



## *City of Allentown Memorandum*

TO: Allentown City Council  
FROM: Solicitor's Office  
RE: Amendment to Zoning Ordinance for Inclusionary Zoning  
DATE: 2/10/2017

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### ISSUE

The following statement was submitted to the Solicitor's Office from legal review: "Council is interested pursuing legislation that would ensure the development of affordable housing/mixed used residential development. To this end, we have received a proposed Zoning Amendment that would establish inclusionary housing standards and certain incentives; and create an overlay district within the Neighborhood Improvement Zone. Could your office review the attached proposal with these ends in mind both in regard to its legality and impact on our current zoning code? We would then like to talk to you about the procedures for enacting such legislation."

From this, four questions appear to be raised to be addressed by the Solicitor's Office: 1) what are the legal requirements for amending the zoning ordinance; 2) is inclusionary zoning legal; 3) what affect would inclusionary zoning have with regards to current/ ongoing projects; and 4) can an overlay district be created in the Neighborhood Improvement Zone.

### DISCUSSION

1) What are the legal requirements for amending the Allentown Zoning Ordinance?

The legal requirements for amending the Allentown Zoning Ordinance are found in Section 1305.04 of the Allentown Zoning Ordinance and Section 609 of the Pennsylvania Municipalities Planning Code, 53 P.S. § 10609. First, as a potential amendment that has not originated with the Allentown Planning Commission, the proposed amendment must be submitted to the Allentown Planning Commission and the Lehigh Valley Planning Commission for review and

recommendations. Allentown Zoning Ordinance, § 1305.04.B.; 53 P.S. § 10609(c), (e). No sooner than thirty (30) days after submittal to the Allentown Planning Commission and Lehigh Valley Planning Commission, the City Council must hold a public hearing (after proper notice) to receive public comment on the proposed amendment. Allentown Zoning Ordinance, § 1305.04.B.; 53 P.S. § 10609(b)(1). Any changes to the amendment from comments retrigger the public hearing requirement. Allentown Zoning Ordinance, § 1305.04.C.; 53 P.S. § 10609(d).

2) Is inclusionary zoning legal?

Yes. Inclusionary zoning is legal as the Pennsylvania General Assembly has delegated broad authority to local authorities in establishing zoning laws. *See* 53 P.S. §§ 10105, 10603. Specifically, zoning ordinances may include “provisions authorizing increases in the permissible density of population or intensity of a particular use based upon expressed standards and criteria set forth in the zoning ordinance...” § 10603(c)(6).

While inclusionary zoning is largely thought to be allowed by the Municipalities Planning Code, like all other ordinances, the implementation, and use can still create problems for the City of Allentown. The ability to dictate the use of one’s property is a constitutional right and any regulation or restriction of such use cannot be “arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.” *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

Along with this LSR, a draft amendment was submitted that appears to be another municipality’s inclusionary zoning ordinance (“Borough” appears a few times in the ordinance in relation to the enacting municipal authority where in other places it is changed to “City” or “Allentown”). Taking another municipality’s ordinance, while not *per se* illegal, does present issues because each locality is unique. Any inclusionary zoning ordinance must be unique to Allentown: size of the development project (i.e. number of units); percentage of inclusionary units; income eligibility; pricing; length of inclusionary status; and inclusionary incentives. An inclusionary

zoning amendment must be appropriately vetted and tailored to the City of Allentown because of the rights held by property owners.

3) What affect would inclusionary zoning have with regards to current/ ongoing projects?

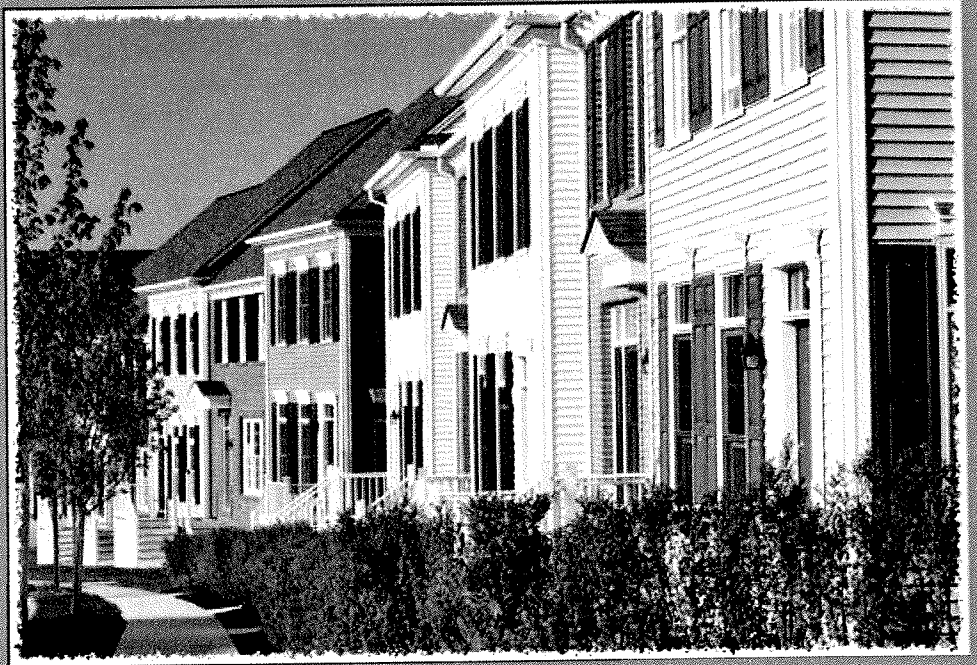
Like any other zoning ordinance amendment, inclusionary zoning cannot be applied retroactively. Any property in use, or being built or planned to be put in use will be considered a nonconforming use. Allentown Zoning Ordinance, § 1303.01. Please note, the requirements of allowing for nonconforming uses may prevent enforcement against some of the building types in Section 2.a. of the proposed amendment. Nonconforming use determinations are fact- specific, so no broad statement of legal applicability can be made (numbers 3 and 4 being the problematic ones, and possibly 5).

4) Can an overlay district be created in the Neighborhood Improvement Zone?

Currently, the Neighborhood Improvement Zone is not a zone nor overlay district within the zoning ordinance. The NIZ is designated for tax and development purposes only, not for zoning. While another overlay district can be created, the NIZ is already subject to the Hamilton Street Overlay District (in addition to others). It may be more prudent to use an existing district than create a new one or apply the amendment to specific zones (e.g. B1/R, RH, B2, etc.).

Along with this memorandum is a copy of the Lehigh Valley Planning Commission's 2008 Inclusionary Zoning Guide and Model Regulations (there is a 2015 update, but it was difficult to read in pamphlet form and there were no substantial changes).

# *Inclusionary Zoning*



**Guide | Model Regulations**

**Lehigh Valley Planning Commission**

**December 2008**

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**Approved by the Lehigh Valley Planning Commission  
December 18, 2008**

**Special thanks to the Montgomery County (PA) Planning Commission for the permission to use the Inclusionary Zoning Model Ordinance as the basis for the model ordinance included in this report.**

**Photographs depict Florin Hill, a mixed use development in Mount Joy, PA. Florin Hill incorporates Inclusionary Zoning. Photographs are courtesy of Charter Homes and Neighborhoods.**

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## **PREFACE**

The report *An Affordable Housing Assessment of the Lehigh Valley in Pennsylvania* researched and defined existing conditions, quantified problems and provided recommendations regarding affordable housing. The LVPC released this report at the March 2007 meeting and started to follow through with the recommendations contained therein. The report included the following conclusions:

“The primary issue confronting the Lehigh Valley is how to create affordable housing opportunities for households with lower incomes. Many of these households include hard-working people who provide for their families and others, but cannot afford market rate housing, whether they are renters or home owners looking to move. The challenges facing these households are numerous.

Vital community occupations and some rapidly increasing occupations provide insufficient income to purchase the median value housing unit. In 2006, one-income households where the wage earner was a janitor, retail salesperson, warehouse worker, licensed practical nurse, police officer or elementary school teacher could not afford to buy the median priced housing unit at \$189,000 without becoming cost burdened.”

The report recommends that a model inclusionary housing ordinance be developed as one tool for dealing with this problem. The guide and model regulations that you are reading responds to this recommendation.

## **INTRODUCTION**

Inclusionary zoning is a means of both helping fulfill the Lehigh Valley’s need for affordable housing and meeting community development objectives. This guide provides the reader with an explanation of inclusionary zoning, its components and associated issues. This material will help the reader to decide whether to pursue the drafting and adoption of inclusionary zoning provisions. Model zoning provisions including commentary are provided to assist those that are interested.

Inclusionary zoning creates affordable housing with minimal public expenditure and in a way that avoids the creation of pockets of low or moderate income households in a community. This differentiates inclusionary zoning from most affordable housing programs and efforts. Other programs and efforts, such as the construction of housing owned and managed by housing authorities or rehabilitated housing sold by non-profit organizations to income eligible households, involve substantial public subsidies. The creation of affordable housing is limited by available public financing. Much of the public housing of the past resulted in concentrations of low income households. The negative impacts of pockets of poverty have been documented. This being said, inclusionary zoning is not a panacea for housing affordability problems. However, it can be part of the solution. The Lehigh Valley Planning Commission supports the use of inclusionary zoning.

## **DESCRIPTION**

Inclusionary zoning describes a variety of techniques that either encourage or require developers to incorporate a certain percentage of affordable units in their developments. A development subject to or participating in inclusionary zoning must scatter units within that development that are priced to be affordable to and are reserved for income eligible households. The construction is undertaken by the developer/builder, not by a government agency or government hired contractor.

## **HISTORY**

The use of inclusionary zoning is well established nationwide. Inclusionary zoning ordinances were first created in 1972. The Furman Center for Real Estate and Urban Policy at New York University reports that well over 300 juris-

dictions have adopted such ordinances. The Montgomery County, Maryland ordinance is among the best known. First adopted in 1974, the ordinance has created more than 12,000 affordable housing units through 2005. Inclusionary zoning is newer in Pennsylvania. At least four Lancaster County municipalities have adopted inclusionary zoning measures. Inclusionary zoning has resulted in affordable housing unit construction in Mount Joy Borough, Lancaster County.

## **ISSUES**

### **MANDATORY OR VOLUNTARY?**

The first issue faced with inclusionary zoning (IZ) is whether compliance with the ordinance is mandatory or voluntary. Voluntary approaches involve the creation of a development option. That is, a developer could develop conventionally under a given set of rules or he could choose to develop under the IZ provisions with a different set of rules. Incentives would be offered in order to encourage the developer to choose the IZ option. Without incentives, it is unlikely that a for profit developer would choose the use of IZ. This Guide will describe incentives provisions in detail starting on page 4.

Under mandatory IZ, developers would be compelled to provide affordable housing in order to receive plan approval and/or permits. The mandatory approach can be undertaken both with incentives and also with no incentives. The advantages of providing incentives are that they respond to the equity issues associated with the requirement, increase the potential for the political acceptability of IZ and reduce the risk that the courts will find the ordinance to constitute a legal taking or otherwise be illegal.

Experience nationwide has shown that mandatory inclusionary zoning provisions are more effective than voluntary ones. Mandatory provisions obviously have greater participation since all builders must participate. In jurisdictions where both mandatory and voluntary provisions have been used, the mandatory provisions have yielded more units.

We recommend that municipalities adopt voluntary provisions. This recommendation is based on practical considerations relating to municipal acceptability. Voluntary provisions are presumed to be more acceptable because any property owner or developer who does not wish to use inclusionary zoning would simply develop as they otherwise would have. It would not impose any requirement or responsibility. Therefore, we can also presume that voluntary inclusionary zoning provisions would also be less likely to be subjects of legal challenges. The likelihood of legal challenges touches on the legal basis of inclusionary zoning, covered in the next section. Third, the adoption of mandatory provisions could alter regional development patterns, although they are not intended to have that effect. For example, if some municipalities in a housing market adopted mandatory inclusionary zoning provisions while others did not, it is possible that builders and developers could shift their activities to those municipalities that had not adopted the provisions as a means of avoiding the inclusionary zoning requirements. All of the Pennsylvania examples of IZ are voluntary. Although we favor the voluntary approach, municipalities are not discouraged from considering mandatory approaches. The Commonwealth can increase the legal support for mandatory inclusionary zoning by amending the MPC to clearly enable such zoning.

### **LEGAL BASIS OF INCLUSIONARY ZONING IN PENNSYLVANIA**

We believe that inclusionary zoning is enabled by the PA Municipalities Planning Code (MPC) based on a broad reading of the statute. Section 603(c) states that “zoning ordinances may contain ... such other provisions as may be necessary to implement the purposes of this act.” Section 105 of the MPC recites the purposes of this act which include “to permit municipalities to minimize such problems as may presently exist or which may be foreseen ...” IZ would be thus authorized based upon findings that affordable housing is a community problem and that IZ would be a relevant means of addressing the problem. Inclusionary zoning, adopted to date in Pennsylvania has not been subject to legal challenge. Municipalities considering inclusionary zoning provisions should seek the advice of their



solicitors as to the authority for such provisions. The reason for using a broad reading of the MPC is that it has little that directly relates to inclusionary zoning.

Fortunately, the MPC is very clear with regard to the matter of density bonuses that are typically used in connection with inclusionary zoning. They are authorized. Section 603(c) states "Zoning ordinance may contain ... (6) provisions authorizing increases in the permissible density of population or intensity of a particular use based upon expressed standards and criteria set forth in the zoning ordinance."

## **ONSITE/OFFSITE**

Inclusionary zoning is intended as a means of providing affordable housing on sites being developed. However, other options exist. IZ can also be structured so that the affordable units are sited elsewhere or that the affordable housing requirements are met in other ways. One way that the ordinance could allow offsite units would have the developer construct the affordable units at a different site. The second way that the ordinance could meet the affordable housing obligations would have the developer make a financial contribution to another entity such as a nonprofit organization which would use the funding for affordable housing purposes.

While providing offsite options increases program flexibility, offsite approaches are less desirable than the onsite approach. Onsite approaches meet two objectives, provision of affordable housing and true integration of the affordable units within the community. The offsite approach only meets the objective of providing affordable housing. The units would be sited in an all-affordable housing area. If offered, offsite options should be less attractive than onsite options. Otherwise, the developer would be likely to choose the offsite options. The inclusionary zoning should be structured to increase the amount of affordable housing if offsite options are chosen. For instance, a greater number of affordable dwelling units could be required offsite as compared to onsite. The financial contribution to nonprofit housing providers would be greater than the cost of providing the affordable housing onsite.

## **INCOME TARGET**

*An Affordable Housing Assessment of the Lehigh Valley in Pennsylvania* (Affordable Housing Assessment) prepared by Mullin & Lonergan Associates Inc. for the Lehigh Valley Planning Commission, demonstrated that many groups have a need for affordable housing. Among others, these include low income households, very low income households and moderate income households. (The term workforce housing is often used in lieu of moderate income persons.) Other groups include the elderly, the handicapped and first time homebuyers. Inclusionary zoning is better at meeting the needs of certain of these groups than others. The program needs to identify those households that will be eligible to purchase or rent the affordable units.

Inclusionary zoning can be targeted to a variety of income groups. Some housing programs target households with incomes up to 120 percent of the area median income. Others target households with earnings at or below the average area median income. While these other income limites have their advocates, we recommend that inclusionary zoning programs be targeted to households with incomes up to 80 percent of the area median income. This recommendation is consistent with the Affordable Housing Assessment which recommends that inclusionary efforts be targeted to low income households. Low income households are those with income ranging from 50 to 80 percent of the area median income. This recommendation coincides with the experience gained with Florin Hill, a housing development featuring inclusionary zoning in Mount Joy, Lancaster County currently under development. The administrators of the affordable housing program found that households with incomes close to 80 percent of the area median income were able to meet the continuing financial obligations. (These obligations included the mortgage payments, taxes and insurance.) Households with lower incomes were found to have insufficient income to meet these financial obligations.

## **APPLICABILITY**

The inclusionary zoning program needs to identify developments to which the ordinance applies. Most programs apply solely to residential developments. Some apply also to non-residential development. Housing production requirements applied to non-residential development are referred to as linkage programs. The reasoning behind linkage programs is that the non-residential development (typically offices or other buildings involving employment) will attract new workers to the area. Unless new housing is provided for these workers, they will compete with existing residents for housing units and thus aggravate existing problems. The shortage of housing stock and increase in housing costs will increase housing affordability problems. Linkage programs have been used on a limited basis, usually in large central cities like San Francisco with a tremendous demand for office space and extremely high housing costs. These conditions do not exist in the Lehigh Valley making linkage less relevant. We recommend that inclusionary zoning be applied solely to residential developments.

## **PERCENTAGE OF AFFORDABLE UNITS**

The IZ ordinance needs to establish the portion of the dwelling units within the development that are affordable. The establishment of such a percentage is a matter of judgment. A percentage that is too low fails to deliver affordable housing units. A percentage that is too high may discourage investment by market rate buyers within the development. A survey of percentages throughout the United States shows that the vast majority are within the range of 10 to 20 percent. (The extremes are 5 and 60 percent.) Fifteen percent is an often recommended and used standard.

Numerous adjustments to the formula for the percentage of affordable units are possible. Some jurisdictions vary the percentage of affordable units to reward desirable project characteristics. For instance, a municipality can prescribe a lower percentage if the units are affordable to lower income households and a higher percentage if the units are affordable to moderate income households. Such an approach would be intended to meet the needs of the full range of household incomes, while not affecting the economics of the project. Other municipalities vary the percentage of affordable units to reflect the amount of density bonus that can be actually realized on a given project.

## **INCENTIVES**

Incentives are commonly used in connection with IZ. Few programs are undertaken without incentives. The purposes of incentives vary according to the type of program. For mandatory programs, incentives are used as benefits accrued by developers and builders, those who are charged with the obligation to build affordable dwelling units. The incentives/benefits are intended to offset the costs of complying with IZ. Without such incentives/benefits, the financial burden will be conveyed to the private sector, initially to the developers/builders. In such circumstances, the developers/builders have sought to pass along such costs either to the landowner from whom they have purchased the land through a lower price for the land or to the buyers of the market rate dwellings. (Additional commentary is provided on



*Affordable units are mixed with market rate units in Florin Hill.*

the issue of the burdens imposed by IZ in the section entitled Adoption Considerations on page 10.) Also, incentives/benefits are intended to reduce the opposition to the adoption of IZ provisions. Further, incentives/benefits serve as a defense against legal claims that the IZ represents a taking. Overall, incentives/benefits are intended as the means of providing equity to the participants.

For voluntary IZ programs, incentives are provided as an enticement for using the program. After all, the developer/builder has the right to proceed pursuant to the municipality's conventional zoning provisions. Unless developers and builders choose to use the IZ provisions, no affordable units will result. The incentives give him or her the reason to do so, or at a minimum increase the feasibility of the project for a socially conscious developer/builder.

A wide variety of incentives are in use nationwide. Each has its own advantages and disadvantages. Differences in markets and regulatory situations make certain incentives more relevant and effective than others. Choosing the right incentives requires a knowledge of the local circumstances.

The most widespread of all incentives involves allowing the developer/builder to create more dwelling units on a particular property than would be possible under conventional zoning. Such incentives are popularly identified as density bonuses. The additional units provide revenue and profits to offset the lower revenues and profits attendant with the affordable units. Density bonuses provide a substantial benefit to the developer/builder and as such serve as a strong and effective incentive. Density bonuses also are favored because they do not involve a financial outlay by the municipality.

Two basic approaches have been used for density bonuses. The first is a flat increase for meeting the IZ provisions. For instance, the bonus could be one additional market rate dwelling unit for each affordable housing unit built. The second is a percentage increase based on the conventional zoning regulations in place. In this approach, the allowable density for the development is increased by a certain percent. To make either of these approaches workable, dimensional requirements need to be adjusted. If densities are increased, the minimum front yard setback, side yard setback, maximum lot coverage, etc. need to be examined for workability and adjusted as appropriate.

The amount of the density bonus is a key standard to be determined. The incentive must be sufficient to be financially attractive without being overgenerous and thus providing a windfall to the developer/builder. The Montgomery County Planning Commission of Pennsylvania (MCPC) provides two methodologies for determining the amount of the bonus. The first methodology is called the *Builder's Profit Method*. This approach bases the amount of the increased density by comparing calculations of the budgeted profit achieved through conventional development and the budgeted profit resultant from meeting the IZ requirements. The amount of the density bonus would be based on the number of additional units needed to meet or exceed the profit budgeted under the conventional development, but with the use of affordable units per the IZ regulations.

Montgomery County names the second methodology the *Equivalent Land Cost Method*. They cite the use of this methodology in Seattle and Bellevue, Washington. The determination of the amount of the density bonus is based upon comparative calculations of the cost of the land needed to meet or exceed the profit budgeted under conventional development, but with the use of affordable units per the IZ regulations. Interested readers can find more detailed information about both of these methodologies in the MCPC publication, *Promoting Workforce Housing – Expanding Locations and Development Potential* (available online at [planning.montcopa.org](http://planning.montcopa.org)).

The use of density bonuses must relate to the availability of infrastructure, specifically sewage disposal and water supply. Density bonuses should not be used in areas where on lot sewage disposal systems and on lot wells are used to increase densities beyond what those types of systems can support. The *Comprehensive Plan The Lehigh Valley ... 2030* recommends a maximum density of one dwelling unit per acre with the use of on lot systems. These types of issues are absent in areas served by public sewer and community water systems. Areas recommended for urban development in the Comprehensive Plan are served or are planned to be served by public sewer and community water systems. Density bonuses should not be used where the resulting densities require the need for centralized sewer and

water systems in order to support the development. Such development would be inconsistent with the Comprehensive Plan.

The LVPC report *Density Bonuses and Minimum Density — Guide and Model Regulations* further explores the use of density bonuses and provides model regulations for incorporating density bonuses into zoning ordinances. Those considering the use of density bonuses are referred to this document.

In a survey of ordinances, we found density bonuses to fall in a range from 10 to 30 percent. Many center around 20 percent.

Many other incentives are also offered. These include the following:

- Review fee waivers. Municipalities can reduce or completely waive review fees for proposals involving IZ. This provides a smaller financial incentive compared to those created by increased densities. The cost of the review is shifted to the municipality.
- Impact fees. Municipalities can waive impact fees connected with IZ developments. This incentive is of limited use in Pennsylvania. State law limits the use of impact fees to transportation impact fees and recreation fees in lieu of dedication. Impact fee waiving is more meaningful in places where heavy reliance is placed on impact fees, like California, where a per dwelling unit impact fee of \$40,000 is not unusual.
- Reduced infrastructure. Municipalities could reduce infrastructure requirements associated with developments. That is, the street widths, park and recreation requirements, parking requirements, etc. could be reduced. Such reductions seem difficult to achieve without compromising public health, safety and welfare.
- Priority processing. Expedited processing of the development application is cited as a possible incentive. The relevance of this incentive in Pennsylvania is unclear given the presence of provisions in the PA that already protect the developers' right to a timely decision. (That is, compliance with the State law is sufficient.)
- Funding assistance. In some jurisdictions, a cash subsidy is offered to the developer in connection with an IZ project. The funding is drawn from housing trust funds or other traditional source of public financing. Funding up to \$5,000 per dwelling unit is cited. This incentive adds direct public sector costs, negating one of the major advantages of IZ. Nevertheless, the funding assistance might be necessary in certain cases to make the package of incentives workable.
- Tax abatement. In some jurisdictions, tax abatements or Tax Increment Financing (TIF) could be offered as an incentive in connection with IZ projects. The abatement would be a means for increasing the affordability of the units, lowering the monthly costs to homeowners. A TIF would allow the municipality to use future tax revenues to pay for infrastructure costs associated with a development. The inclusion of these incentives should be based on the advice of attorneys familiar with Pennsylvania tax laws.
- Housing type modification. Some jurisdictions allow the developer to build a housing type not otherwise allowed in the given zoning district as an incentive for IZ. For instance, townhouses could be an added permissible housing type connected with an IZ development in a zoning district that does not otherwise allow townhouses.
- Non-residential size bonus. This incentive is a cousin to the density bonus. Instead of increasing the number of dwelling units allowed, the amount of non-residential space could be offered as an incentive. For instance, an additional 1,000 square feet of commercial space could be allowed for every affordable dwelling unit provided.
- Residential in non-residential zoning districts. This incentive would allow residential uses in a zoning district in which residential uses would not otherwise be allowed.

## **COMPATIBILITY AND DISTRIBUTION**

IZ ordinances include provisions relating to the distribution of the affordable units within the development and assuring the compatibility of the affordable units with the market rate units. These provisions assure that the development both fulfills the objective of the ordinance while at the same time protecting the integrity of the overall development.

IZ ordinances typically require the affordable units to be scattered throughout the development. The purpose is to integrate households of varying economic backgrounds rather than to establish economic divisions within the development. No specific numerical standards are provided, such as each affordable unit must be separated from other affordable units by x number of market rate units.

Compatibility standards are included for both the benefit of those living in the affordable units as well as the development as a whole. Without compatibility, the affordable units could be seen as downgrading the character of the development and stigmatizing those living in the affordable units. Compatibility, however, should not be confused with the aim of making the affordable units indistinguishable from market rate units. While the aim of making the two indistinguishable is the ideal, such an end may not always be possible, usually for financial reasons.

Compatibility standards include several aspects of the dwelling unit. Ordinances require the architectural style and the materials used on the exterior of the dwellings to match. However, the standards allow the market rate and the affordable units to be appointed differently in the interior. The market rate unit may have features and grades of materials that are more costly than those in the affordable units.

The size of the dwelling units is also a compatibility issue. For attached housing types like twins, townhouses and condominiums, the matching of the size of the dwelling units is achievable. However, matching the size of the affordable and market rate dwelling units for single-family detached dwellings is difficult particularly where the dwelling units are large. Many Lehigh Valley developments feature dwellings of 3,000 square feet or greater. Creating affordable housing with units of such size would both be inappropriate and would involve large costs. IZ ordinances offer several solutions for this problem. First, the ordinances allow the affordable dwelling units to be smaller than the market rate units. These ordinances include minimum square foot requirements for the affordable units to assure their adequacy for the living needs of their occupants. Companion provisions promote the equivalency of the units by requiring that the bedroom mix of the affordable units be the same as for the market rate units. For instance, if half of the market rate units in the development are four bedroom units and half are three bedroom units, the affordable units need to be built in the same proportion. Another way that IZ ordinances can deal with this problem is to allow the affordable units to be of a different housing type. For instance, twins could be used as the affordable units within the single-family detached unit development.

## **RENTAL**

Inclusionary zoning programs are primarily identified as dealing with dwelling units in ownership. Some IZ programs also involve the creation of rental units. In establishing an IZ program, one should consider whether to have a rental component in addition to the ownership component.

The first issue is whether units intended as rentals, such as an apartment complex, would be subject to IZ. If so, the program must establish a means for administering the rental operations. The program would need to assure that the units were rented to income eligible households and that the rents would be at appropriate levels. This work could be undertaken by the administrative agency. Enforcement would be vested in the administrative agency through deed restrictions on the property or agreements signed with the original developer of the rental units, binding the developer and successive owners to maintaining the affordable units as affordable for the term of the program. Such mechanisms are similar to ones that have been used in connection with the Low Income Housing Tax Credit program (LIHTC).

A second means exists for creating rental units. In this approach, the developer would be required to make a certain portion of the dwelling units available for sale to a housing oriented community land trust, housing authority or other non-profit organization dealing with housing. That organization would acquire the dwelling unit at the reduced affordable price and then rent it to income eligible households. The means would seem to most typically fit with attached housing types like condominiums, townhouses and twins, although it could be done with single-family detached dwellings.

Some IZ programs also include provisions intended to control the rental of units in individual ownership. The provisions either prohibit or limit the rental of the affordable units. The intention is to both keep the dwelling units as ownership units and to keep the units as affordable units.

## **LONG-TERM AFFORDABILITY**

The creation of affordable housing through IZ resolves the needs of the selected households. However, this does not permanently solve the problem. Future households will have their own need for affordable housing. Therefore, the IZ program must be designed to meet future as well as current needs. The program must include a mechanism so that currently affordable units remain as a part of the solution in the future. The continuing component allows the IZ program to meet future needs with fewer resources, rather than requiring constant new investment. Accomplishing this objective is one of the more intricate components of the IZ program.

Long-term affordability is accomplished by establishing rules about the future sale of the property. Unlike the owner of a market rate housing unit, the owner of the affordable unit is restricted in the sale of the property. This restriction is in exchange for the benefit of acquiring the dwelling unit below market rate. Four basic issues are involved with assuring long-term affordability. These are:

- The period of affordability,
- The method of controlling the property,
- The distribution of the money from resale, and
- Determining the buyer.

IZ ordinances will identify the term during which the restrictions on the resale of the property are in effect. Experience nationwide shows wide variation in approach. Some ordinances require the restrictions in perpetuity. Most ordinances provide a defined period that the control will be in effect. These periods range from five years to 99 years. The longer the period of control, the greater the affordability benefits. Limitations to the period may reflect a caution in establishing a program that may or may not be appropriate past the foreseeable future.

The method of control refers to the legal instrument by which the administrative agency or organization gains the authority to enforce the rules about resales. Again, a wide range of solutions has been used. These include:

- Deed restrictions,
- Covenants,
- Contractual agreements,
- Wraparound second mortgages,
- Ground leases, and
- Land use restriction agreements.

The choice of the best control methods in part depends on the nature of the administrative agency or organization. For instance, community land trusts may favor ground leases. The effectiveness also should consider the likelihood that restriction will be noticed in any proposed future property transfer and that the appropriate referral is made to the administrative agency or organization.

The price of the dwelling unit upon resale and the distribution of the increased value are the cruxes of the continuing affordability. The rules are intended to be fair to both the household that is selling the dwelling unit and the need to provide affordable housing for new households that will occupy the dwelling unit. IZ programs are structured so that the original owners would not gain an undeserved windfall from the sale of the unit. Instead, the original and subsequent owners must sell under the equivalent terms under which they purchased the unit.

Two components are involved in maintaining fairness to all participants, the price of the unit and the distribution of the amount that the values have increased. If the affordable unit was sold at market value, the difference between the price that the original buyer paid and the market rate selling price would likely be considerable. The price difference would reflect both the initial subsidy as well as the increase in value accrued by all units in the development. This would represent an unearned windfall previously cited for the original owner. To prevent this situation, IZ programs require the administrative agency to set the selling price. The selling price could represent the increase in the Housing Price Index<sup>1</sup> during the period that the original owner possessed the dwelling unit, and applying that rate of increase to the original price of the dwelling unit.

Adjustments are often made to the total money allotted to the original owner. These include the costs of selling the dwelling unit (real estate agent commissions) and the value of the improvements made to the dwelling unit during the original owner's occupancy. (If the original owner was not compensated for the improvements, he/she would have a disincentive to undertaking any improvements.)

The IZ ordinance will set the distribution of the difference between the price paid by the owner and the selling price. A typical distribution would give the owner half of the increase while the other half would go to the administrative agency or organization. Other distributions are also used. The distribution would provide some of the benefit of appreciation to the owner, in part giving them the financial benefit enjoyed by market rate owners. The administrative agency or organization would use their portion of the increased value as additional capital for affordable housing programs. Some programs reward long-term owners by increasing the portion of the difference between prices that is given to the owner as time passes. That is, the longer that the owner occupies the unit, the greater the portion that they would receive.

The last aspect of the long-term affordability deals with the buyers of the units. In some IZ programs, the owner is responsible for finding an income eligible, qualified household to purchase the dwelling unit. In many programs, the administrative agency or organization assists the owner by pre-qualifying households for the purchase of the affordable housing units and by providing a list of the qualified households to the owner. In several IZ programs, the administrative agency or organization reserves the right of first refusal to purchase the property for itself or an approved non-profit organization. In Montgomery County, Maryland, the stated purpose of this provision is "to expand and retain an inventory of low-income housing ..." This right of first refusal is a required element of the deed for the affordable housing unit.

## **ADMINISTRATIVE AGENCY**

IZ programs require initial and ongoing administration. Decisions need to be made on two aspects of the administration. First, the duties of the administrative organization or agency must be defined. Secondly, the organization or agency that serves as the administrators must be chosen.

Multiple duties and responsibilities can be assigned to the organization or agency. These include:

- Deal with the builders and developers that need or choose to comply with the IZ.
- Market the affordable dwelling units.
- Oversee the resale of units.
- Establish prices and rents for the affordable units.
- Qualify households eligible for the affordable units. Verify incomes of applicants wishing to be qualified households.
- Monitor the status of the program.

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<sup>1</sup>The Housing Price Index (HPI) is produced by the Office of Federal Housing Enterprise Oversight within the US Department of Housing and Urban Development. The HPI tracks changes in the prices of single-family house prices by Metropolitan Statistical Area, such as the Allentown-Bethlehem-Easton MSA.

- Report on the status of the program from time to time or annually.
- Select non-profit organizations to participate in the IZ program.
- Acquire and manage affordable dwelling units.
- Establish and enforce deed restrictions and other legal instruments.

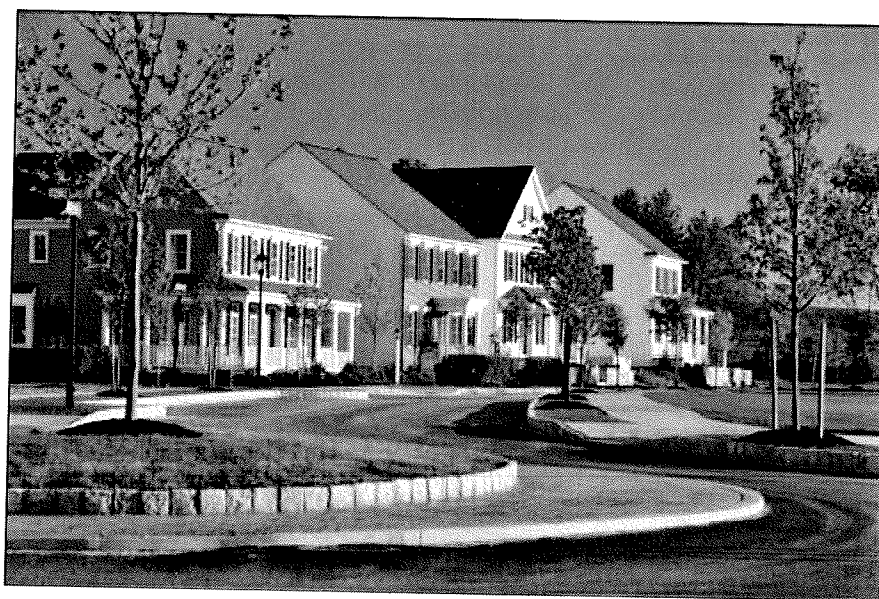
The administrative agency can either be a governmental entity or a selected non-profit organization. Several choices exist among governmental entities that deal with housing and community development issues. These include:

- Housing authorities. Five housing authorities exist in the Lehigh Valley. They consist of the Allentown Housing Authority, the Bethlehem Housing Authority, the Easton Housing Authority, the Lehigh County Housing Authority and the Northampton County Housing Authority.
- Redevelopment authorities. Allentown, Bethlehem and Easton each have a redevelopment authority.
- Departments of Community and Economic Development. Lehigh County and Northampton County each have a Department of Community and Economic Development. These departments administer the Affordable Housing Trust Funds among other activities. Many municipalities also have departments of Community and Economic Development.

Numerous choices also exist among private non-profit organizations. These include the following:

- Housing and community development oriented organizations such as the Alliance for Building Communities, Habitat for Humanity, Housing Association and Development Corporation and Valley Housing Development Corporation among others.
- A Community Land Trust. The Bi-County Affordable Housing Policy Advisory Committee is exploring the creation of a Community Land Trust to serve the Lehigh Valley.
- The Community Action Committee of the Lehigh Valley.

These agencies and organizations in turn would have the ability to contract the work to either another non-profit organization such as the Housing Development Corporation of Lancaster County or a for profit company such as Mullin & Lonergan Compliance Management. It is suggested that municipalities interested in using a private non-profit organization use a competitive process in selecting the organization.



*Florin Hill includes several housing types.*



The selection of the organization or agency should consider their experience and capabilities in these matters, their ability to work in a multimunicipal regional context and any legal limitations to their ability to carry out their responsibilities.

## **ADOPTION CONSIDERATIONS**

### **SUCCESS FACTORS**

Those who have studied inclusionary zoning programs have identified two hallmarks of successful programs. These are strong political support and the presence of a strong housing market.

Montgomery County, Maryland provides a good example of the strong political support needed for IZ program success. The county's analysis of the history of its program shows that strong support has come from many groups. These include home buyers who benefit from the program, employers and businesses whose employees or potential employees benefit from the affordable units, affordable housing organizations and elected officials who appreciate the way the program meets housing needs in a low-impact fashion and at minimum public expense. However, the program has also had its critics including no growth and slow growth advocates who oppose the higher densities enabled by the density bonuses and "fairness in taxation" groups. Additionally, builders initially expressed objection to some of the regulations. (Montgomery County reports that builders are currently generally supportive of the program.)

The successful IZ program needs a strong housing market. The strong housing market benefits IZ in terms that are both practical and build political acceptability. These terms exist:

- Because the number of affordable units is a percentage of total units built, the more dwelling units built, the greater the number of affordable units built.
- Stronger housing markets create higher profit margins for builders. Higher profit margins increase the acceptance of participating in IZ in order to participate in the housing market.
- Stronger housing markets make incentives such as the ability to build additional dwelling units more lucrative to builders.

### **IZ PROGRAM COSTS**

As this Guide has explained, IZ programs produce affordable housing with minimal public expense. Yet, these units do not become affordable without cost. Who then bears this cost? Given the importance of this question, it has been extensively studied. Three groups have been generally considered as those that would bear the costs. The first are the builders/developers. Second are the landowners. Third are the buyers of the market rate dwelling units in the developments that include affordable units.

Builders/developers accept lower prices for affordable dwelling units than for equivalent market rate units. This can be termed the subsidy amount. Incentives are intended to offset these costs. That is, with appropriate incentives the developer should suffer no financial loss as a result of the affordability provisions.

Without adequate incentives, builders/developers can seek to offset the subsidy amount by factoring that cost into the price that they are willing to pay for the land. Thus, the costs of the IZ program would be borne by the landowners who sell their land to the builders/developers.

Alternately, builders can seek to recover the subsidy amount by increasing the prices of the market rate dwelling units in the development. In this manner, the costs of the IZ program would be shifted to the market rate buyers.

In studying the matter of who bears the burden of the IZ program costs, the Urban Land Institute has concluded that this is “more an academic question than a practical exercise.” “The significance of economic impacts becomes almost moot, however, if an inclusionary zoning program provides incentives that largely offset cost subsidies, such as density bonuses, fee waivers, reductions in code standards for subsidized units, and expedited approval processes.”<sup>2</sup>

In instances where incentives do not fully offset the subsidy cost, the consensus of research is that the costs are passed on by the builders to the buyers of the market rate dwelling units in the developments.

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<sup>2</sup>Porter, Douglas R., Inclusionary Zoning, Two issues color many developers’ outlook for inclusionary zoning, Urban Land, January 2004, page 29.

# MODEL REGULATIONS

## A NOTE ABOUT THE MODEL REGULATIONS

The model regulations are designed to be incorporated into municipal zoning ordinances. The provisions are designed to constitute a section of the General Regulations within the zoning ordinance. This placement within the ordinance reflects their application to several although in all likelihood not all of the zoning districts and their application to several different housing types.

The provisions have been created as representing a voluntary option to developers and builders, not a mandatory requirement. The choice of voluntary provisions is based both on the lack of clear authority to adopt mandatory provisions in Pennsylvania and on the judgment that the voluntary provisions would be more politically acceptable in the Lehigh Valley. We believe that the incentives built into the model regulations will provide an economic reward that will convince developers and builders to use the provisions.

The model regulations are for the purpose of providing guidance to Lehigh Valley municipalities interested in meeting their housing needs while maintaining viable and attractive neighborhoods. They are provided here only for review, reference and example purposes. This is not a legal document or the provision of legal advice. For the model regulations to be valid and legally enforceable, they need to be customized to the particular circumstances of the municipality and reviewed by the municipal solicitor.

In order to effectuate inclusionary zoning, the municipality needs to designate an entity, whether an agency of the municipal government, another unit of government or a non-governmental entity as the administrative agency. If an agency of the municipal government is not the administrative agency, the municipality needs to draft and execute an agreement with that outside agency or entity that sets forth the duties, responsibilities and authority of that agency and entity. The provisions of such an agreement are not contained in the model zoning ordinance whereas they are outside of the bounds of zoning.

Special thanks to the Montgomery County (PA) Planning Commission for the permission to use the Inclusionary Zoning Model Ordinance as the basis for the model ordinance included in this report.

## MODEL REGULATIONS COMMENTARY

## INCLUSIONARY ZONING MODEL ORDINANCE

- 1) Purpose and Intent
  - a) Purpose
    1. To increase the supply of affordable housing.
    2. To meet the housing needs of low and moderate income households residing in the community.
    3. To provide housing in a wide choice of locations which maximizes the social and economic opportunities for everyone.
    4. To preclude over-concentrations of low and moderate income households in any one area.
    5. To promote social and economic integration in stable neighborhoods.
    6. To create and maintain suitable residential areas that are well-maintained, attractive and stable.
    7. To protect property values. and
    8. To implement the housing goals and policies contained in the municipal comprehensive plan.

## COMMENTARY

b) Intent

To provide an alternative set of regulations for residential development that creates affordable housing and intermingles such housing within the development.

2) Findings

a) See the adjacent commentary.

The findings section is essential in providing the justification for the ordinance in the event of a legal challenge. The municipality should cite existing evidence of a shortage of affordable housing, creating the need for a solution such as the inclusionary zoning provisions. On a bi-county basis, the report *An Affordable Housing Assessment of the Lehigh Valley in Pennsylvania* provides such evidence. This April 4, 2007 report was prepared by Mullin & Lonergan Associates Inc. for the Lehigh Valley Planning Commission. The study found that "households earning the median incomes in Lehigh County and Northampton County in 2006 could not afford to buy the median priced housing unit." The report documents the number of cost burdened households in terms of housing. The study states "The primary issue confronting the Lehigh Valley is how to create affordable housing opportunities for households with lower incomes." Municipalities should supplement this data and findings with data and findings particular to their municipalities.

3) Applicability

a) This article shall apply to any zoning district that allows residential development by right, special exception or conditional use. In order to use the provisions of this article, the development shall result in a minimum of 15 or more dwelling units. Residential developments shall use public sanitary sewer and community water supply systems. Residential developments not using public sanitary sewer and community water supply shall not be eligible to use these provisions.

The applicability section sets the threshold for the minimum development size to which the inclusionary zoning provisions may be applied. Developments smaller than 15 units would only create one affordable unit. It is unlikely that developers of these small projects would choose to participate in inclusionary zoning. The requirement of public sewer and community water availability is tied to the appropriateness of the higher densities.

## **COMMENTARY**

Consistent with the recommendations of *An Affordable Housing Assessment of the Lehigh Valley in Pennsylvania*, the inclusionary zoning targets low income households. The program can be used for both ownership and rental units.

The "Certificate of Qualification" is the administrative procedure used to identify qualified households. This work is done by the Administrative Agency, relieving the developer/builder from such work.

Below is an example of how the density bonus works. A developer owns a tract of land. The sketch plan layout shows that under conventional zoning, 100 dwelling units could be built. Using the inclusionary zoning provisions, the developer would build 15 units as affordable housing. In exchange, he would receive a 20% density bonus. In sum, he would be able to build 120 dwelling units on the property, 105 of which are market rate and 15 which are affordable. The ordinance may include other incentives. A number of possible incentives are listed on pages 5 and 6. Incentives related to funding assistance, tax abatement and housing type modification appear to be the most appropriate types of incentives.

The Administrative Agency is responsible for setting the specifics of the appropriate prices and rents.

- 4) Provision of Affordable Dwelling Units
  - a) A minimum of 15% of the dwelling units within the participating residential development shall be affordable to households with an income not to exceed 80% of the Area Median Income for the Allentown-Bethlehem-Easton MSA as determined annually by the US Department of Housing and Urban Development.
  - b) Participating residential developments including or consisting of apartments shall provide affordable housing units as rental units in the same proportion that the apartments comprise a portion of the total residential development.
- 5) Eligible Households
  - a) Households whose income does not exceed 80% of the Area Median Income as adjusted for household size are eligible to purchase an affordable dwelling or rent an affordable apartment.
  - b) In order to purchase or rent an affordable housing unit, the income eligible household must receive a "Certificate of Qualification" from the Administrative Agency.
- 6) Incentives Provisions
  - a) Density bonus. Residential developments complying with the provisions of this article are eligible to receive the following density bonus. The number of allowed dwelling units on the property to be developed shall be increased by 20 percent. The number of additional dwelling units shall be determined by calculating the number of dwelling units allowable pursuant to the zoning ordinance given the size of the parcel, the lot size/density standards and the environmental protection provisions. These shall be illustrated on a sketch plan. The number of possible units shall be determined by the zoning officer with the assistance of the municipal engineer. The bonus units may be sold at market rate and are not subject to any additional requirements for affordable dwelling units.
  - b) Zoning ordinance dimensional adjustments. The minimum lot size and dimensional standards (including the minimum lot width, the maximum lot coverage by impervious cover, and the minimum front yard, side yard and rear yard setbacks) shall be adjusted to enable development with the density bonus.
  - c) Other incentives.
- 7) Appropriate Sale and Rental Prices for Affordable Dwelling Units
  - a) Pricing schedule. The Administrative Agency shall annually publish a pricing schedule of sale and rental prices for affordable dwelling units. The prices shall be set at the maximum level affordable to households earning no more than 80% of the Area Median Income for the Allentown-Bethlehem-Easton MSA. Different prices shall be set for efficiency, one-bedroom, two-bedroom, three-bedroom and four-bedroom or more dwelling units, based on an assumed household size for each unit size. The number of persons in the household equals the number of bedrooms plus one. For example, one person will occupy an efficiency unit, two persons will occupy a one-bed-

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room unit, three persons will occupy a two-bedroom unit, etc. The following additional factors will also be used in the calculations:

1. For owner occupied affordable housing, prices will be calculated on the basis of:
    - a. An available fixed-rate 30-year mortgage, consistent with the most recently published rate by Freddie Mac.
    - b. A down payment of no more than 20% of the purchase price.
    - c. A calculation of property taxes.
    - d. A calculation of homeowner's insurance. And
    - e. A calculation of condominium or homeowners' association fees.
    - f. The price found based on items 7)a)1a through 7)a)1e will not exceed the price affordable to households earning no more than 80% of the Area Median Income as calculated in Section 7)a)
  2. For renter occupied affordable housing, the rent shall be no more than 30% of the price affordable to households earning no more than 80% of the Area Median income as calculated in Section 7a), minus an allowance for the monthly cost of utilities.
- 8) Long-Term Affordability
- a) All owner occupied affordable dwelling units created by this article shall have limitations governing their resale for a period of x years. This period shall be known as the control period. The limitations shall be established and administered by the Administrative Agency. The purpose of these limitations is to preserve the long-term affordability of the dwelling unit and to ensure its continued availability for households earning no more than 80% of the Average Median Income. The resale controls shall be established through a deed restriction on the property and shall apply during the control period.
    - i. Purchaser restriction. All resale transactions must be to qualified purchasers that have received a Certificate of Qualification from the Administrative Agency.
    - ii. Resale price. The resale price shall be set by the Administrative Agency on the following basis. It shall equal the total of the price paid by the household desiring to sell the unit, 50% of the change in the appraised value of the dwelling unit between the time of the most recent previous sale and the proposed sale, and the costs associated with the sale of the unit.
  - b) Each rental unit created in accordance with these provisions shall remain rented only to income eligible households that have received a Certificate of Qualification for a period of x years.
  - c) The purchaser of affordable housing other than dwellings built as apartments shall occupy the purchased units as their primary residence. Individually owned units shall not be rented to third parties during the course of the period governing resale limitations.

The affordability controls are to be set at a given number of years. The model does not specify the number of years, leaving it to municipal discretion. Another approach would be to require affordability controls in perpetuity.

The model provisions include a basic set of standards. As the Guide portion of this publication points out, several more sophisticated sets of provisions can fine tune these controls. The price of the sale is set in such a way as to reflect changes in the value of the dwelling unit and capital improvements made by the owners during their occupancy of the dwelling unit and granting the owner a portion of those changes. This approach is intended to help retain the affordability of the dwelling unit for the next income eligible household, providing for a degree of return on investment for the owner while recognizing the subsidy provided to them and thus preventing windfall profits.

## **COMMENTARY**

The provisions of subsection c are intended to prevent the conversion of affordable units in ownership oriented developments from becoming rental units, in the interests of promoting stability within the development and discouraging the purchase of affordable units as investments.

The affordability controls contained in the model ordinance do not include provisions granting the Administrative Agency the right of first refusal in acquiring the affordable units. Should the preferred strategy be to have direct ownership of the affordable units by an entity dedicated to managing affordable housing units, such provisions can be added to the model regulations.

While the size of the affordable and market rate dwelling units in the development may differ, they should be visually compatible. The provisions related to minimum dwelling unit sizes for the affordable housing units are intended to assure the provision of adequate living space within the affordable units.

The inclusion of different dwelling unit types within the development is another means of dealing with both the density bonus and dwelling unit size issues. For instance, a development that incorporated both single-family detached dwellings and two-family dwellings could maintain architectural consistency while increasing the density with small increases in building footprints.

### 9) Design and Integration of Affordable Dwelling Units

- a) Location of affordable dwelling units. Affordable dwelling units shall be dispersed among the market rate dwelling units throughout the development.
- b) Construction phasing. The developer/builder shall submit and comply with a phasing plan that provides for the timely and integrated development of the affordable dwelling units throughout the qualified development. The phasing plan shall provide for the development of the affordable dwelling units concurrently with the market rate dwelling units. Building permits shall be issued for the development subject to compliance with the phasing plan.
- c) Exterior appearance. The affordable dwelling units shall be compatible with the market rate dwelling units in exterior visual appearance and architectural style. External building materials and finishes shall be substantially the same in type and quality for the affordable dwelling units as for the market rate dwelling units.
- d) Interior appearance and design. Affordable dwelling units may differ from market rate dwelling units with regard to interior finishes, features and gross floor area subject to the following requirements:
  - i. The bedroom mix of affordable dwelling units shall be in equal proportion to the bedroom mix of the market rate dwelling units.
  - ii. The differences between the affordable dwelling units and the market rate dwelling units shall not include improvements related to energy efficiency, including mechanical equipment, plumbing, insulation, windows and heating and cooling systems.
  - iii. The minimum square footage of an affordable dwelling unit shall not be less than 750 square feet per one-bedroom unit, 1,000 square feet per two-bedroom unit, 1,100 square feet per three-bedroom unit and 1,250 square feet per four or more bedroom unit.

- 10) Offsite Alternatives  
Not recommended.

11) Compliance Agreement

- a) Prior to the approval of a final subdivision or land development plan proposed under the terms of this article, the applicant shall have entered into an agreement with the municipality regarding the specific affordable housing requirements and restrictions on the proposed development.
- b) The applicant shall agree to execute any and all documents deemed necessary by the municipality, including, without limitations, restrictive covenants and other similar instruments, to ensure the continued affordability of the affordable housing units in accordance with this article. The agreement shall set forth the commitments and obligations of the applicant, the municipality and the Administrative Agency. The agreement may be modified by mutual consent of the applicant and the municipality, as long as the modified agreement remains in conformity with this article.
- c) The agreement shall be incorporated into the deed of all affordable housing dwelling unit properties within the development as a deed restriction.

## DEFINITIONS

**Administrative Agency.** The agency or organization responsible for implementing and administering the provisions of the Inclusionary Zoning Ordinance.

**Affordable housing.** Affordable housing is housing that involves paying no more than 30% of gross household income for housing expenses including mortgage or rent, utilities, insurance and taxes, regardless of income level.

**Certificate of Qualification.** The documentation issued by the Administrative Agency indicating that the household has met the Inclusionary Zoning program eligibility standards.

## COMMENTARY

The model ordinance does not include provisions for meeting affordable housing obligations offsite. These provisions are not preferable in any circumstance in that they do not accomplish the integration aspect of inclusionary zoning. Such provisions are more likely to serve situations where the inclusionary zoning provisions are mandatory. They serve as a means of relief from hardships or site specific circumstances. They are less relevant to our model provisions which take the voluntary approach.



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