

Statewide Inclusionary Land Use Laws and Suburban Exclusion

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There is little, if any, dispute over the need for more low- or moderately-priced¹ housing, nor is there much disagreement that the shortage of such housing is more severe in newer suburbs than in central cities and older, inner-ring suburbs. One way of addressing those situations is through inclusionary land use rules that make the production of lower-priced housing an integral part of residential and/or commercial development. These rules are intended to increase the supply of low-priced housing and reduce its increasing concentration in existing areas of poverty.

All inclusionary programs present a trade-off for the developer. For projects subject to the inclusionary rules, the developer bears the burden of providing some affordable units (inclusionary units) as a condition for receiving development permits. In return, the developer receives benefits to offset that burden.² These benefits almost always will include a density bonus; that is, the developer will be allowed to build more units (bonus units) than would have been allowed in the absence of the inclusionary rules. The bonus units can then be sold or rented

at market prices. In addition, the inclusionary rules may allow or mandate other cost saving incentives to help defray the additional expense of providing the inclusionary units (Smith et al. 1996; Mallach 1984). The intended result is an increase in the supply of lower-priced housing,³ financed mostly by the added profit generated by the bonus units (Dietderich 1996). In theory, no direct public funding is required.⁴

Inclusionary rules may be adopted by an individual municipality⁵ as local regulations (locally-adopted),⁶ or they may be enacted at the state level⁷ as part of the general laws and state regulations (statewide).⁸ Some statewide plans specify the essential program elements (state-designed),⁹ while others require municipalities to accommodate housing for lower-income families but let local government determine the operating details of the program to accomplish that goal (locally-designed).¹⁰ Some municipalities in states with statewide programs have also adopted their own local plans with provisions different from, but not inconsistent with, the state's;¹¹ statewide and locally-adopted plans are not mutually exclusive.

This article will discuss: 1) the beliefs underlying statewide inclusionary programs, to show which aspects of the problem of suburban exclusion they are trying to address, and 2) the characteristics of five existing statewide programs, to highlight the similarities and differences among them. While statewide, the programs in California and New Jersey are locally-designed and exhibit many of the same operational elements as locally-adopted plans, such as the one in Montgomery County, Maryland. The programs in Connecticut, Massachusetts and Rhode Island are all state-

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designed and offer a distinctly different approach.

Suburban Exclusion and Statewide Plans

The essential difference between statewide and locally-adopted inclusionary plans is in the basic theory underlying the two classes of programs. Locally-adopted programs are based on the premise that the scarcity of affordable housing in a community is due to the unwillingness of developers to produce such housing. Therefore, municipalities must compel developers to build affordable units as a condition of getting approvals for the larger project. Statewide programs, on the other hand, are based on the theory that the scarcity of lower-priced housing is, at least partially, the deliberate and/or inadvertent result of local land use and development regulations. Lower-priced housing is being excluded (Dietderich 1996; Davidoff et al. 1971). Therefore, the state must either prevent municipalities from using their power to exclude, or compel them to accept some affordable housing through regional or statewide allocation.

The connection between local land use ordinances and exclusion is a widely-noted phenomenon (Pendall 2000; Farley et al. 1993), and the reasons offered to explain why that may be so are also numerous. Rolleston (1987) finds three reasons why municipalities adopt the kinds of land use regulations that they do: fiscal concerns, reduction of negative externalities and discrimination. The first two are consistent with arguments that suburban exclusion may be an unintended side-effect of legitimate local actions to address community concerns (Mueller 1989; Fischel 1985). All three are consistent with explanations of why local government might, affirmatively, want to exclude the poor (Dietderich 1996; Briffault 1990).

The fiscal concerns are based on the desire of local officials to provide the highest possible level of local services at the lowest cost to residents. Since most municipal revenue is from local property taxes, this objective may be accomplished by permitting only those units that will contribute more than their ratable share of property taxes for the existing level of services

(Mueller 1989; Tiebout 1956). That means that, rationally, local government should only permit relatively more expensive residential development, excluding the poor who probably will require more in locally-funded services than they pay in property taxes.

Two commonly identified negative externalities of development that local regulations seek to prevent are traffic congestion and decreasing property values of existing housing (Dietderich 1996; Rolleston 1987). Both are associated, whether justifiably or not, with the increased density and multi-family units that may be necessary to produce lower-priced units (Pozdena 1987; Ellickson 1981). Local government can, therefore, rationally conclude that more widely scattered, single-family housing will help avoid those negative externalities and zone accordingly.¹² Because large-lot single-family housing is relatively expensive to produce, the poor are excluded.

A community that wants to exclude minorities and the poor or that does not want affordable housing built within its jurisdiction can, easily and with legally sufficient reasons, adopt zoning and subdivision regulations that make the development of affordable housing economically impossible (Dietderich 1996; Davidoff et al. 1971; Babcock 1966). Although *Buchanan v. Warley*¹³ prevents local government from explicitly discriminating based on race, local government is allowed to discriminate based on wealth,¹⁴ and, given the correlation between wealth and race in this country, that achieves substantially the same end result. Under the guise of protecting the general welfare or preserving property values,¹⁵ a municipality can limit new housing to single-family units on large lots. It can impose infrastructure requirements that drive the cost of subdivision out of the range of affordability. It can, through hurdles and delays in the permitting process, make it clear to prospective developers that they will not gain approval, within time and cost parameters that allow any chance of financial viability, for projects seeking to create lower-priced housing (Luger et al. 1997; NIMBY Report 1991). Because all of these local government actions drive up the price of housing, they effectively

keep out the poor and minorities, even if that is not what was intended (Luger et al 1997; Lowry et al. 1990; Johnston et al. 1984; Seidel 1978). If it is what was intended, the law will still accept the proffered reasons as sufficient to justify the local actions.

Statewide inclusionary programs are a direct response to perceived suburban exclusion (108HLR1127 1995; Breagy 1976). In these programs, the state, as sovereign, steps in to limit municipalities' power to exclude and/or compel them to permit some affordable housing. There are two ways that states have done this. In one approach, used in New England, the state has directly limited local power and imposed a complete inclusionary system on its constituent municipalities so that all operate under exactly the same rules. The other approach, used in California and New Jersey, compels municipalities to accept a "fair share" of regional affordable housing needs but gives local governments flexibility in meeting that responsibility. Municipalities are required to plan for their regional allocation of affordable housing, and the state provides for sanctions for failure to comply.¹⁶ That strategy has led to a variety of local tactics, including inclusionary programs. Because each plan is locally-designed, there is substantial variation in the operational details among the various local programs, with many quite similar to the Moderately Priced Dwelling Unit ordinance in Montgomery County, Maryland.

Whether the plan is state- or locally-designed, review and approval of development proposals remains at the local level. The rules for the permitting process may be modified, but local boards still have the responsibility for and power over the initial project approvals (Lohe 2000). The statewide program is not one in which the state takes over local government's role in deciding how development should occur.

Program Participation - Mandatory or Voluntary

One of the most fundamental differences between the two statewide systems is how any given municipality's program determines whether a specific development proposal will be governed

by the inclusionary rules. The rules may require developer participation (mandatory program), or developers may be allowed to choose whether to have the inclusionary rules apply (voluntary program).

Most locally-designed plans, including approximately 90% of plans in California, are mandatory (Burchell et al. 1994), although there are exceptions.¹⁷ This may reflect local officials' belief that developer choices are the reason for the shortage of lower-priced housing in their community.¹⁸ The three statewide, state-designed programs in New England are all voluntary. Those programs operate on the premise that local government exclusion is the dominant reason for the scarcity of lower-priced housing in the suburbs and that developers will produce more of it if they are not hindered by local government (Herr 2000; Stockman 1992).

The New Jersey program, as initially created by the state's Supreme Court in *Southern Burlington County NAACP v. Township of Mt. Laurel*¹⁹ (*Mount Laurel I*) and *Southern Burlington County NAACP v. Township of Mt. Laurel*²⁰ (*Mount Laurel II*), was a voluntary plan. It originated with *Mount Laurel I*, where the Court found that the local government was excluding and ordered it to stop. Eight years later, in *Mount Laurel II*, the Court found that the same township was still "afflicted with a blatantly exclusionary ordinance."²¹ At that point, the Court created a "builder's remedy" that allowed developers to seek permits in court for inclusionary development. In response to local governments' complaints about the impact of the builder's remedy, the state legislature created a statewide program, superceding the Court's program, that has allowed municipalities to adopt mandatory inclusionary regulations and avoid the builder's remedy (Burchell et al. 1994; Mandelker 1990).²²

Mandatory programs typically require a project to be inclusionary if it is over a threshold size. Commonly, that threshold is based upon the number of units in the proposed development, although that is not the only possibility. The program may exempt some types of residential developments, such as projects that create rental units. Commercial development may also be

subject to inclusionary requirements, with the threshold based on the number of square feet, prospective employees, or some other quantifiable basis (Burchell et al. 1994; Mandelker 1990; Mallach 1984; Ellickson 1981).²³

Voluntary programs induce participation by offering sufficiently large incentives to make development under the inclusionary rules more attractive than under the regulations that would otherwise apply to the project. Instead of determining when a project must be inclusionary, voluntary programs have criteria to establish whether a project or developer may be eligible for those benefits. The rules may require a minimum percentage of affordable units as a condition of participation, and they may restrict eligibility by prohibiting for-profit developers, as is done in Massachusetts²⁴ and, under some circumstances, in Rhode Island.²⁵ In addition, the programs all are self-limiting to prevent developers from overwhelming any single municipality with affordable units or excessive density. Projects are not eligible in any municipality that meets statutory threshold criteria, such as having 10 percent or more of its housing stock subsidized.

Basic Program Elements

The basic elements of an inclusionary program establish the *quid pro quo* of the trade. They determine: 1) how many inclusionary units the developer must produce; 2) how much of a density bonus he or she will receive; and 3) other cost-saving incentives that may be included in the bargain as additional compensation for the inclusionary units.

Set-aside Requirement

The first part of the trade the program must specify is the percentage of inclusionary units, or set-aside requirement. The California and New Jersey programs use regional or state authorities to determine regional housing needs and allocate a "fair share" of those to each municipality, which may then impose sufficient set-asides on new development to attain that "fair share." Because the program details are specified locally, the set-aside requirements may vary from

one municipality to the next. In California, most of the programs require a set-aside of between 10 and 15 percent of the total number of units in the project, although the actual set-asides range from 5 to 35 percent (Burchell et al. 1994).

The New England voluntary programs establish the set-aside percentage as the condition of eligibility for the density bonuses and other incentives of the program. In Massachusetts, for example, only projects providing 25 to 30 percent affordable units may proceed under the inclusionary rules, while Connecticut requires 20 percent for some classes of projects (Burchell et al. 1994; Stockman 1992).

Density Bonus

Closely linked to the set-aside requirement is the extent of allowable density bonus. The higher the set-aside, the greater the density bonus must be to compensate for the cost of the inclusionary units, all other things being equal.²⁶

For mandatory programs, the additional units must adequately compensate the developer for the cost of producing the inclusionary units to avoid two possible negative consequences. If the bonus is not sufficient, the regulations could be found to be a taking, or developers may decide to build where their profits are not so adversely affected (Dietderich 1996; Mandelker 1990; Ellickson 1981). The latter is less of a factor if the inclusionary requirements are regionally uniform because developers will find it harder to move to avoid them and still serve the same target housing market.²⁷ Most mandatory programs establish the number of bonus units as a function of the number of inclusionary units required, allowing X bonus units for every inclusionary unit (Dietderich 1996).

For voluntary programs, the density bonus has to be enough to make inclusionary development preferable to proceeding under the otherwise applicable rules (Dietderich 1996; Stockman 1992). The three statewide voluntary programs in New England all allow the developer to determine the extent of density bonus necessary to make the project economically viable, considering the set-aside required for program participation.

Only in California do municipalities have the option of not allowing a density bonus. One of the California state laws mandating local inclusionary plans requires communities to “grant density or other bonuses” (Burchell et al. 1994: 159), while another speaks of “regulatory concessions and incentives” (Burchell et al. 1994: 159). That statutory language would appear to give communities the option of requiring inclusionary units without permitting bonus units, although other cost saving incentives are then required.

Additional Cost Saving Incentives

Finally, the program may identify additional or alternative cost saving incentives that may be allowed for inclusionary developments. Typically, those include reduced infrastructure, expedited permitting, fee waivers, or other exemptions from locally adopted regulatory requirements, all of which are potentially available under all five statewide programs. Because voluntary plans rely on incentives to induce participation, they are generally more flexible and offer the potential for a wider array of incentives than mandatory plans.

In offering other cost-saving incentives, statewide plans have substantially more flexibility than locally-adopted programs. A locally-adopted plan is limited by the extent of the local government’s power. It can only change local rules. The state, however, in adopting a statewide plan, can offer additional incentives in the form of exemption from or specific benefits in state laws or regulations.

Neither California nor New Jersey make significant use of that possibility for the locally-designed mandatory programs adopted by their municipalities. The builder’s remedy in New Jersey appears to give substantial benefit to developers, but only, in effect, in communities that do not have COAH-certified housing elements. The California DHCD may withhold discretionary funding from a municipality if its housing element does not comply with state requirements (Burchell et al. 1994; Mandelker 1990). That may not directly save costs for the developer of an inclusionary project, but it may provide him or her with additional leverage in

negotiating for local permits.²⁸

All three statewide voluntary programs make more extensive use of the ability to provide incentives through changes in state law. One common strategy is to reduce the time, expense and uncertainty in the permitting process, a major concern for developers (Luger et al. 1997). Both Massachusetts and Rhode Island offer inclusionary proposals through a unitary permitting process, eliminating the need for multiple local approvals. In both states, the application goes to the local zoning board, which, by statute, may grant whatever special exemptions or variances from pre-existing local regulations may be necessary for the project to proceed and issue the permit.²⁹ This saves developers the time and expense of appearing before several different town boards and reduces the opportunity for opponents to delay the project with appeals of each separate approval. In addition, Massachusetts specifies an accelerated schedule for hearing and rendering a decision on the initial application for inclusionary proposals, further reducing the time needed. If the board fails to act within the time allowed, either to open the hearing or render a final decision, the permit is automatically granted (Stockman 1992).³⁰

Beyond the limited preemption of local regulations through the broad powers granted to the local zoning board in the unitary permitting process, all three statewide voluntary plans provide for a substantially more developer-friendly appeals process. In Massachusetts and Rhode Island, inclusionary developments may take an expedited appeal of unfavorable local decisions to a special administrative agency, the Housing Appeals Commission (HAC) in Massachusetts and the Housing Appeals Board (HAB) in Rhode Island. In Connecticut, the appeal goes to a specially designated court on an expedited calendar. In all three New England states, the municipality has the burden of proving on appeal that its decision was justified. This is a reversal of the ordinary situation, in which local decisions are accorded a presumption of validity,³¹ and the developer would have to prove that there was not “rational or reasonable basis” for the decision, that it was “clearly erroneous,”

or that it was "arbitrary and capricious."³² Municipalities are more limited in the reasons they may use to sustain an unfavorable decision on appeal than those that would generally apply to local regulatory decisions. While the exact statutory language varies among the three states, the common element is that protecting the "general welfare" is not sufficient. To sustain an adverse local decision, in both Connecticut and Massachusetts, the appellate board must find that the public interests justifying the decision outweigh the need for affordable housing. In Rhode Island, the board must find that the decision was "both 'reasonable' and 'consistent with local needs' as expressed in the locality's comprehensive plan and zoning requirements" (Burchell et al. 1994: 146).

The impact of these changes is to increase the developer's chances of getting local approval or prevailing on appeal of an unfavorable local decision. In Massachusetts, between 1969 and 1986-7, there were 458 applications under the state's inclusionary program. Of those, 238 were granted without conditions, 89 with conditions and 131 denied at the local level. Of the 220 applications not granted unconditional approval, 200 appealed to the HAC. Of those, 20 dropped the appeal before the HAC could render its decision, leaving 180 applications. The HAC upheld the local denial in only 10 of those cases. In 70 cases, the board reversed the local decision, and in 100 the parties settled and the permit was issued as agreed. Therefore, of the original 458 applications to build affordable housing, 408 received permits, and the developers who pursued their appeals to a decision by the HAC received a permit in 170 of 180 cases (Burchell et al. 1994; Stockman 1992).³³ In Connecticut, as of the end of 1998, there had been 36 court cases filed involving 28 developments resolved on the merits of the case. The applicant prevailed in 28 of those cases involving 21 developments. In addition, courts rejected 4 cases in which an abutter appealed a local approval (Hollister 1999).

Finally, the Massachusetts and Rhode Island laws provide for a "builder's remedy," allowing the appellate authority to actually issue the permit. This saves the developer the time and

expense of going back in front of the same local authorities who rendered the initially unfavorable decision. It also deprives those authorities of the opportunity to reopen negotiations after losing the appeal.

Other Program Elements

Price/Rent Ceiling

Programs, both mandatory and voluntary, usually specify the target price or rent for the inclusionary units.³⁴ All five programs set the price level based on income. In California, the state compels municipalities to plan, through the required housing element, for the needs of households from very-low- through moderate-income. Locally-designed plans vary from targeting very-low- and low-income households only, all the way to including moderate-income units. New Jersey allocates the "fair share" of the regional needs of very-low- and low-income households to each municipality, though the local inclusionary regulations adopted to satisfy that allocated share may include higher incomes as well (Wish et al. 1997; Burchell et al. 1994). Connecticut only allows low-income housing to qualify for its program, while Massachusetts and Rhode Island include moderate-income households in their programs (Stockman 1992).

Affordability Covenants

Neither of the statewide mandatory programs sets a specific limit on the length of time that the inclusionary units must remain affordable. One complaint about the earliest local programs in California was that the units only had to remain affordable for one year, after which they could be sold at fair market value (Ellickson 1981). However, since the system requires each municipality to provide its "fair share" of affordable housing, it is in the municipality's interest to ensure that the units contribute for as long as possible, with restrictions lasting from five years to perpetuity (Burchell et al. 1994).

Two of the statewide voluntary programs do require that the inclusionary units remain affordable for a minimum period of time, at least in some cases. In Rhode Island, inclusionary units in developments by for-profits must remain

affordable for at least 30 years. There are no time limits on units in projects by government agencies or non-profit organizations. Connecticut requires a minimum 20-year restriction (Burchell et al. 1994). Massachusetts imposes no time limit within its program but limits participation to government agencies, non-profits and limited dividend corporations, reducing the probability that the developer will be unwilling to negotiate substantial affordability protection as part of the permit.

In addition to any internal requirements in either kind of inclusionary program, there may be additional or more stringent affordability restrictions imposed by external funding sources. For example, some inclusionary projects in Massachusetts receive tax-exempt bond financing through state programs to increase the supply of rental housing.³⁵ That program requires that 40 percent of the units be affordable by households with incomes less than 60 percent of median, or that 20 percent be affordable by households with incomes less than 50 percent of median, and they must remain affordable for a minimum of 15 years (Stockman 1992).

Clustering, Off-site, Out-of-town, and Payments In Lieu

Inclusionary developments under four of the statewide plans are not necessarily required to integrate the inclusionary units into the larger project. Developers may be allowed to cluster those units in one area, creating a small section of affordable units separated from the more expensive market portion of the project. Both California and New Jersey allow locally-designed programs to condone this practice, and neither Connecticut nor Rhode Island prohibit it. Of the state-designed programs, only Massachusetts has regulations against clustering, specifically requiring that the inclusionary units be spread ratably through the project.

Under both the California and New Jersey laws, locally-designed plans may allow the developer to provide the inclusionary units off-site, giving credit for units in other developments. Developers can create one project of exclusively market housing and another, at a different

location, with the inclusionary units that would have been required for the market project. All three state-designed plans in New England require that the inclusionary units be built within the same development.

New Jersey goes so far as to permit developers to provide up to half of all required inclusionary units in a different city or town through regional contribution agreements. This allows suburban developers to build inclusionary units in older urban areas to satisfy part of the suburban "fair share" requirement. Some critics have noted that this policy may work against the goal of increasing housing opportunities in the suburbs for lower-income households (Payne 1996).

For locally-designed plans in California and New Jersey, where participation is mandatory, the program may allow some developers, usually for smaller projects or those for which additional density cannot adequately compensate, to make a payment *in lieu* instead of actually producing the inclusionary units. The money is placed in a fund that is then used to finance affordable housing.

Impact of Statewide Inclusionary Programs

One of the most obvious advantages of a statewide inclusionary program is that it can address the problem of exclusion. Reliance on locally-adopted plans cannot. Whether locally- or state-designed, the statewide approach ensures that all municipalities have inclusionary rules. This, in turn, raises the probability that every community will eventually have some affordable units. When Massachusetts adopted its totally voluntary inclusionary program in 1969, only 2 of its 351 cities and towns had 10 percent or more affordable housing. As of May 2000, that had increased to 23 communities (Lohe 2000), with an additional 14 municipalities having 8 percent or more affordable housing.³⁶ Over 21,000 units were produced under the law as of October 1999 (Krefetz 1999). In 1972, 171 Massachusetts municipalities had no subsidized housing; by 1997, that figure was reduced to 54, with the vast majority of them located in the economically moribund western part of the state (DHCD 1972; DHCD 1997).

A statewide, locally-designed type of program, as used in California and New Jersey, may be preferable to the New England model for two reasons. First, the New England voluntary programs do not plan for the allocation of the low-priced housing. Developers decide where it will be built, without necessarily considering actual local or regional needs. Only on appeal are those needs assessed, and that is against an arbitrary statutory guideline of 10 percent of the housing stock of the local community. The two statewide, locally-designed programs allocate affordable housing to communities based on a "fair share" of regional needs. While some places in New Jersey have questioned their allocation, at least there is some attempt to relate location and need. Second, voluntary plans do not ensure that all communities will have affordable housing. Developers choose, and they may decline to pursue inclusionary projects in extremely hostile locations for fear of reprisal on other, non-inclusionary proposals the developer may be planning. Because the statewide, locally-designed plans rest on a mandate for all communities to accommodate a "fair share" allocation, every municipality will have some affordable housing.

The state-designed voluntary approach, however, also has advantages. Locally-designed plans can be rendered ineffective if there is an imbalance between burdens and incentives, and they are initially dependent on the commitment of local officials for implementation (Herr 2000). Voluntary plans, in which the developer establishes what the balance is, will be as effective as long as inclusionary development can be more economically efficient than the alternative (Dietderich 1996). Because developers implement the program, voluntary programs will require little bureaucracy and are very inexpensive to administer. There is no need for regional authorities to determine the "fair share" allocation, project growth and housing needs, and oversee local plans. There is no requirement to monitor the behavior of local government to ensure compliance. Instead, these functions are left to the developers who initiate inclusionary proposals. The only real expense to the state is providing an appellate

body to hear developer complaints.

One area where these programs may fall short of their goals is in actually making affordable housing available to the households and groups that were previously excluded.³⁷ Wish et al. (1997) note that only 7 percent of households occupying units created in response to the *Mount Laurel* decisions had moved from cities to the suburbs, and 66 percent of those were white. The main beneficiaries of New Jersey's efforts were elderly white women (Wish et al. 1997). In Massachusetts, the law was amended after the state noted that communities were permitting disproportionately high percentages of elderly housing and lower percentages of proposals for family housing. After the amendment, only half of a community's obligation under the law could come from elderly housing (Stockman 1992).

Conclusions

Statewide inclusionary development programs are essential tools in efforts to reduce suburban exclusion. Without them, municipalities that want to keep out the poor will continue to find adequate, legally-defensible means to do so. The poor will be left to find housing in the interstitial non-exclusionary areas where they already are forced to reside. The jobs-housing mismatch will persist. Poverty will remain concentrated; growth will not be smart.

Both types of statewide programs discussed in this article offer promising models, and neither is clearly preferable. Both have characteristics that could be profitably incorporated into the other. They demonstrate the program elements that must be addressed in the design of any inclusionary program, statewide or locally-adopted, and the range of possible choices for each of those elements. Five states have shown what can be done. After careful consideration of the options, an effective program can be created that will reduce exclusion, open up housing options for the poor, and still protect the interests of local communities. ©

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- Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A2d 713 (N.J.) appeal dismissed & cert. denied, 423 U.S. 808 (1975) (*Mount Laurel I*)
- Southern Burlington County NAACP v. Township of Mt. Laurel*, 92 N.J. 158, 456 A2d 390 (1983) (*Mount Laurel II*)
- Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977)

Notes

- ¹ I use "low- or moderately-priced" rather than "affordable" initially to avoid confusion. The latter is commonly used as a term-of-art to denote units priced to be affordable by households at specific income levels, with housing cost not to exceed a set percentage of that income, based upon market conditions. In this article, "affordable" will be used in the generic sense: housing that is relatively moderately priced.
- ² If the developer were not given some benefits, the inclusionary program might be found a "taking" if challenged (Mandelker et al., 1990; Schwartz et al., 1983).
- ³ Ellickson (1981), however, contends that inclusionary regulations will reduce the supply of affordable housing.
- ⁴ That is not to imply that public funds will never be involved in an inclusionary project. The developer may qualify for subsidies under either federal or state housing programs, and so may prospective purchasers or renters of the inclusionary units. For example, the project may use Low Income Housing Tax Credits as part of the financing package, and inclusionary unit purchasers may receive below-market financing from the state. There is nothing in any inclusionary program that precludes government funding; it simply is not a required part of inclusionary development.
- ⁵ As used in this article, "municipality" will refer to both incorporated local governments (such as cities, towns, villages, boroughs, etc.) and counties.
- ⁶ Local government can only exercise power delegated to it by the state, and so whether any community can actually adopt an inclusionary ordinance is a matter of state law. In some states, such as Maryland, local governments have such authority, which is why Montgomery County could create its Moderately Priced Dwelling Unit ordinance. In other states, like North Carolina, whether local government has that authority is unclear.
- ⁷ States do not have unlimited power, particularly if there is a "home rule" provision in the state constitution. When Massachusetts first adopted its inclusionary law, its right to do so was challenged as an infringement of local governments' rights under the Commonwealth's home rule amendment. The claim was rejected, however, in *Board of Appeals v. Housing Appeals Committee in Department of Community*

- Affairs*, 363 Mass 339, 294 NE2d 393 (1973).
- ⁸ Statewide programs, as used in this article, are those adopted by state government with some affirmative requirement for local action or limitation on pre-existing local power. This definition includes the laws in California, Connecticut, Massachusetts, New Hampshire, New Jersey, and Rhode Island. Not included as "statewide" programs are those state laws authorizing, but not requiring, local government to adopt inclusionary regulations, as in Maryland.
- ⁹ In Connecticut, Public Acts 89-311, codified as Connecticut General Statutes, §8-30g. In Massachusetts, Chapter 774 of the Acts of 1969, codified as Massachusetts General Laws, Chapter 40B, §§ 20-23. In Rhode Island, Public Laws of 1991, Chapter 154, §1, codified as Rhode Island General Statutes 45-54-1 *et seq.*
- ¹⁰ In California, there are several provisions of state law that apply. In New Jersey, New Jersey Statutes 52:27D-301 *et seq.*
- ¹¹ For example, Nantucket, Massachusetts, has a mandatory inclusionary requirement for all commercial developments of over 4,000 square feet enclosed space.
- ¹² In fact, the right to prohibit multi-family units from being built in the same neighborhood as single-family houses was fundamental to the original sanctioning of zoning by the Supreme Court of the United States in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Justice Sutherland, in his majority opinion, wrote: "With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district." (*Euclid v. Ambler*, 272 U.S. 365, 394 (1926)).
- ¹³ 245 U.S. 60 (1917).
- ¹⁴ Local regulations can't exclude minorities, of course, since the Supreme Court ruled that local ordinances that exclude based on race were unconstitutional in *Buchanan v. Warley*. However, the Supreme Court has, through its decisions, left any judicial remedy for economically exclusionary zoning to the states. In *James v. Valtierra*, 402 U.S. 137 (1971), the Court refused to grant privileged status to the poor as it had in poll tax and criminal laws cases, and it found a law requiring a referendum for approval of all affordable housing to be race-neutral. In *Warth v. Seldin*, 422 U.S. 490 (1975), the Court denied relief sought by outsiders (residents, developers and non-profits) seeking to challenge exclusionary practices of another jurisdiction on the basis that the plaintiffs failed to show specific injury from the defendant town's actions. Finally, in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), the Court ruled that disproportionate impact is not sufficient to invalidate zoning decisions; there must be evidence of intentional discrimination to amount to a violation of equal protection. These cases left matters largely to the states unless there was clear evidence of racially discriminatory motives. At the state level, the law may be different, and discrimination based on wealth may be prohibited. Courts in some states have limited the impact of exclusionary regulations by finding state constitutional or statutory limitations that impose obligations to consider regional housing needs in local regulations and decision making. See *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713 (N.J.) appeal dismissed & cert. denied, 423 U.S. 808 (1975) (*Mount Laurel I*) and *Southern Burlington County NAACP v. Township of Mt. Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) (*Mount Laurel II*), which established the rule in New Jersey. *Beck v. Town of Raymond*, 118 NH 793, 394 A2d 847 (1978), and *Britton v. Town of Chester*, 134 NH 434, 595 A2d 930 (1991), did the same in New Hampshire. Other decisions have looked to regional considerations when examining zoning in New York, Pennsylvania and California.
- ¹⁵ North Carolina allows cities to adopt zoning regulations "[f]or the purpose of promoting health, safety, morals or the general welfare of the community," N.C.G.L. §160A-381. "The regulations shall be made...with a view to conserving the value of buildings..." N.C.G.L. §160A-383. Counties have the same authority under §153A-340 and §153A-341.
- ¹⁶ In California, the state Department of Housing and Community Development reviews the local housing elements and may withhold discretionary funding from municipalities whose housing elements do not comply with state requirements. In New Jersey, communities whose housing elements are not certified by the Council on Affordable Housing (COAH), the

administrative agency established as part of the legislative reaction to the *Mount Laurel* decisions, are exposed to potential builder's remedy lawsuits in state court.

- 17 One voluntary plan is in Orange County, California. Originally, the county had a mandatory plan, but it changed. The county has been one of the most successful in the state at producing affordable units, with over 6,400 of the statewide total of 20,000 units. Most of the Orange County units were produced under the mandatory program (Burchell et al. 1994).
- 18 They may, very well, also recognize that their own actions may have contributed to the problem. There is no evidence to indicate that the local preference for mandatory programs is an attempt to deny any responsibility for the shortage of affordable housing in the community. It may be an honest effort to address the possibility that both governmental and private sector decisions have played a role in the creation of exclusionary suburbs.
- 19 336 A.2d 713 (N.J.) appeal dismissed & cert. denied, 423 U.S. 808 (1975).
- 20 92 N.J. 158, 456 A.2d 390 (1983).
- 21 *Southern Burlington County NAACP v. Township of Mt. Laurel*, 92 N.J. 158, 198, (1983).
- 22 To avoid the builder's remedy, a community had to adopt a housing element that presented a reasonable prospect of meeting its "fair share" obligation. That plan had to be certified by COAH. Upon certification by COAH, the community would receive a six year exemption from builder's remedy lawsuits. Some New Jersey municipalities have not sought certification, and so the builder's remedy remains possible in those jurisdictions.
- 23 California, with its variety of locally-designed programs, offers examples of these criteria.
- 24 Under the Massachusetts law, only government agencies, non-profits and limited dividend corporations are eligible.
- 25 Under the Rhode Island law, for-profits may qualify if the project is for rental housing and the inclusionary units will remain affordable for at least 30 years.
- 26 Other program requirements may affect the extent of density bonus needed to compensate the developer. For example, the lower the allowable price of the inclusionary units, relative to their cost of production, the greater the compensation needed.
- 27 For example, with a strictly local plan, the developer only has to move to the next town.

With a uniform statewide plan, he or she would have to move to another state. In the latter situation, the developer obviously would less likely serve the same housing market as he or she would in a move from one town to the next.

- 28 Wheeler (1990) describes the local permitting process as negotiation. The threat of the possible loss of state funding could be one factor a developer could use to convince the local permit granting authority that the municipality would be better off allowing the inclusionary project than not.
- 29 For example, without the unitary permitting process, a developer might have to submit one application to rezone the property from single-family to multi-family, increase allowable density, reduce frontage and setback requirements, and increase maximum floor area ratio to conform with the proposal. He or she might need separate approval to subdivide the parcel into multiple building lots once it is rezoned. Then he or she might need a certificate of compliance from the local conservation commission, a certificate of adequate public facilities from the traffic safety committee, etc.
- 30 In practice, there are techniques local boards can use to slow permitting, but the process is still faster than having to obtain multiple permits (Stockman, 1992).
- 31 A legal doctrine which allows courts to presume that local actions are valid and requires a party challenging to prove that they were not.
- 32 The "rational/reasonable basis," "clearly erroneous," and "arbitrary and capricious" language is commonly used as the standard of review in decisions on appeals of local government actions. There are other bases upon which a local decision could be overturned, including lack of procedural due process. The regulation upon which the decision is based may have been beyond the authority of the municipality to adopt. The standards cited are those applicable to challenges to a procedurally proper decision based upon a statutorily sound local regulation.
- 33 It should be noted that 70 of the pro-developer HAC decisions were without conditions. That means that the permits were granted as originally requested by the developer, without conditions to which he or she might have agreed had the local government negotiated a permit acceptable to the developer.
- 34 One reason why I do not consider Oregon's growth management system inclusionary is

because it does not limit the price or rent of any units.

³⁵ The program is called the Tax Exempt Loans to Encourage Rental Housing (TELLER). The Commonwealth has other programs with other requirements, both for rental and ownership units.

³⁶ That figure is based on my analysis of data from Massachusetts DHCD, MHFA and other sources.

³⁷ The goals for the *Mount Laurel* decisions and subsequent legislation creating COAH were:
“To provide housing opportunities in the suburbs for poor urban residents who had been excluded by past suburban zoning practices. To ameliorate racial and ethnic residential segregation by enabling blacks and Latinos to move from the heavily minority urban areas to white suburbs” (Wish et al. 1997: 1276).