

MODEL ORDINANCE

Inclusionary Zoning

Updated December 2015



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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.

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.”¹

More recently, the *Regional Housing Plan* recognized a significant shortage in the supply of housing for lower and moderate income households, which comprise a considerable portion of the region’s population. “Households earning above 120% of AMI (Area Median Income) constitute 40% of Lehigh Valley households, with 50-80% of AMI the next largest at 16.6% of all Lehigh Valley households.”²

Inadequate supply, coupled with a significant number of households paying significantly more than they can afford, only compounds the problem as it relates to the region’s housing affordability. “For the Lehigh Valley and the school district study areas, unmet demand for housing less than 50% of AMI is universal. There is a shortage of housing for households that earn 30-50% of AMI in 11 of the 12 study areas. More than half of all households in this income range are cost burdened. There is a theoretical unmet demand for greater than 120% of AMI in 11 of the 12 study areas, with the exception of Saucon Valley-Southern Lehigh. As stated above, this really means that the higher earning households are spending less than 30% of their gross incomes on housing as a trade-off with costs of a commute outside of the Lehigh Valley. Relieving downward pressure by building higher quantities of expensive housing won’t solve the pricing problem at the lower end.”³

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 respond 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

¹ Lehigh Valley Planning Commission, *An Affordable Housing Assessment of the Lehigh Valley in Pennsylvania*, pg.72.

² Lehigh Valley Planning Commission, *Regional Housing Plan* pg.235, http://www.lvpc.org/pdf/2014/Housing%20Plan/LVPC_Regional_Housing_Plan.pdf.

³ *Regional Housing Plan*, pg. 236.

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, ideally by reducing public expenditure and in a way that avoids the creation of intense concentrations 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 geographically isolated pockets of low income households. The negative impacts of pockets of poverty are manifest, and the inability to afford housing can make it virtually impossible for an individual or household to obtain the necessary stability to transcend living conditions associated with poverty. 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. It serves as an incentive for the private sector to participate in affordable housing: thus, 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 jurisdictions have adopted such ordinances. The Montgomery County, Maryland ordinance is among the best known. First adopted in 1974, the ordinance has created more than 12,500 affordable housing units through 2014.⁴ Inclusionary zoning is newer in Pennsylvania. At least three Lancaster County municipalities have adopted inclusionary zoning measures.⁵ Inclusionary zoning has resulted in affordable housing unit construction in Mount Joy Borough, Lancaster County.⁶ Within the Lehigh Valley, the most prominent inclusionary zoning legislation comes from the City of Bethlehem, which in June of 2012 passed a Workforce Housing Incentive (Article 1307) to encourage the construction of residential units for lower or moderate income households.

⁴ National Low Income Housing Coalition, “40 Years Ago: Montgomery County Pioneers Inclusionary Zoning”, May 16, 2014, <http://nlihc.org/article/40-years-ago-montgomery-county-maryland-pioneers-inclusionary-zoning>.

⁵ Strategies for Increasing Housing Affordability in Lancaster County, Pennsylvania, <http://www.lhop.org/Docs/Strategies%20for%20Increasing%20Housing%20Affordability.pdf>.

⁶ Vision and Goals of Choices, The Housing Element of the Lancaster County, Pennsylvania Comprehensive Plan, <http://www.lancastercountyplanning.org/DocumentCenter/View/20>.

LEGAL BASIS OF INCLUSIONARY ZONING IN PENNSYLVANIA

We believe that municipal inclusionary zoning initiatives are enabled by the Pennsylvania Municipalities Planning Code (MPC). Unlike many states, Pennsylvania's legislature has retained very little authority over zoning and land use, having delegated it instead to the state's many units of local government. The Pennsylvania Municipalities Planning Code, Act 247 of 1968, delegates the responsibility for planning to each local municipality and county. It conveys planning authority and sets the ground rules that a municipality must follow. Only the Cities of Pittsburgh and Philadelphia have their own distinct enabling legislation, giving them powers to set their rules and procedures governing planning.⁷ The MPC governs all other "municipalities", a term including all counties (except Philadelphia County) and home rule municipalities. Therefore, the MPC governs the Lehigh Valley Planning Commission as a two-county planning agency. Counties, cities, townships and boroughs often perceive zoning and land use powers as the primary means of shaping the appearance and character of their jurisdictions.⁸

Like any other planning commission, the LVPC is required to prepare a Comprehensive Plan for "long-term growth, development and well-being of the municipality" (or the two counties in this instance). The MPC also confers a number of other powers to a planning commission under Section 209.1.⁹

The most germane of these powers as they relate to this educational document are featured in the accompanying text box.

Section 209.1

- (b) The planning agency at the request of the governing body may:
- (2) Prepare and present to the governing body of the municipality a zoning ordinance, and make recommendations to the governing body on proposed amendments to it as set forth in this act.
 - (3) Prepare, recommend and administer subdivision and land development and planned residential development regulations, as set forth in this act.
 - (8) Promote public interest in, and understanding of, the comprehensive plan and planning.
 - (9) Make recommendations to governmental, civic and private agencies and individuals as to the effectiveness of the proposals of such agencies and individuals.
 - (14) Review the zoning ordinance, subdivision and land development ordinance, official map, provisions for planned residential development, and such other ordinances and regulations governing the development of land no less frequently than it reviews the comprehensive plan.

⁷ The Planning Commission in Pennsylvania, Planning Series #2, Ninth Edition 2001.

⁸ Governor's Center for Local Government Services, The Planning Commission in Pennsylvania: Planning Series #2, Eleventh Edition, August 2014, http://www.newpa.com/sites/default/files/uploads/Local_Gov/publications/planning_series/PlanningSeries-2_2014.pdf.

⁹ Pennsylvania Municipalities Planning Code, Twenty Second Edition, January 2015.

Nestled within several sections of the MPC are the provisions that allow municipalities to adopt regulations for inclusionary zoning. Among the first are the General Provisions (Section 105 in Article I),¹⁰ which states that the purpose of the act is "to permit municipalities to minimize such problems as may presently exist or which may be foreseen. . ." The word "problems" allows broad flexibility as to its interpretation, which can include a reference to housing needs in a community which are currently unfulfilled. More explicitly, the provisions of the MPC for the Comprehensive Plan (Section 301(a) in Article III)¹¹ provide details on what a municipal, multimunicipal or county comprehensive plan should include:

- (2.1) A plan to meet the housing need of present residents and of those individuals and families anticipated to reside in the municipality, which may include conservation of presently sound housing, rehabilitation of housing in declining neighborhoods and the accommodation of expected new housing in different dwelling types and at appropriate densities for households of all income levels.

Multiple provisions within the MPC on Zoning (both Sections 603 and 604 in Article VI)¹² clearly stipulate the broader public purposes under which an inclusionary zoning provision would be permissible.

Inclusionary zoning amendments should comply with the Zoning provisions of the MPC listed in the accompanying text box.¹³ These regulations must show a reasonable relationship to a legislative purpose.

Section 603. Ordinance Provisions.

- (a) Zoning ordinances should reflect the policy goals of the statement of community development objectives and give consideration to the character of the municipality, the needs of the citizens and the suitabilities and special nature of particular parts of the municipality.
- (c) Zoning ordinances may contain:
 - (5) provisions to encourage innovation and to promote flexibility, economy and ingenuity in development, including subdivisions and land developments as defined in this act.
 - (6) provisions authorizing increases in the permissible density of populations or intensity of a particular use based upon expressed standards and criteria set forth in the zoning ordinance.

Section 604. Zoning Purposes.

The provision of zoning ordinances shall be designed:

- (1) To promote coordinated and practical community development and proper density or population.
- (4) To provide for the use of land within the municipality for residential housing of various dwelling types encompassing all basic forms of housing, including single-family and two-family dwellings, and a reasonable range of multifamily dwellings in various arrangements, mobile homes and mobile home parks, provided, however, that no zoning ordinances shall be deemed invalid for the failure to provide for any other specific dwelling type.
- (5) To accommodate reasonable overall community growth, including population and employment growth, and opportunities for development of a variety of residential dwelling types and nonresidential uses.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ "Legal Basis for Inclusionary Zoning", <http://pa-centrecounty.civicplus.com/DocumentCenter/View/422>.

In order to attract developers, it is advisable that zoning provisions provide incentives to offset any regulatory burden, and the ordinance should offer relief or alternatives. Lastly, the standards established should be clear enough to avoid arbitrary interpretation. Fortunately, the MPC is very clear with regard to the matter of density bonuses that are typically used in connection with inclusionary zoning. Specifically, it allows for “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” (Section 603(d)), which authorizes municipalities to apply density bonuses as an incentive to induce developers to include other features that might “encourage innovation and to promote flexibility, economy and ingenuity in development.” (Section 603(c)(5)).¹⁴

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.

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 induce 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. However, mandatory provisions could yield negative political consequences: for example, if some municipalities in a housing market adopt mandatory inclusionary zoning provisions while others do 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. Furthermore, mandatory zoning provisions may prove more likely the subject of legal challenges.

The Commonwealth can increase the legal support for mandatory inclusionary zoning by amending the Municipalities Planning Code to clearly enable such zoning.

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

¹⁴ Pennsylvania Municipalities Planning Code, Twenty Second Edition, January 2015.

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, onsite approaches meet two critical objectives: 1) location-specific provision of affordable housing and 2) 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

The *Regional Housing Plan* found “the housing affordability analysis and the jobs-housing balance analysis indicate that housing values in the Valley do not reflect local households’ ability to pay. The Lehigh Valley market is undersupplied in housing for the households earning less than 50% of AMI (Area Median Income) (\$29,350), based on the housing affordability analysis, and even up to 80% of AMI (\$46,960) from the more income conservative jobs-housing balance analysis. The total number of owner and rental cost burdened households under 50% of AMI is 40,750. The most vulnerable Lehigh Valley households are the least served, with large housing shortages below 30% of AMI (\$17,610). This translates into many households at the lowest incomes being forced to pay above 30% of their gross income for housing, exceeding the threshold and becoming cost burdened. The alternative is to seek housing outside the Valley.”¹⁵ (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% of the Area Median Income. Others target households with earnings at or below the average Area Median Income. While these other income limits have their advocates, the LVPC recommends that targeting inclusionary zoning programs to households with incomes up to 80% of the Area Median Income. This recommendation is consistent with the *Regional Housing Plan*, which recommends targeting inclusionary efforts to low income households. Low income households are those with incomes ranging from 50 to 80% 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% of the Area Median Income were able to meet the continuing financial obligations, which included the mortgage payments, taxes and insurance.

Linkages to Other Land Uses

The inclusionary zoning program needs to identify developments to which the ordinance applies. Most programs apply solely to residential developments. Some apply also to nonresidential development. Housing production requirements applied to non-residential development are referred to as linkage pro-

¹⁵ *Regional Housing Plan*, pg.238.

grams. The reasoning behind linkage programs is that the nonresidential 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 have not historically existed in the Lehigh Valley, making linkage less relevant; however, escalating home prices and shifting nodes of employment may make such linkage opportunities desirable in the future. Most inclusionary zoning initiatives in eastern Pennsylvania brand themselves as “workforce housing” (as is the case in the 2012 Bethlehem ordinance), partly because the term is more marketable than “affordable housing”, but also because such housing intends to attract people because of its proximity to jobs, many of which will offer modest wages.

Incentives

Few inclusionary zoning 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. 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 repudiation of historic zoning, which often required much lower densities. Adding other benefits to an IZ development helps fend the proposal against attacks by adjacent property owners, who may object to the density or the possibility of affordable dwelling units. Overall, incentives/benefits are intended as the means of providing equity to the participants and increasing the desirability or marketability of the project as a whole.

For voluntary IZ programs, in which the developer can elect either to provide affordable housing or to proceed pursuant to the municipality’s conventional zoning provisions, incentives are the obvious enticement for using the program. Although 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: the already cited 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.

Density bonuses primarily use two basic approaches. 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 to include the additional housing units.

The amount of the density bonus is a key standard to be determined. It can correlate to the percentage of affordable units provided, as is the case in Lower Salford Township of Montgomery County, Pennsylvania, where developers receive a bonus of .5 units per gross acre when between 15 and 25% of units are produced for sale at 75% of the market units or less. However, the Montgomery County Planning Commission (MCPC) in Pennsylvania also cites density bonus tactics that depend less on the number of units and more on the financing and cash flow.¹⁶ The first tactic 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.¹⁷ 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 tactics in the MCPC publication, *Promoting Workforce Housing – Expanding Locations and Development Potential* (available online at planning.montcopa.org and cited below).

Nestled within considerations of density bonuses, the inclusionary zoning 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, while the extremes can range from 5 to as high as 60%, the vast majority are within the range of 10 to 20%.^{18,19} 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.²⁰ As an example, the City of Bethlehem’s aforementioned Workforce Housing Incentive (Article 1307 within the Zoning Ordinance) offers different levels

¹⁶ Promoting Workforce Housing: Expanding Locations and Development Potential, Report Three, <http://www.montcopa.org/DocumentCenter/View/4121>.

¹⁷ *Ibid.*

¹⁸ Read, Justin C., JD, “Inclusionary Zoning: A Framework for Assessing the Advantages and Disadvantages Prepared for Homes for Working Families”, <http://community-wealth.org/sites/clone.community-wealth.org/files/downloads/report-read.pdf>.

¹⁹ Callies, David L., FAICP, “Mandatory Set-Asides As Land Development Conditions For Affordable/Workforce Housing”, ACREL1, <http://www.acrel.org/Documents/Seminars/Callies-Mandatory%20Set-Asides.pdf>.

²⁰ “Inclusionary and Mixed Income Communities”, Evidence Matters, Spring 2013, <http://www.huduser.org/portal/periodicals/em/spring13/highlight3.html>.

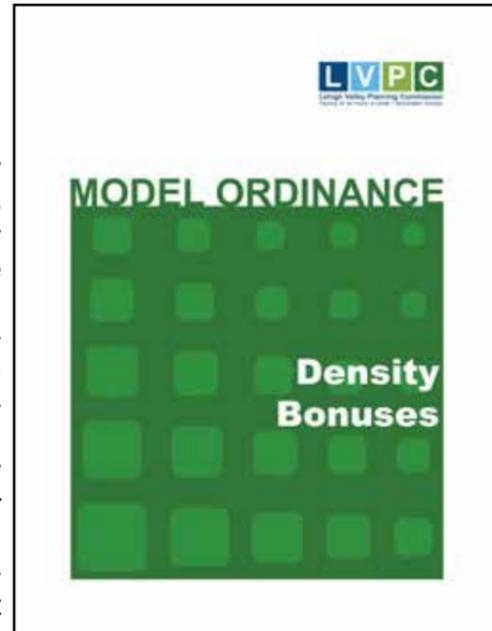
of density bonuses—as well as a maximum applicability of the density bonus—depending on the number of affordable dwelling units proposed in the development.²¹

The use of density bonuses must relate to the availability of municipal services. Among the key considerations is the existing 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*. Additionally, developments with atypically high density (generated through density bonuses) depend upon adequate road, bridge and transit networks—something typically absent from low density, rural areas. Furthermore, urban areas have greater resources to adapt to an increase in demand for community services (police and fire, among other things) without placing as much burden on the tax base. Thus, areas recommended for urban development in the *Comprehensive Plan* are generally more suitable for inclusionary zoning practices that depend heavily on density bonuses as incentives. It is critical to note that housing density's relation to municipal services and infrastructure transcends affordable housing; high-density developments have greater needs, regardless of the income of the population housed, and high-density developments tend to integrate better in urban environments, regardless of the incomes of the residents.

The LVPC report *Density Bonuses* 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.

While density bonuses are the most common and often most lucrative incentive, many other incentives are also available. 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.²²
- **Reduced infrastructure.** Municipalities could reduce infrastructure requirements associated with developments. That



²¹ City of Bethlehem Zoning Ordinance, https://www.bethlehem-pa.gov/ordinance/ZONING_ORDINANCE%204-09-2015.pdf.

²² Been, Vicki, "Impact Fees and Housing Affordability," *Cityscape: A Journal of Policy Development and Research*, Volume 8, Number 1, 2005, <http://www.huduser.org/periodicals/cityscape/vol8num1/ch4.pdf>.

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, so this tactic is less common.

- **Priority processing.** Expedited processing of the development application is a possible incentive in some locations across the country. The relevance of this incentive in Pennsylvania is unclear as the Municipalities Planning Code already protects a developer's right to a timely decision. In other words, 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 sources of public financing. 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. One potential drawback of this strategy is that the housing type could become inextricably associated with affordable housing, thus creating a stigma to that type of housing within the community. Addressing compatibility and distribution—explored more thoroughly in the next section—can help mitigate against this negative association.
- **Residential in nonresidential zoning districts.** This incentive would allow residential uses in a zoning district in which residential uses would not otherwise be allowed.
- **Nonresidential size bonus.** This incentive is a cousin to the density bonus. Instead of increasing the number of dwelling units allowed, the amount of nonresidential 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, thereby promoting mixtures of use in an affordable housing development.

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 throughout 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. Site planning and approval process can help determine a suitable distribution of the affordable 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. 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 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. During the pre-recession housing boom, many Lehigh Valley developments featured dwellings of 3,000 square feet or greater. 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

While most inclusionary zoning programs target the construction of owner-occupied dwelling units, 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. Enforcement would be vested in an 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 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). Low Income Housing Tax Credits are the primary incentive for the development of affordable rental housing. After applying through a competitive process and committing to a certain number of “set-aside” units available to households at 50% or 60% AMI, the successful developer will receive a federal tax credit equal to a percentage of the cost incurred in the development of low income units in a rental development.

A second means for creating rental units requires the developer to make a certain portion of the dwelling units available for sale to a housing-oriented community land trust, housing authority or other nonprofit 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 in ownership and affordable.

Long-Term Affordability

The creation of affordable housing through IZ resolves the needs of the selected households at that point in time. However, this does not permanently solve the problem. Future households will have their own need for affordable housing. Therefore, the IZ program must include a mechanism so that currently affordable units remain as a part of the solution in the future, without requiring constant new investment to offset escalating maintenance costs and values, which inevitably will rise over time, just like their market-rate counterparts. Accomplishing this objective is one of the more intricate components of the IZ program.

Establishing rules about the future sale of the property helps achieve long-term affordability. 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:

- 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, ranging from five years to 99 years.²³ The longer the period of control, the greater the affordability benefits. Limitations to the restriction period may reflect a concern that a program’s viability could change over time, as housing markets continue to evolve. 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 have been used.^{24 25} 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.²⁶ In judging which method of

²³ Business and Professional People for the Public Interest (BPI), “Keeping For-Sale Units Affordable Over Time: One Important Step in Administering a Successful Inclusionary Zoning Program”, <http://www.bpichicago.org/documents/KeepingFor-SaleUnitsAffordableOverTime10.26.04.pdf> .

²⁴ Read, “Inclusionary Zoning”.

²⁵ National Community Land Trust Network : PERMANENTLY AFFORDABLE HOUSING: Sector Chart & Glossary of Terms, <http://cltnetwork.org/wp-content/uploads/2015/01/Permanently-Affordable-Housing-Sector-Chart-Glossary-11-2014-design-update.pdf>.

²⁶ The Community Land Trust Report – Draft, <http://www.hud.gov/offices/cpd/about/conplan/foreclosure/pdf/austin-commtrust.pdf>.

control to use, a party should also recognize that any restriction will come to light during a proposed future property transfer and may affect the terms and conditions of that transfer.

The price of the dwelling unit upon resale and the distribution of the increased value are the lynchpins of the continuing affordability. The rules must remain fair to the party that is selling the dwelling unit and must provide affordable housing for subsequent parties that will occupy the dwelling unit. IZ programs are structured so that the original owners would not gain a windfall from the sale of the unit. Instead, the original and subsequent owners must sell under terms comparable to those which they purchased the unit.

Two primary components help maintain fairness to all participants: the price of the unit and the distribution of the amount that the values have increased. Hypothetically, 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, reflecting both the initial subsidy as well as the increase in value accrued by all units in the transaction. To prevent such a windfall, IZ programs require the administrative agency to set the selling price. The selling price could represent the increase in the Housing Price Index²⁷ 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 him or her the financial benefit enjoyed by market rate owners. The administrative agency or organization would use its 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 he or she 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 nonprofit organization, with the explicit purpose of expanding and retaining an inventory of low income housing. This right of first refusal is a required element of the deed for the affordable housing unit.

²⁷ 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. For more information on HPI visit the definition provided by the Federal Housing Finance Agency: <http://www.fhfa.gov/KeyTopics/Pages/House-Price-Index.aspx>.

Administrative Agency

IZ programs require initial and ongoing administration, which requires two key elements. First, in the event that the private developer lacks the knowledge, ability or capacity to administrate the affordable housing it has constructed, a municipality must choose an organization or agency to serve as the administrator. Secondly, the administrative organization or agency must explicitly define its duties with regards to affordable housing.

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

- Dealing with the builders and developers that need or choose to comply with the IZ;
- Marketing the affordable dwelling units;
- Overseeing the resale of units;
- Establishing prices and rents for the affordable units;
- Qualifying households eligible for the affordable units;
- Verifying incomes of applicants wishing to be qualified households;
- Monitoring the status of the program;
- Reporting on the status of the program to the parent entity or executive board;
- Selecting nonprofit organizations to participate in the IZ program;
- Acquiring and managing affordable dwelling units;
- Establishing and enforcing deed restrictions and other legal instruments.

The administrative agency can either be a governmental entity or a selected nonprofit organization. Several choices exist among governmental entities that deal with housing and community development issues. Please note that these organizations' current missions give them much greater capacity to administrate affordable rental housing than owner-occupied affordable units. These include:

- **Housing authorities.** Five housing authorities exist in the Lehigh Valley: Allentown, Bethlehem, Easton, Lehigh County and Northampton County.
- **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 nonprofit 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.
- The Lehigh Valley Community Land Trust provides affordable homeownership opportunities in Pennsylvania's Lehigh and Northampton counties. It is administered by the Community Action Committee of the Lehigh Valley. <http://lvclt.caclv.org/>.

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

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 and Costs

The hallmark of a successful IZ programs is strong political support. Montgomery County, Maryland's Moderately Priced Dwelling Unit (MPDU) program (the county's IZ program) is the oldest and has produced more affordable units than any other, all while going unchallenged in the courts since it began in 1974.²⁸

Support for programs such as the MPDU in Maryland must come from many groups: moderate income homebuyers, employers and businesses whose employees may depend upon 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, IZ programs also often encounter 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 have typically expressed objection to some of the regulations, particularly in municipalities just beginning the programs. Generally, however, IZ programs are a powerful rebuttal to those sectors of the population who do not feel municipal governments should be "getting into the housing business"—after all, compared to public or subsidized housing, IZ at its most effective results in substantive affordable housing gains with very little public sector involvement. The developers simply comply with the zoning laws in place.

As this Guide has explained, IZ programs can produce affordable housing while reducing or even minimizing public expense, but these units do not become affordable without some party to bear the cost. Who would this be? Most IZ programs reveal three groups: developers/builders, landowners and buyers of the market rate dwelling units in the developments that include affordable units.

Developers/builders 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, developers/builders 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 developers/builders at a lower value calibrated to the market rate without the density bonuses.^{29 30} Alternately, builders can seek to recover the subsidy amount by increasing the prices of the market rate dwelling units in the development. In this cross-subsidizing manner, the costs of the IZ program would be shifted from the builders to the market rate buyers.³¹ Such a strategy, however, is only likely to work in markets where demand is so strong and

²⁸ National Low Income Housing Coalition, "40 Years Ago: Montgomery County Pioneers Inclusionary Zoning", May 16, 2014, <http://nlihc.org/article/40-years-ago-montgomery-county-maryland-pioneers-inclusionary-zoning>.

²⁹ Powell, Benjamin and Stringham, Edward, "The Economics of Inclusionary Zoning Reclaimed: How Effective are Price Controls?" Florida State University Law Review Vol. 33:471, page 478.

³⁰ Bento, Antonio and Lowe, Scott. "Housing Market Effects of Inclusionary Zoning", *Cityscape: A Journal of Policy Development and Research*, Volume 11, Number 2, 2009.

³¹ Powell and Stringham.

elastic that the market rate buyers may voluntarily pay higher prices to live in the development. And the optimal way to maintain high demand among the market rate contingent is to pack the development with amenities (e.g., open space, shared community features, low cost or free utilities)—which again links strongly to potential incentives.

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,"³² such as density bonuses, fee waivers and expedited approval processes.

Regardless of the final method of managing the funding gap created through the provision of units well below the market rate, it is critical that the administrative agencies work with the developers well in advance in order to devise a financing scheme that will recover those costs. The solutions listed above are just a few among many possibilities, but the challenge is developing exactly the right financing package—one that will not only ensure that the benefits accrued through inclusionary zoning help to get the development off the ground, but one that articulates an administrative strategy that will ensure those housing units (rental or ownership) remain viable to low and moderate income families for years to come.

³² 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.
 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.
- 4) Provision of Affordable Dwelling Units

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 of which are affordable. The ordinance may include other incentives. A number of possible incentives are listed on pages 10 and 11. 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.

- 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%. 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-bedroom 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.
 - 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 7)a), minus an allowance for the monthly cost of utilities.

COMMENTARY

- 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.
 - 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 7)a), 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.
 1. Purchaser restriction. All resale transactions must be to qualified purchasers that have received a Certificate of Qualification from the Administrative Agency.
 2. 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, 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:
 1. The bedroom mix of affordable dwelling units shall be in equal proportion to the bedroom mix of the market rate dwelling units.
 2. 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.
 3. 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.

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.

- 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.

OTHER RESOURCES

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