <li>• Expedited processing</li> </ul>	Offsite and fees in lieu allowed
Longmont, Colorado	1992: Amended July 2001	528 rental units; 102 owner units	No threshold; applicable to all residential development	10 percent per phase of development	20 years for rental units; 10 years via deed restriction for owner units	Up to 20 percent for developments that exceed the required amount of affordable units	<ul style="list-style-type: none"> <li>• Fee reductions of up to 75 percent</li> <li>• Expedited plan review</li> <li>• Variances from land development requirements</li> <li>• Reduction of water/wastewater fees</li> </ul>	<ul style="list-style-type: none"> <li>• Offsite allowed on a case-by-case basis</li> <li>• Fees in lieu allowed</li> </ul>
Monterey County, California	1980: Amended May 2003	230 rental units; 270 owner units	No threshold; applicable to all residential development	20 percent	Permanent affordability by deed restriction	Not currently offered	None currently offered	Fees in lieu and offsite allowed special circumstances
Montgomery County, Maryland	1974: Amended 2003	3,174 rental units; 8,036 owner units	New construction of 35 units or more	12.5–15 percent	10 years for owner units; 20 years for rental units	Up to 22 percent	<ul style="list-style-type: none"> <li>• Smaller lot sizes</li> <li>• Ability to build attached units on detached zoned property</li> </ul>	Fees in lieu and offsite allowed in “exceptional cases” at the discretion of the director
Santa Fe, New Mexico	1998: Amended March 2003	12 units	No threshold	11–16 percent depending on target income levels for development	30 years; 30-year period start over with each new occupant	11–16 percent; bonus is equal to the set-aside percentage	<ul style="list-style-type: none"> <li>• Fee waivers for plan submittal</li> <li>• Waiver of building fees for affordable units</li> </ul>	Not permitted

Table researched and assembled by Lynn Ross. Demographic information source: U.S. Census Bureau, *Census 2000 Summary File 3*. Accessed July 9, 2003, through American Fact Finder available at [factfinder.census.gov/servlet/Basics](http://factfinder.census.gov/servlet/Basics)

Anderson identifies three possible takings challenges to inclusionary zoning.

Anderson’s first argument is that the required affordable housing set-asides so severely diminish the economic value of the land that they result in a taking. She next agrees that inclusionary zoning lacks a rational nexus to legitimate government purposes. Finally, she says inclusionary zoning forces the landowner to bear the cost of what is essentially a public burden. Each argument poses a serious threat to inclusionary zoning ordinances. Still, a municipality can take steps to address them prior to the implementation of its regulations.

Arguments over diminished economic value can be addressed with developer incentives. This is often done with a density bonus. In 1971, Fairfax County, Virginia, became one of the first places in

the nation to implement inclusionary zoning. The original ordinance did not include a density bonus. A 1973 Virginia Supreme Court ruling found the ordinance unconstitutional in part because it resulted in a taking. When Fairfax County introduced a new inclusionary zoning ordinance in 1990, the regulations included a sliding-scale density bonus of up to 20 percent. The 1990 ordinance has never been challenged in court.

The municipality can circumvent Anderson’s second takings argument by performing a nexus study to demonstrate the connection between an inclusionary ordinance and the municipality’s desire to provide affordable housing. Anderson says that because the nexus study relies on data analysis it can assist the locality in articulating objective reasons for inclusionary zoning. For example, prior to implementing a 1998 inclusionary zoning ordinance, Santa Fe conducted such a study. By focusing on service employees, the study tied the need for the ordinance to the creation of market-rate housing units. The

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**PROGRAMS**

Program	Population (2000)	Median Household Income (2000)	Median Home Value (2000)	Median Rent (2000)
Program 1	94,673	\$44,748	\$304,700	\$818
Program 2	969,749	\$81,050	\$233,300	\$998
Program 3	143,072	\$72,057	\$316,800	\$1,272
Program 4	71,093	\$51,174	\$177,900	\$769
Program 5	401,762	\$48,305	\$265,800	\$776
Program 6	873,341	\$71,551	\$221,800	\$914
Program 7	62,203	\$40,392	\$182,800	\$707

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city’s rationale was that new market-rate housing attracted new residents who in turn increased demand on the local service industry. This demand would lead to a greater need for service employees, most of whom could not afford market-rate housing.

The Santa Fe example illustrates the importance of such studies in defining the specific needs and goals of the community and how inclusionary ordinances will address them. Quite simply, the nexus study should provide the program justification a municipality can point to in the event of a legal challenge.

Anderson’s final argument—that inclusionary zoning unfairly burdens the landowner with the provision of affordable housing—also can be addressed through the nexus study. The municipality must demonstrate that the required set-aside is roughly proportional to the impact of new development. The municipality should not only draw the connection between the required set-asides and the creation of new market-rate housing but also illustrate the necessity of the set-aside in advancing

legitimate state interests (i.e. the provision of affordable housing). Using a strong analytical rationale, the municipality can argue that inclusionary zoning set-asides are equivalent to the dedications and fees developers already pay for public goods such as infrastructure, schools, and recreational facilities.

**Challenge 2:  
Fostering Stakeholder Support**

To say that community support for inclusionary zoning is key to the success of the program is a gross understatement. Elected officials, developers, and community residents are among the groups that municipalities must court to move forward with a program. If any of these groups does not agree to the policy, implementation will be difficult if not impossible. Include stakeholders in the process as early as possible or elected officials could refuse to adopt the regulations, developers could build within communities without inclusionary regulations, or residents could mount an aggressive NIMBY campaign.

Boulder, Colorado, conducted public hearings and generated reports on the need for affordable housing for two years prior to the passage of its ordinance in 2000. The Longmont, Colorado, city council formed a task force of community representatives to review affordable housing strategies and advocate for inclusionary housing. Santa Fe staff met with local developers for one year before moving to implement their ordinance. An earlier attempt at an ordinance was thwarted by a takings claim from the development community. Learning from this experience, staff used a series of meetings to educate developers about the ordinance and its benefits.

In addition to creating an open process, a municipality also can garner stakeholder support by framing the issue effectively. In a 2002 report published in *New Century Housing*, Barbara Lipman found that some 14.4 million families faced “critical housing needs”—they used more than half of their household’s income for housing or lived in substandard conditions. Over one-third of these families were low- to moderate-income working families and often included, as heads-of-household, teachers, police officers, and service workers.

Inclusionary zoning makes it possible for such groups to afford decent housing in the communities where they work. Other benefits include the creation of mixed-income communities (by de-concentrating poverty) and reduced sprawl. The latter occurs by using density bonuses to build more homes closer to job centers.

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### Challenge 3: Compensating Developers

Most communities with inclusionary zoning offer incentives to participating developers. The provision of these incentives is important for two reasons: 1) incentives reduce developer opposition and encourage participation, 2) incentives reduce the likelihood that an ordinance will be challenged on the grounds that it results in a taking. Well-designed developer incentives reduce the financial burden of providing affordable units and may even increase the developer's ability to profit from market-rate units.

Of course, not all communities offer a density bonus incentive. Boulder offers a menu of other incentives to developers, including a waiver of excise taxes and development review application fees, and eligibility for city housing subsidy grants. Other communities offer a combination of incentives that include a density bonus. For instance, in addition to a density bonus of up to 20 percent, Fairfax County also offers a reduction in bulk regulations. Montgomery County, Maryland, combines a density bonus with smaller lot sizes and the ability to build attached units in detached housing zones.



### Challenge 4: Changing Market Forces

Inclusionary zoning is market sensitive in that it relies on a strong residential market to create below-rate units. When the residential market levels off or weakens, the effectiveness of the ordinance is hindered. The situation is exacerbated when a community has limited developable land. Santa Fe initiated their ordinance after the city was almost completely built out.

The density bonus is the most common incentive provided in inclusionary ordinances. A density bonus is the percentage of market-rate units the ordinance allows "above and beyond" the existing zoning designation in exchange for the provision of affordable housing. The Santa Fe ordinance allows a density bonus equal to the set-aside percentage (11 percent or 16 percent). The Irvine, California, ordinance provides a 25 percent density bonus as mandated by state law.



*Affordable housing developments in Irvine, California.*



Consequently, the city may have difficulty generating a significant amount of affordable housing. During its five-year existence, the ordinance has produced only a dozen owner-occupied units. Fifty additional units are currently pledged for development.



*(Left) A single-family home in a small-scale affordable housing development in Santa Fe, New Mexico. (Right) A large-scale condominium project in Santa Fe, New Mexico, called Zocalo, consisting of 310 units, of which 31 are Housing Opportunity Program (HOP) units.*

Some communities are able to mitigate the effect of limited developable land by structuring or amending their regulations to be applicable beyond new subdivision developments. For example, Fairfax County requires condominium conversions to provide affordable units. The Boulder ordinance applies to existing construction undergoing significant rehabilitation. PolicyLink, a national nonprofit research and advocacy organization, suggests that landlocked communities consider applying their ordinance to small-scale infill developments that are typically not covered.

One way to promote the integration of affordable units with market-rate units is to make them aesthetically comparable.

Even successful inclusionary zoning programs must adapt to market conditions. The Montgomery County Moderately Priced Dwelling Unit Program (MPDU) is widely regarded as the most successful inclusionary housing program in the country. Initiated in 1974, the MPDU program has produced over 11,000 affordable housing units. However, the conditions that helped make the program a success have recently changed. The county is now 75 percent developed, construction costs have risen sharply, and fewer large developments are being proposed. Consequently, the number of new MPDUs has decreased. Montgomery County addressed this challenge by reducing the applicability threshold from 50 to 35 units. The county also implemented an expedited development review process for affordable housing called the Green Tape Process for Affordable Housing. The process includes modified applications, expedited review and permitting, improved review agency communications, and a GIS map overlay to easily identify affordable housing projects.

### **Challenge 5: Integrating Inclusionary Units into the Community**

One of the key benefits of inclusionary zoning is that it helps to create diverse, mixed-income communities. However, this benefit can be negated when inclusionary units are segregated—either through appearance or location—from market-rate units. The success of an inclusionary housing program hinges on its ability to seamlessly incorporate inclusionary units with market-rate units. Within the ordinance this issue can be addressed through appearance controls and off-site construction rules.

One way to promote the integration of affordable units with market-rate units is to make them aesthetically comparable. Anderson says requiring a similar look and size eliminates the stigmatizing of families in the below-rate units. Generally, these aesthetic controls apply only to the exterior of the units such as in Monterey County, California, where the regulations state that interiors may differ in the affordable units. The Santa Fe ordinance requires both “architectural and landscaping integration” of affordable units with market-rate units.

Of course, the aesthetic regulations only come into play if the affordable units are built on-site. However, some communities allow the construction of affordable units outside of the developments. The majority of ordinances state whether

developers have the option to build affordable units off-site. In Fairfax County and Santa Fe, developers are not allowed to construct units off-site. Communities that allow off-site development typically attach special requirements to the option. For example, Boulder only allows off-site development for projects of four or less units. Montgomery County allows off-site development only in “exceptional cases,” as determined by the planning director.

In short, requiring affordable units on-site ensures a mixed-income community. Allowing developers to construct units off-site is sometimes necessary, particularly in land-challenged communities, but the option should be used with discretion. If the goal of an income-integrated community is to be met, then it is imperative that affordable units be required on-site with market-rate units.

Some critics argue that inclusionary housing units lower the value of market-rate units in the same development. A recent study by the Baltimore-based Innovative Housing Institute found no significant difference between the resale price of market-rate units in inclusionary developments and the market

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*The Sundial development in Longmont, Colorado, consisting entirely of single-family, detached homes. Nineteen affordable homes were completed, the last of which closed in July. Each of the four-bedroom homes sold for \$174,750.*

*Single family homes in a mixed-unit development in Longmont, Colorado. The developer was required to build two single-family units and 12 condominiums. Both three-bedroom single-family homes sold for \$158,325. Four condominiums have been sold.*



*Rick Damman, City of Longmont, Colorado*

as a whole, a fact that is particularly true in communities where regulations have been carefully crafted to ensure maximum affordable unit integration and compatibility within the larger community.

### **Challenge 6: Maintaining the Affordability of Inclusionary Units**

The purpose for inclusionary zoning is the provision of affordable housing. Typically, the ordinance will include information on unit prices and marketing procedures, and details on what income levels will be required for eligibility. The goal in setting this type of criteria is to ensure that newly created units are affordable for the jurisdiction's target income levels. Income levels and pricing are determined upfront, but how is affordability maintained over time?

One way that municipalities manage long-term affordability is through the control period set forth in the regulations. Control periods run the gamut and should be carefully considered by each jurisdiction because they have a direct impact on the effectiveness of the program. For example, Boulder and Monterey County require permanent affordability. Montgomery County requires only 10 years of affordability, which it acknowledges may not be enough. Less than half of the affordable units created by the MPDU program since 1974 remain affordable today. Consequently, the county has granted itself the authority to purchase MPDU units during and after the initial control period to control the resale with new 10-year price controls in place.

Controlling the resale also can be an effective tool for the municipality. Resale controls are especially important when the control period is less than permanent. These controls may take the form of deed restrictions, contractual agreements, land trusts, or covenants that run with the land. Resale controls are particularly effective in preventing homeowners of affordable

units from selling them at market-rate prices or to families that do not meet the required income levels. Fairfax County recently discovered that owners of affordable units were selling their units to non-qualifying buyers during the control period or renting them at market-rate prices. So the county stepped up enforcement and is in the process of developing a more detailed monitoring mechanism to track sales and rentals of affordable units.

### **Conclusion**

Creating, implementing, and administering an inclusionary housing program is no easy task. The challenges outlined herein scarcely touch on the many issues generated by regulations. Municipalities considering the adoption of inclusionary housing can learn from the communities discussed in this article—the need for adequate study, an open process, regulatory flexibility, and continued evaluation. As stated earlier, even in the absence of a comprehensive study of inclusionary zoning programs we know that these programs are not without challenges, but we can now look to a growing number of examples to discover that success is possible.

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