

INCLUSIONARY ZONING

A GUIDE TO ORDINANCES AND THE LAW

C. Tyler Mulligan and James L. Joyce



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Printed in the United States of America

14 13 12 11 10 1 2 3 4 5

ISBN 978-1-56011-651-6

∞ This publication is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

♻️ Printed on recycled paper

Contents

Introduction	/	1
Notes	/	3
1. Laying the Groundwork: Collecting Data and Raising Awareness	/	7
Effects of Inclusionary Zoning	/	7
Effectiveness	/	8
Impacts on the Broader Housing Market	/	8
Prime Conditions for Inclusionary Zoning	/	10
Conducting a Housing Needs Assessment	/	10
Notes	/	12
2. Preamble: Establishing Legal Authority for the Ordinance	/	17
Findings	/	17
Statement of Purpose	/	21
Notes	/	25
3. Production Provisions	/	27
Level of Compulsion	/	27
Mandatory	/	28
Voluntary	/	29
Conditional	/	31
Types of Developments Subject to the Ordinance	/	33
Threshold Number of Units	/	34
Use Categories	/	36
Stage of Development	/	36
Change in Tenancy	/	39
Set-Aside Percentage of Affordable Units	/	39
Fixed Percentage	/	39
Tiered or Variable Percentages	/	40
Establishing Affordable Unit Prices	/	42
Selecting a Qualifying Household Income Level	/	43
Defining Affordability	/	45
Setting Unit Prices	/	46
Notes	/	51

4. Incentives / 55

Density Bonuses / 56

Fee Reductions and Waivers / 58

Fast-Track Permitting / 59

Relaxed Development Standards / 60

Notes / 63

5. Flexibility Measures / 65

Prospective Application Clauses / 66

Hardship Clauses and Variances / 67

Alternatives to On-Site Development / 68

Off-Site Provision / 70

In-Lieu Payments / 71

Land Donation / 74

Notes / 77

6. Developer Compliance Considerations / 81

Concurrent Construction of Inclusionary and Market-Rate Units / 81

Integration of Inclusionary Units within a Development / 83

Consistent Tenancy or Manner of Ownership / 89

Development Plans and Agreements / 89

Resolving Conflicts with Other Local Regulations / 92

Notes / 94

7. Occupancy and Transfer Controls / 97

Managing Inclusionary Units / 97

Resident Eligibility and Qualification / 100

Preferences for Certain Populations / 104

Control Period / 108

Transfer Controls / 110

Deed Restrictions, Deeds of Trust, and Ground Leases / 110

Right of First Refusal / 113

Equity Sharing / 116

Leasing and Subleasing / 119

Marketing of Inclusionary Units / 121

Notes / 122

Legal Appendix / 125

Part 1: Constitutional Considerations / 126

Takings / 126

Due Process / 133

Equal Protection / 137

Part 2: State Law Issues—Authority and Rent Control / 139

Local Government Authority to Enact Inclusionary

Zoning in North Carolina / 140

North Carolina Limitation on Rent Control / 151

Index / 155

Introduction

To many local government leaders, it is readily apparent that market forces favor the development of high-end housing over affordable housing. Developers, who earn higher profit margins on high-end homes, are motivated to build those homes. Local government leaders, too, may prefer for developers to build higher-priced housing, because under the property tax system, homes carrying higher values also generate greater tax revenues. Partly as a result of these incentive structures, in many communities high-end residential development far outpaces development of affordable housing for low- or moderate-income households.¹

Local governments throughout the United States have long recognized this affordability gap and have employed a variety of policy tools to increase the supply of affordable housing. In North Carolina, local governments have typically relied on publicly subsidized affordable housing construction programs. In an effort to reduce reliance on public subsidies, a number of local governments are now turning to regulatory approaches that rely upon the private market to increase the supply of affordable housing.²

One regulatory approach that has received increased attention in North Carolina and across the country is inclusionary zoning.³ Inclusionary zoning ordinances encourage participating developers to set aside a percentage of the units they build for housing that is affordable to households in a certain income bracket, and they require developers to maintain the affordability of the set-aside units for a period of time. These set-aside units are called inclusionary or affordable units. The goal of inclusionary zoning is not solely to produce affordable units; inclusionary zoning is undertaken to ensure that new residential developments contain housing with an appropriate mix of affordability that reflects the income ranges of persons living and working in the community.

Public officials, housing advocates, and concerned citizens typically want to know what choices they have in designing inclusionary zoning ordinances for their communities. In answering that question, it is important to point out that an inclusionary zoning ordinance cannot be implemented with a mere one-line council resolution stating that developers must ensure that 20 percent of the units they build are affordable to households with incomes at or below the area median wage. Nor is there one model inclusionary zoning ordinance that can be readily replicated. Rather, each locality faces different circumstances, and the most effective inclusionary zoning ordinance will be tailored to fit the particular community and the housing market it serves. Those seeking to enact an inclusionary zoning ordinance need to be aware of the nuances and complexity involved.

A number of available resources describe various inclusionary zoning policy choices, while others address the legal aspects. However, no one guide addresses all of the issues to help translate policy decisions into a working ordinance. This publication aims to fill that gap. It explains the major policy decisions associated with inclusionary zoning and provides the legal context for those decisions. Examples from existing inclusionary zoning programs illustrate specific choices.⁴

This publication assumes that general land use ordinances are already in place and functioning, and so it does not describe, for example, the components of a general zoning ordinance and its accompanying procedural requirements.⁵ Rather, it provides policy makers with a menu of choices and accompanying examples of provisions that can be assembled into an inclusionary zoning ordinance tailored to an individual community.⁶ The examples used throughout this publication, however, are intended to be illustrative only, so a policy's inclusion should not be viewed as an endorsement of that policy as a best practice.

Listed below are the localities from which the examples are drawn. Although not every North Carolina locality employing inclusionary zoning is mentioned here, as many as possible are included due to the North Carolina focus of this publication. Featured North Carolina programs include the following:

- Town of Davidson, North Carolina⁷
- Town of Carrboro, North Carolina⁸
- Town of Chapel Hill, North Carolina⁹

- Dare County, North Carolina¹⁰
- Town of Kill Devil Hills, North Carolina¹¹
- Town of Manteo, North Carolina¹²
- City of Winston-Salem/Forsyth County, North Carolina¹³

Inclusionary zoning programs from other U.S. cities and counties were also reviewed for this publication. Programs from the localities listed below have been included for one or more of the following reasons:

- The program exhibits longevity, which increases the likelihood that its provisions have been tested and refined over time.
- The program has produced high numbers of units, which indicates that it has been heavily utilized and its provisions tested by such use.
- The program is frequently referenced in inclusionary zoning literature.
- The program employs a unique or thoughtful approach to an issue raised in this publication.
- The program adds geographic diversity to our list of surveyed programs.

Featured out-of-state programs include the following:

- City of Boulder, Colorado¹⁴
- City of Burlington, Vermont¹⁵
- Fairfax County, Virginia¹⁶
- Montgomery County, Maryland¹⁷
- City of Napa, California¹⁸
- City of Sacramento, California¹⁹
- City of San Diego, California²⁰
- City of Santa Fe, New Mexico²¹

It should be noted that none of the ordinances is presented in its entirety, and any specific provision might not prove workable or productive when applied in the context of a different community. The primary consideration in selecting these examples was to illustrate how various localities approach the policy decisions discussed in this publication.

Notes

1. See BARBARA J. LIPMAN, CENTER FOR HOUSING POLICY, *SOMETHING'S GOTTA GIVE: WORKING FAMILIES AND THE COST OF HOUSING* 11–12, (2005), available at www.nhc.org/pdf/pub_nc_sgg_04_05.pdf; Douglas R. Porter, *The Promise and Practice*

of *Inclusionary Zoning*, in *GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT?* 213–14 (Anthony Downs ed., 2004).

2. For an overview of local government authority to increase the supply of affordable housing, see ANITA BROWN-GRAHAM, *AFFORDABLE HOUSING AND NORTH CAROLINA LOCAL GOVERNMENTS* (UNC School of Government 2006).

3. Inclusionary zoning is often just one component of a broader housing program to increase production of affordable housing units. Many different labels have been applied to these programs, such as “affordable,” “moderately priced,” “inclusionary,” “family,” “life-cycle,” or “workforce” housing programs.

4. Commentary on the legal risks associated with a specific policy choice is provided where possible, but in settling questions of law, there is no substitute for the advice of the city or county attorney.

5. For a comprehensive treatment of land use law, see generally DAVID W. OWENS, *LAND USE LAW IN NORTH CAROLINA* (UNC School of Government 2006).

6. For an idea of the breadth of variation in existing inclusionary zoning programs, their state regulatory environments, and their successes, see Jenny Schuetz, Rachel Meltzer, and Vicki Been, *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, DC, and Suburban Boston*, 75 *JOURNAL OF THE AMERICAN PLANNING ASSOCIATION* 441 (2009).

7. TOWN OF DAVIDSON, N.C., *PLANNING ORDINANCE* § 6.3 (2009), available at www.ci.davidson.nc.us/DocumentView.aspx?DID=1412, and TOWN OF DAVIDSON, N.C., *PLANNING ORDINANCE* § 23.2 (2009), available at www.ci.davidson.nc.us/DocumentView.aspx?DID=1316.

8. CARRBORO, N.C., *TOWN CODE* ch. 15, art. XII (2009), available at www.ci.carrboro.nc.us/PZI/LUO.htm.

9. Town of Chapel Hill, N.C., Ordinance 2010-06-21/O-11 (codified at *CODE OF ORDINANCES OF THE TOWN OF CHAPEL HILL*, Appendix A (Land Use Management Ordinance) § 3.10 (2010)), available at www.ci.chapel-hill.nc.us/index.aspx?page=115. This recently enacted ordinance supersedes an earlier resolution that is also cited in this publication. See Town of Chapel Hill, N.C., Resolution 2000-03-06/R-4 (Mar. 6, 2000), available at www.townofchapelhill.org/index.aspx?page=579.

10. DARE COUNTY, N.C., *CODE OF ORDINANCES* tit. XV, ch. 155, app. A (Zoning Ordinance) (2008), available at www.amlegal.com/library/nc/dareco.shtml.

11. TOWN OF KILL DEVIL HILLS, N.C., *CODE OF ORDINANCES* tit. I, ch. 10 and tit. XV, ch. 153 (2008), available at www.amlegal.com/library/nc/killdevilhills.shtml.

12. TOWN OF MANTEO, N.C., *ZONING CODE* art. XI (2009), available at www.townofmanteo.com.

13. CITY OF WINSTON-SALEM/FORSYTH COUNTY, N.C., *UNIFIED DEVELOPMENT ORDINANCES* § 3-9.1–3-9.6 (2008), available at www.cityofws.org/Home/Departments/Planning/ZoningAndSubdivision/Articles/UDOAndAmendments.

14. CITY OF BOULDER, COLO., *REV. CODE* ch. 9-13 (2009), available at www.colocode.com/boulderpdf/chapter9-13.pdf.

15. CITY OF BURLINGTON, VT., COMPREHENSIVE DEVELOPMENT ORDINANCE art. 9 (2009), *available at* www.ci.burlington.vt.us/planning/zoning/zn_ordinance/article_09_housing.pdf.

16. COUNTY OF FAIRFAX, VA., ZONING ORDINANCE art. 2 (2009), *available at* www.fairfaxcounty.gov/dpz/zoningordinance/.

17. MONTGOMERY COUNTY, MD., CODE REGS. (COMCOR) ch. 25A (2003), *available at* www.amlegal.com/library/md/montgomeryco.shtml.

18. CITY OF NAPA, CAL., MUN. CODE ch. 15.94 (1999 & 2005), *available at* <http://74.205.120.199/images/cityclerk/MunicipalCode/Title15/Chapters/15.94.pdf>. Napa's ordinance was the subject of a significant legal challenge in 2000. *See* Home Builders Ass'n of N. Cal. v. City of Napa, 90 Cal. App. 4th 188, 196–97 (2001).

19. SACRAMENTO, CAL., CITY CODE tit. 17, div. VI, ch. 17.190 (2009), *available at* www.qcode.us/codes/sacramento/.

20. CITY OF SAN DIEGO, CAL., MUN. CODE ch. 14, art. 2, div. 13 (2008), *available at* <http://docs.sandiego.gov/municode/MuniCodeChapter14/Ch14Art02Division13.pdf>, and CITY OF SAN DIEGO, CAL., INCLUSIONARY AFFORDABLE HOUS. IMPLEMENTATION & MONITORING PROCEDURES MANUAL (revised Mar. 2008), *available at* www.sandiego.gov/development-services/news/pdf/ahprocmanual.pdf.

21. SANTA FE, N.M., CITY CODE ch. XXVI (2009), *available at* <http://clerkshq.com/default.ashx?clientsite=Santafe-nm>.