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Evaluating Inclusionary Zoning Policies (not updated since 2002)

A clear distinction must be drawn between *affordable housing* policies and *inclusionary zoning* policies.

Affordable housing policies are designed to stimulate the production of more affordable housing for low- and moderate-income households. Primary examples would be the federal Low-Income Housing Tax Credit (LIHTC) policy that HUD estimates is now involved in 90% of all affordable housing projects and Florida's State Housing Initiative Program (SHIP), perhaps the USA's largest state-funded program. Whether as tax credits (LIHTC) or as direct public subsidies (SHIP), affordable housing policies work primarily through financial incentives. These can result in mixed-income housing developments. (Qualified projects can be as low as 80% market-rate/20% affordable). However, much of the new housing built is in traditional, project-type developments exclusively for low- and moderate- income households. They are often located in already low-income neighborhoods and can result in more economic segregation. Non-profit housing agencies are important producers.

Inclusionary zoning policies are primarily oriented towards private, for-profit homebuilders that account for over 95% of all housing production annually. Though financial benefits are often awarded, inclusionary zoning policies function through the zoning mechanisms that control land development.¹ They are much more likely to produce mixed-income housing developments in low-poverty neighborhoods and typically lead to less economic segregation. The Brookings survey should limit itself to identifying inclusionary zoning policies.

Mandates vs. Overrides

Inclusionary zoning policies fall into two broad categories. The first I would term "inclusionary zoning mandates." These require that a certain

¹ According to the National Association of Home Builders, "public policy dictates where development occurs." NAHB. *Smart Growth: Building Better Places To Live, Work, and Play*. Washington, DC (2000), p.8.

proportion of affordable housing units be included in any housing development above a specified scale. Montgomery County, MD's Moderately Priced Dwelling Unit (MPDU) policy and Fairfax County, VA's Affordable Dwelling Unit (ADU) policy would be prime examples.

The second category I would term "inclusionary zoning overrides." These policies provide that existing local zoning restrictions that discourage affordable housing (e.g. large minimum lot sizes, bans on multi-family housing, etc) can be overridden by a state agency or state courts on a project by project basis. The provisions are only triggered by a specific affordable housing proposal from a local housing developer (often a non-profit agency) that would otherwise be rejected by local zoning authorities. Prime examples of "inclusionary zoning overrides" would be Massachusetts's Anti-Snob Zoning Act (Section 40(b)), Connecticut's Affordable Housing Land Use Appeals Process, and New Jersey's Fair Housing Act of 1985/Council on Affordable Housing (COAH).

There are, of course, a variety of state land use laws that establish goals that local jurisdictions must provide for the full range of housing need, including assuring an appropriate level of low- and moderate-income housing. Sometimes these can result in specific threshold targets. (Connecticut law, for example, requires that every one of their 169 municipalities must reach at least 10% "assisted housing.") However, turning these vague goals into operational programs invariably involves either state-sponsored affordable housing programs or state-sanctioned inclusionary zoning programs.

Key Issues

I have developed specifications for a model inclusionary zoning ordinance or statewide law based on the optimal mix of provisions that I have encountered. Most are practiced by Montgomery County, MD. However, in its specifics every local ordinance must be tailored to fit the specific community – its governmental structure and its housing market.

The following is a discussion of key issues regarding inclusionary zoning policies. After the discussion, I will propose an evaluation matrix involving points awarded for various provisions.

Mandatory vs. Override: Adopting mandatory inclusionary zoning is more politically contentious at the outset, but is both much more productive and usually becomes rapidly accepted and become routine "rules of the game." Mandatory inclusionary zoning is more productive because it automatically captures a

proportion of market-rate activity (subject to whatever minimum project size is adopted – see below). As a political controversy, the public battles are fought over initial adoption of the ordinance. As a mandatory requirement, inclusionary zoning typically is administered as an integral bureaucratic step in the land development process. Typically, binding inclusionary commitments must be made when a developer or builder seeks sub-division plat approval or issuance of building permits. Its implementation disappears from public view. Mixed-income housing just *happens*.

Adopting inclusionary zoning override policies (thus far, always at the state level) is only slightly less contentious politically, but override policies have more limited impact, and often are subject to constant controversy.² Market-rate builders are *not* required to include affordable housing in all projects (above a specified minimum size). Instead, production depends on specific projects being proposed by interested developers (often non-profits). Almost invariably, such proposals become targets of local public opposition; as such, they are often rejected by local planning bodies. The override stems from the special process provided for housing developers to appeal the local rejection to the state courts or a state-established regulatory agency.³ More controversy, more time lost, and more cost ensue while the issue is litigated. Years can be consumed in the process.

Sometimes, after the courts or regulatory agencies have established clear case law, local governments begin to approve projects where local rejection will clearly be overturned on appeal. An even better (but rarer) outcome occurs when local governments work actively with housing developers to meet state-established affordable housing targets. In general, however, the override strategy is a slow and painful path. Mixed-income housing doesn't just happen.

Geographic Coverage: The rule is: the greater the geographic coverage, the better the law. Within a metropolitan-wide, multi-county context, a state law or rule adopted by a state-empowered regional agency is the only feasible path for

²My study of the New Jersey portion of the Philadelphia PA-NJ PMSA showed that for the tri-county area (Burlington, Camden, and Gloucester) an MPDU policy would have produced 5,289 MPDUs during 1985-96. This compares with 1,969 units listed as “Mt. Laurel” units built during a comparable period. Moreover, 1,763 MPDUs would have been owned by local housing authorities for very low-income households (less than 50% of median household income). Most Mt. Laurel units skimmed the top of the low-income market (less than 80% of median household income).

³Connecticut, for example, set up a single special state court in Hartford and shifted the burden of proof – traditionally on the builder – to the local zoning authority

achieving regional coverage.⁴ Governmentally simple “big box” regions can achieve metro-wide coverage by bi-lateral agreement (e.g. Tallahassee-Leon County, FL). Otherwise, local governments’ policies are limited to their jurisdictional boundaries. In such a context, one might evaluate the actual scope of a jurisdiction’s policy by what proportion of the region’s new housing starts would be affected. From 1990-96 a city of Jacksonville inclusionary zoning law would have covered over 52% of its region’s housing starts; a city of Baltimore law would have covered less than 2%.

Furthermore, some laws have restricted inclusionary requirements to targeted areas. Some, for example, are targeted on downtown redevelopment.⁵ Others are part of the revitalization strategy for depressed neighborhoods. (In my view, this is wrong headed: more low-income housing for neighborhoods that already have too much.) By contrast, Connecticut law exempts municipalities that already exceed the 10% assisted housing threshold from the provisions of the Affordable Housing Land Use Appeals Process. Bridgeport, Hartford, and New Haven head the list of about 25 municipalities (out of 169) that have more than their “fair share” of assisted housing.

I believe that the inclusionary requirement should be jurisdiction-wide rather than try to target certain neighborhoods. However, in below median income neighborhoods, developments whose “market rates” are also below median income might be exempted from the requirement for direct acquisition by public housing authorities to avoid adding to the number of very low-income residents.

Threshold Size: In theory, there is some minimum project size below which inclusionary policies cannot be applied. My recommendation is that a minimum project size should be adopted that assures that, in the context of the local housing market, the inclusionary requirement will apply to at least 50 percent of all new residential construction. For Montgomery County and Fairfax County, that was 50 or more units; for Cambridge, Massachusetts, 10 or more units; and for Arlington, Massachusetts, 7 or more units. However, Santa Fe, New Mexico has adopted a standard of 4 or more units.

⁴In 1998, Metro, the Portland area’s elected regional government, announced its intention to enact a region-wide inclusionary zoning requirement. End-running Metro, the homebuilders lobbied successfully for the 1999 Oregon legislature to enact a law (HB 2658) that banned any municipality (including Metro) from adopting inclusionary zoning. To my knowledge, “progressive” Oregon is the only state with such an outright ban on the books.

⁵ The District of Columbia “inclusionary” zoning law requires that a percentage of commercial projects be devoted to housing units in the downtown core. Unfortunately, the concern is simply to encourage more downtown housing which has resulted only in high-end apartments and condos.

The “As-of-Right” Provision: Though both adopt the same threshold (50 or more units) in comparable housing markets, Fairfax County’s ADU policy is triggered far less often than Montgomery County’s MPDU policy. The difference is that Fairfax County treats pre-1990 zoning “as of right” – that is, it is protected (or “grandfathered”) from the ADU requirements that were adopted in 1990. Only if the developer/homebuilder seeks a zoning change or variance are the ADU requirements triggered. Though Montgomery County “grandfathered” projects that had already received plat approval or building permits prior to its 1974 MPDU law, its policy applies automatically to all residentially zoned land.

Income eligibility: Generally, the upper limit for income eligibility should be no more than 80% of *regional* median household income.⁶ (Beginning with 80% of the county’s median household income, Montgomery County subsequently dropped to a 65% standard). Some jurisdictions have set their ceiling as high as 120% of median household income. Other programs have set a proportion at 80% maximum and another proportion at 50% maximum. I generally favor the approach that assistance for very low-income families (below 50 percent of median household income) would be assured by directing the public housing authority to acquire one-third of the affordable units.

Inclusionary requirement: Montgomery County requires that 12.5% to 15% of the total development must be affordable (i.e. units can be bought or rented for no more than 30 percent of the maximum eligible income). Fairfax County requires 12.5% of for-sale units and 6% of rental units. Cambridge MA and Lake County IL set a 10% standard. A 20 percent standard is also common; it is the minimum proportion that qualifies a development for use of Low-Income Housing Tax Credits. To help de-concentrate poverty and meet the housing needs of very low-income households, the public housing authority should have right-of-first purchase (or lease) for one-third of affordable units.

Housing type: Preferably, the inclusionary requirement should apply to both for-sale and rental housing.⁷ Moreover, early in its MPDU program, Montgomery County found that some homebuilders were leasing their MPDU units in otherwise for-sale developments. At the end of the short control period the MPDU law initially adopted (5 years), the builders would put the rental units up for sale at market rates. The county amended the MPDU law to require that MPDUs must have the same status (rental or for-sale) as the overall development.

⁶In very high-income communities as were found in Fairfield County, CT, a standard of 80% of a town’s median income produced such a high eligibility threshold that it was politically indefensible. The Connecticut legislature subsequently amended state law to set the bar at 80% of *the lower of* local or statewide median household income.

⁷ The pending inclusionary zoning law in St. Cloud MN and four suburban towns covers only for-sale housing.

Builder “Cost Offsets”: Purely voluntary, incentive-based policies don’t work.⁸ However, “cost offsets” to improve the economics of compliance need to be provided for for-profit homebuilders.⁹ Density bonuses (up to 22 percent in Montgomery County) are most effective in strong-demand housing markets. Other incentives include waiver of various fees, expedited processing of plan review and building permits, or even direct cash subsidies. In Florida, SHIP funds could be used in conjunction with inclusionary zoning policies. LIHTC funds are often part of the financing package of inclusionary developments.

Cash payments in lieu of building inclusionary housing: *Don’t do so, or only under the rarest of circumstances.* Given an easy out, most homebuilders will take it every time. Tallahassee offered builders the alternative of making an in-lieu-of cash payment into the city’s affordable housing fund. Nineteen of the first 20 builders after the law’s enactment did so. The result was that Tallahassee’s new subdivisions remained exclusionary and the city ended up with a larger pot of money to build traditional low-income projects where they could obtain cheap land – that is, in already poor neighborhoods. (Montgomery County has allowed in-lieu-of cash contributions to its affordable housing fund only two or three times in 26 years.)

On the other hand, Fairfax County’s ADU law (and several others) requires homebuilders of developments *below* the minimum threshold to make cash contributions (determined by formula) into the county’s affordable housing fund.

Price control period: A balance must be struck between keeping affordable units affordable in the long run and allowing purchasers to accumulate equity from their homes. Montgomery County controls re-sale prices for 10 years and rent levels for 20 years. The resale price is set at the original price plus inflation plus the value of improvements; only income-eligible households can purchase units during the control period. After the control period expires, homes can be sold at market rates but half of the equity windfall is recaptured for the county’s affordable housing fund. However, more and more affordable homes have reached the end of the control period and are being re-sold at market rates, reducing the county’s inventory of affordable housing.

⁸Cambridge’s purely voluntary approach, for example, produced *zero* affordable units over a ten-year period before the city adopted its mandatory ordinance in the late 1990s.

⁹Such financial *quid pro quos* also provide a legal defense against charges of an unconstitutional “taking” of private property without adequate compensation.

Fairfax County initially set control period for for-sale units at 50 years but found that it had few takers; the county subsequently reduced the for-sale control period to 10 years. Cambridge controls re-sale prices for 50 years and rents in perpetuity. Cambridge feels that, in that hyper-cost market, the opportunity for a former renter/now purchaser to deduct mortgage interest payment from tax liability and build equity through paying down the mortgage balance on a price-controlled unit is sufficient incentive.

I have had an Oregon housing advocate describe how a Housing Equity Trust Fund, capitalized with an initial public appropriation, works.¹⁰ Purchasers of affordable homes automatically become trust fund beneficiaries. Upon re-sale (at the controlled price), sellers receive a lump sum distribution from the trust fund that approximates what might have been their share of a market-rate sale windfall.

Administration: It is most desirable that approval/processing of the inclusionary requirements be made as routine and bureaucratic (in the positive sense) as possible rather than setting up each proposal as the potential target of public opposition. In Montgomery County the inclusionary zoning requirements are administered by staff within the county Department Planning and Community Development. Acquisition and management of “welfare-to-workforce” units are administered by the county’s Housing Opportunities Commission (HOC). HOC is both the public housing agency and housing finance agency; it manages over 35,000 affordable units in mixed-income communities.

¹⁰ I incorrectly believed that Cambridge had set up such a Housing Equity Trust Fund. I do not yet know of a specific community where such a mechanism is in place.