



## Triangle J Council of Governments

### Report of the 2002-03 Inclusionary Zoning Task Force

#### **Introduction**

In response to a rapidly growing shortage of “workforce” housing near Triangle job centers, several of the region’s cities and counties began in 2001 to explore “inclusionary” zoning. “Inclusionary” provisions in development ordinances require -- or create powerful incentives for -- including moderately-priced dwellings in new residential developments. In 2001, these local governments joined forces with housing advocacy groups and proposed state legislation that would have authorized a comprehensive pilot program in the Triangle. At a hearing on the proposal, Senate Judiciary Committee members requested that these local governments instead invite stakeholders to try to design an inclusionary program that would increase the affordable housing stock for sale in new developments and be acceptable to local governments, builders, and landlords.

There is precedent for this approach. Inclusionary zoning programs in Montgomery County Maryland, and Arlington and Fairfax County, Virginia have added hundreds of affordable homes in job and transit centers. These effective programs have won the acceptance or support of local officials and developers, having solved many details of program design and administration. Over 150 communities across the country have implemented inclusionary programs.

So in 2002, the COG Center for affordable Living invited a broad range of stake holders to participate on an Inclusionary Zoning Task Force, and 37 regional leaders agreed to join.<sup>1</sup> The Center worked with the UNC Institute of Government to raise funds for researchers there and at the UNC Community Development Law Clinic to provide the Task Force with legal advice and to publish a guide to designing inclusionary zoning programs for NC local governments. With support for the Task Force from the Z. Smith Reynolds Foundation, and for the Institute of Government guide through Triangle Community Foundation, from Emma’s Fund, and the E. and E. Chanlett Fund, the project began in October.

---

<sup>1</sup> See *List of Task Force Members* and *Triangle Task Force Meeting Topics*. Seven advocates, seven housing industry professionals, three expert consultants, three school officials, seven planners, five local elected officials, and five community development administrators served on the Task Force. They came from six municipalities and four counties.

The Task Force met seven times, and reported its findings and recommendations in May 2003. The Institute of Government guide is due for publication in summer 2003. This report summarizes each meeting. Documents produced for and by the Task Force, and references the Task Force consulted, are listed at [www.tjcog.org/housing/inclus/resources.htm](http://www.tjcog.org/housing/inclus/resources.htm).<sup>2</sup>

### **First Meeting - October 18**

Task Force members articulated their interests in this process and its outcome. They began to explore the Montgomery County inclusionary zoning model.<sup>3</sup> Finally the task force members listed their questions and concerns. This list is reflected in the ***Charge to the Task Force***.

The Task Force agreed to compile a list of legal questions by December, to discuss them with the legal team in January, complete its work in February, and receive the Institute of Government guide in April.<sup>4</sup> The program research will focus on the experience of a number of successful, locally-initiated inclusionary zoning programs in states where there are no state-initiated programs.

Questions surfaced in three more categories: Housing Market Economics, Experience, and Connections, for example:

#### Housing Market Economics

- Can inclusionary programs work in large and small developments?
- What is the current demand for and supply of affordable housing in the Triangle?
- Is there demand for compact developments near jobs as well as for homes on large lots with long commutes?
- Will subsidies for development be available to non-profit and for-profit developers?
- How will neighboring property values be affected?

#### Experience

- What inclusionary programs have succeeded in other communities and how do these communities compare to the Triangle?

---

<sup>2</sup> All the documents referred to in this report with titles in bold font are listed and linked in this **List of Resources on Inclusionary Zoning**.

<sup>3</sup> See **Introduction to Inclusionary Zoning – The Montgomery County Maryland Approach**, and “Including Moderately-Priced Dwellings: A Win-Win Program,” a video presentation by the President of the Washington Metro Builders Council; copies available at TJCOC; contact Audrey Thorngren, athorngren@tjcog.org, 919/549-0551.

<sup>4</sup> In April, Project Director Anita Brown-Graham informed the COG in April that the release of the IOG Guide will take place in September, 2003.

## Connections

- How can inclusionary housing fit in rural communities?
- How can affordable housing be built in transit service areas?
- What are the costs and benefits of inclusionary housing?

## **November 8**

Task Force members reviewed and fine-tuned **Concepts and Terms: Inclusionary Zoning** and **Working Definitions: Housing Affordability**.

The Task Force then discussed the Metropolitan Washington, D.C. experiences with inclusionary zoning, to explore why such similar ordinances had such different outcomes when applied even within one metro region.<sup>5</sup>

They viewed images of inclusionary housing architectural styles and compatibility in metro DC.<sup>6</sup>

Having read an article about defining “interests,” as opposed to “positions,”<sup>7</sup> the group divided into stakeholder groups to define their interests and reported them, in an exercise designed to develop **Options for Mutual Gain** between local governments, low-income housing advocates, home builder industry reps, and nonprofit housing developers.

## Montgomery County Overview

- All subdivisions of 50 homes or more must include 12.5 to 15 percent affordable dwellings.
- The program is required for subdivisions with water and sewer and with lots of a half acre or less, but not in rural areas.
- Prices are restricted for 10 years for sales and 20 years for rentals.
- Density bonuses of up to 22 percent of underlying zoning are awarded.
- The Montgomery County housing commission has the right to purchase 33 percent of new moderately priced dwellings to rent to low-income households.
- Attached housing is allowed in single family zoning districts.

The Task Force divided into three groups, each with a variety of stakeholders, to address the three questions below. After brainstorming, members voted on the ideas that they recommended for deserved further Task Force exploration. The ideas with the majority of votes follow. These “**Options for Mutual Gain**” will

---

<sup>5</sup> See **Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area**, by Karen Destorel Brown: Brookings Institution, 2001. You can find it on the web at:

<http://www.brookings.org/dybdocroot/es/urban/issues/housing/affordablepublic.htm>

<sup>6</sup> See **Inclusionary Design – Housing in Montgomery County**.

<sup>7</sup> "Don't Bargain Over Positions" and "Focus on Interests, Not Positions", in *Getting to Yes*, by Roger Fisher and William Ury, 1991, Penguin Books.

form a focus of program research, and discussion about applicability in the Triangle.

*Developers: What could local governments do to make inclusionary programs workable?*

- Voluntary programs with incentives, including high density
- Flexible zoning and permit process that encourages duplexes that look like single family homes and allows the mixing of single and multi-family residences.
- Focus on areas with access to public transportation to increase buying power.
- Allow for payments in lieu.

*Local Governments – What could local governments do to encourage developers to include affordable housing in new developments?*

- Create economic incentives (i.e. low-interest loans, grants, infrastructure, fee waivers, and property tax abatements).
- Expedited review process.
- Encourage mixed-use developments.

*Local Governments – How to make higher density and lower price homes acceptable to neighbors and community at large?*

- Education or “social marketing.” Promote mixed income communities as desirable places to live and characterize residents as good neighbors.

## **November 22**

The Task Force discussed several of high priority issues identified earlier.

### Thresholds for Inclusionary Requirements

Montgomery and Fairfax Counties require that developments of over 50 dwellings include affordable homes. For example on a site with a base zoning that allows 50 homes, the developer could build up to 60, and 6 would be price-restricted. Developers there report that this threshold is usually feasible to lay out, given site constraints, and profitable.

The Task Force therefore considered the size of **Residential Developments Approved** in a sample of Triangle region zoning jurisdictions. While less than 30 percent of developments in this sample had more than 50 units, these larger developments accounted for over 85 percent of all the dwellings approved.<sup>8</sup>

In 2001, in the reporting jurisdictions 11,491 homes were added in developments of over 50. If 10 percent more had been built and sold or rented at a price

---

<sup>8</sup> Durham, Cary, and Carrboro did not report for this analysis, and we do not have figures for any Wake County municipalities except Raleigh. It is likely that more than 85% of new homes in Durham, Cary, other Western Wake municipalities were approved in developments larger than 50.

affordable to households with 50% of the area median income, there would have been 1,149 affordable homes added to the region's stock. By comparison, in 2000, in these same jurisdictions, but also including all the municipalities in Wake County, only 47 new homes sold for under \$80,000, and 1,806 sold for \$80,000 - \$130,000.

### Valuable Incentives

Could a density bonus compensate Triangle developers for the reduced profitability of moderately priced homes? At what level do density bonuses become an effective incentive?

In theory, if:

- the density bonus covers all the price restricted homes, so the developer can build all the permitted large homes plus the price restricted ones, and
- the builder can at least cover the costs of the price-restricted home through sale (or rent), and
- the prices for market sale (or rent) homes are not diminished because of the smaller lots, as a portion of the total site is used for the moderately-priced homes, then

the density bonus would fully compensate the developer. Profits would be the same or more. If the market homes on smaller lots would sell for less, the density bonus would need to allow for adding market rate homes in addition to price restricted homes to fully compensate. The key question is whether given other regulatory constraints, the developer can actually take advantage of that density bonus. (See December 13 and February 14 meetings for more on this issue.)

In Montgomery County, the exact proportions of the density bonus for each development are determined at site approval, taking into account site constraints, project design, and market conditions.

Can an entry-level home be built in the Triangle at an affordable price if the cost of the land is subtracted because it is "given" to the developer in the density bonus? Builders on the Task Force provided a rough estimate of the costs for a 1,460 square foot detached single family house in a 5,000 square foot lot.<sup>9</sup> At about \$141,000, minus about \$20,500 for land, the cost would be \$120,500, affordable for a household with an income of about 60-70% of area median. In areas with higher priced land, to build a house for this price would require smaller lots, or attached designs. The Task Force concluded that a density bonus similar to Montgomery County's would enable Triangle builders to sell homes within the target range.

What would be the impact of reimbursing development fees? The Task Force learned that the variation among Triangle jurisdictions in the cost of development fees for new homes is substantial, from less than \$2,000 in a county with no

---

<sup>9</sup> See ***Builders' Estimate of Construction Costs***. This is a rough generic estimate, the land and development fees vary significantly according to location within the region.

water and wastewater systems, to nearly \$7,000 in communities where new homes pay for new space they require in schools, roads, open space, and parks, as well as for water and wastewater treatment. For every \$5,000 in added price, the buyer's income requirement increases by about \$100 a month.<sup>10</sup>

### What is the Scale of the Affordability Gap in the Triangle?

Might an inclusionary program require more entry-level homes than the market would buy? The Task Force considered a staff analysis of market demand and supply for low-income homebuyers in the region.<sup>11</sup> This report states that there is a growing shortage of affordable homes to buy because home prices have risen much faster than incomes. With 50 percent of the 2000 HUD-estimated area family median income (AFMI), a household could afford an \$80,000 home. With 80 percent of the 2000 AFMI, they could afford \$130,000. About 8,800 of the region's new homes were affordable to households with incomes below 80 percent of AMFI. In 2000, about 25,000 potential low-income buyers rented instead, creating a supply gap of 17,234 units in the region.

Here are some figures for sales in 2000 from this report:

Total new homes sold in the Triangle	10,828
New homes sold for less than \$130,000	2,775
If 85% of new homes are in large developments	9,200
10% of the large developments	920
15% of large developments	1,380

So even if every jurisdiction in the region required ten percent of new homes in large developments for sale to be moderately priced, we would expect at most an additional 900 entry level homes yearly.<sup>12</sup> Thus this strategy would meet only a small fraction of the demand. However it is also important to consider that more than 65% of new homes sold for under \$130,000 were located in eastern Wake and Johnston County, far from jobs and most existing services and facilities. By contrast, most of the inclusionary homes would have been located closer to jobs and where the public capacity for serving new development is greater.

Task Force members wondered if an inclusionary requirement might exempt developments already priced at entry level or near entry level, to encourage construction of these developments. There is a precedent for this approach in Santa Fe, where only very high-priced developments are required to include more affordable homes.

---

<sup>10</sup> (If amortized for 30 years at 6% interest.)

<sup>11</sup> See Section 4: Home Ownership Opportunities, in *Housing Opportunity in the Triangle*, TJCOCG Center for Affordable Living, 2003. [www.tjcog.org/](http://www.tjcog.org/)

<sup>12</sup> The number would be somewhat lower than 10% of the total because some entry-level homes are built now in these developments.

## What has been the experience in Chapel Hill with inclusionary policies?

Chapel Hill's zoning procedures are unique in the region. Each application for rezoning includes a special use permit and detailed plans for the proposal that are considered at the same time as the rezoning. Thus the legislative decision on the zoning is combined with site plan approval.

Chapel Hill's comprehensive plan calls for a proportion of new housing to be priced at affordable levels. One of the findings required for Town Council approval of a rezoning is that it complies with the comprehensive plan. The Chapel Hill development ordinance calls for including some small dwellings in new developments, and the Council encourages developers to price them affordably. Rezoning procedures incorporate offers from developers to build affordable housing, make payments in lieu, or provide land for affordable housing. Two recent examples follow:

- A mixed-use development of 42 multi-family dwellings plus non-residential space on Rosemary Street allotted 6 dwellings (15 percent) for families earning 80 percent or less of the area median family income.
- A 64-condominium development in Meadowmont will include 16 condos that are either in the Land Trust or contain deed restrictions ensuring affordability for buyers earning 76 to 100 percent of the median family income.<sup>13</sup>

### **December 13**

In the first part of the meeting, Task Force discussion focused pointedly on the feasibility of delivering density bonuses. Home builders explained that often they couldn't even build the currently allowed density because of required minimum lot and frontage dimensions, and the politics, topography, trees and geometry of sites. To respond to neighbors' opposition to rezoning, developers often add expensive amenities or features. Task Force members agreed that "There are justified regulations that help protect the health, safety and welfare of the public, and excessive regulations that are wasteful and unnecessary. There is a reasonable approval process, and there can be unnecessary costs and delays." They agreed that at the next meeting they would focus on existing regulatory and procedural barriers to building more compact developments.<sup>14</sup>

Task Force members agreed that a density bonus alone would not work as an incentive for inclusion of moderately priced housing. There is considerable public opposition to higher density development, particularly if there is an "affordable housing" component. We must overcome the prevalent assumption that higher density and lower cost housing will look bad and reduce surrounding property values. One elected official proposed setting a base density and leaving the rest of the subdivision layout up to the applicant. A homebuilder suggested that an

---

<sup>13</sup> See handout ***Affordable Housing Provided and Payments-in-lieu of Affordable Housing In Chapel Hill.***

<sup>14</sup> Thanks to *Red Tape and Housing Costs – How Regulation Affects New Residential Development* by Michael Luger and Kenneth Temkin, Rutgers, 2000.

inclusionary ordinance would need to allow a mix of attached and detached housing.

The Task Force crystallized its quest: How can we protect the public interest in environmentally sustainable, attractive, well-served development while:

- Minimizing site regulations to allow for increased density?
- Creating predictable standards for development and an administratively manageable process for approvals?
- Gaining support from neighboring residents for higher density?
- Compensating developers for including low-priced homes?

Political opposition is a large obstacle to inclusionary zoning. One Task Force member noted that in Massachusetts and New Jersey, state law encourages local governments to approve subsidized housing, even in the face of opposition from local constituents. Local governments can only deny proposals for subsidized housing when it is a threat to public health or safety. The Massachusetts law requires “one-stop” expedited permitting with 40 days for public hearing and 40 days for a decision. If a municipality misses these deadlines, the development is automatically approved. What can NC local governments do through plans and development ordinances to create viable, deliverable opportunities for denser development with inclusionary housing and for subsidized housing in desirable locations?

Establishing an inclusionary program will require extensive marketing. Its proponents must sell this idea to developers and elected officials. Both groups assume now that they have much to lose. In order to “sell” this idea, we need to show what compact housing would look like, and the alternative impacts of compact versus low density development as we accommodate continued rapid growth. This marketing cannot come from the affordable housing community alone. It must come from developers, who would agree to support more affordable housing if some stringent development standards were relaxed.

In the second part of the meeting, the Task Force defined terms and concepts<sup>15</sup>, as a background for finalizing a list of research requests for the Institute of Government team to explore. This document distinguishes inclusionary land use zoning, and associated policies that may or may not be part of a zoning approach, such incentives, adequate public facility policies, conditional approvals and exactions or fees.

They then reviewed a list of questions arising during this and earlier meetings. Program questions included:

- Would inclusionary zoning apply in low-income areas that have high concentrations of subsidized or substandard housing?
- Montgomery County reserves the right for housing authorities to purchase a proportion of the moderately priced dwellings. What is the housing authority tenants’ experience?

---

<sup>15</sup> See: ***Task Force Terms and Concepts***.



- How do effective programs discourage applicants from submitting subdivisions one or two below the threshold to avoid inclusionary (or other) requirements of large developments?

The Task Force agreed to send the list of questions<sup>16</sup> to the UNC research team, and devote the January meeting to hearing about their research in progress.

## January 16

The UNC legal team presented its work in progress. UNC Community Development Law Clinic students Will Corbett and Travis Hill, and Professor Thomas Kelley presented an outline of laws and cases that govern the implementation of inclusionary zoning in North Carolina.<sup>17</sup> Anita Brown-Graham and David Owens commented and responded to Task Force questions.

They advised that NC statues authorize local governments to implement carefully drafted inclusionary zoning, with the caveat that if an ordinance is challenged, there is a risk that the courts will not agree. They recommended that new inclusionary zoning ordinances take into account their forthcoming recommendations, for example:

1. Demonstrate a solid link between the impact of new high priced housing developments and the provision of affordable housing. Show how affordable housing in new developments contributes to the community's welfare. Adopt reports making these findings.
2. Defend the feasibility and rationale of the threshold standard.
3. Make sure the developer can actually build the density bonus, or use other incentives that are part of the compensation / feasibility equation.
4. Tie the reasonable, rational inclusionary requirement to the comprehensive plan.
5. Don't impose a mandatory tax or fee; treat inclusionary zoning as a land use regulation.
6. Take into account the statutory restrictions on local governments regarding regulating rents.

Members discussed pros and cons of trying again to get specific authorizing legislation so local governments could act with more certainty based on untested state law, and include rent as well as sales price restrictions. This strategy could be considered in 2005.

The Institute of Government legal team plans to continue its research and ask a number of practicing attorneys for review. Their forthcoming guide for local governments will include the legal background as well as profiles of seven locally initiated inclusionary zoning programs.

---

<sup>16</sup> See *Questions for the UNC Researcher Team*.

<sup>17</sup> See *Inclusionary Zoning – Legal issues in NC*.

## February 14, 2003

At this meeting, the Task Force focused on development standards and residential density. Durham Landscape Architect Dan Jewell provided technical advice.

First the Task Force noted the remarkable differences in the development approval process among the region's jurisdictions. Cary, Raleigh, Chapel Hill and Durham processes were presented, with a focus on what is required for approval of a large development with clustered and attached housing.

For example, City Council approval is required to subdivide 4 lots in Chapel Hill, 50 lots in Durham, and not at all in Raleigh. Clustered housing development requires a minimum of 4 acres in Durham, 10 or 20 acres (depending on zoning) or an overlay zoning and master plan in Raleigh, and an overlay zoning / master plan in Cary. Cary and Durham process most rezoning applications in less than six months; it usually takes much longer in Chapel Hill.

Development ordinances are now being overhauled in Durham, Chapel Hill, Chatham County and Cary. **This suggests a timely opportunity for embedding inclusionary polices in a supportive and compatible overall framework.** The new ordinances also promote consideration of some new tools that could help plan for and accommodate more compact development in suitable areas.<sup>18</sup>

Then the Task Force discussed the barriers posed by existing development ordinances to building compact residential developments. Their aim was to explore what standards or procedures might need to change in order to include moderately-priced homes in new developments.

First the group narrowed its focus to areas where compact development is planned – inside urban growth boundaries and outside areas were watershed protection and natural site constraints – slopes, soils, streams, wetlands limit development. Task Force member to explored:

- A. What are impediments to accommodating 10-20% more density without multiplying development costs?
- B. What are examples of provisions that would accommodate 10-20% more density?
- C. What are your recommendations to address barriers?

---

<sup>18</sup> For example, Durham's consultants propose suburban "ghost plats" in subdivisions to lay out space for future development expected when sewer service is extended. Chatham County is developing a rural compact development option for developments that are large enough to build private wastewater treatment systems.

The Task force considered:

- Zoning categories and standards
- Minimum lots, setbacks, buffers and frontage,
- Clustering regulations, and flexibility in large master planned developments
- Constraints on the amount of vacant land zoned for flexible and/or high density
- Design requirements
- Amenity / facility requirements
- Impact fees and public facility constraints
- Development approval processes – time and number of reviews
- Predictability of standards, review criteria / flexibility

The Task Force compiled a list of recommendations for local governments seeking to include affordable housing in more compact developments.<sup>19</sup>

Many housing developers say they could include moderately priced housing if suitable land were zoned for adequate density, with the flexibility in site and housing design standards to accommodate the desired density, and if approvals were more predictable. However, many home builders and realtors continue to oppose to a standard, streamlined, predictable requirement for moderately priced homes. This leaves local governments with a dilemma. Should they set a standard that applies broadly, uniformly, and predictably, whether a rezoning is required or not? Or should they negotiate inclusionary housing as a condition of each rezoning or other legislative permit, in a far less predictable, but more flexible process? Negotiations over each rezoning add expensive time, uncertainty, and, often neighborhood opposition.

There is probably no one best answer for every community. Some home builders will oppose either approach. Either approach can be productive. Importantly, we now have a wealth of documented experience from communities around the country to show how to develop workable programs.

## February 28 – TASK FORCE CONCLUSIONS

The Task Force concluded:

1. There is a **large and rapidly growing need** to increase the stock of affordable housing in new developments, especially near jobs and transit service.
2. The housing markets, development patterns, plans and development approval history, process and standards of Triangle local governments are so distinctive that there **is no “model ordinance” or one approach** to inclusionary zoning that would meet the needs of the whole region. Inclusionary standards

---

<sup>19</sup> See *Recommendations: Incentives for Low-Income Housing in New Developments*.

need to fit into the local political and planning framework. There is no substitute for a thorough and inclusive local process to create an effective program.

3. Triangle regional collaboration can inform, streamline, and assist local efforts,, and **this process has generated a wealth of information and resources** for ordinance development, from market and needs analysis to implementation details and models.<sup>20</sup>

4. Compact development with **inclusionary zoning can meet a significant but small share** of the need for “workforce” housing. **But** in urban areas near jobs, direct **financial subsidies are required to adequately house families with incomes lower than about 40%-50% of the median.**

5. In North Carolina, most programs will not be able to enforce rent restrictions, so inclusionary policies **cannot be used** broadly or directly **to expand affordable rental housing.**

6. **Many developers would be willing to incorporate moderately priced homes for sale in new developments if:**

- a. The developments are large enough to have a mix of housing types;
- b. No minimum lot size or frontage requirements apply, and attached housing is allowed.
- c. Political support for permitting the compact and affordable homes is assured.
- d. Implementation of the tenant / buyer eligibility standards is streamlined and flexible enough to respond to market conditions.
- e. The added density is substantial enough to compensate for all the developers costs, and can be delivered reliably, without being compromised for other development standards.

7. The **aesthetic and functional design** of the site, streets/ parking, and buildings **is a paramount consideration** in building compact developments. The Task Force discussed tradeoffs between flexibility and predictability – developers want both! They recommended that local governments make the designation of areas where compact development is wanted, and the building standards for those areas, predictable. (For examples, Cary’s comprehensive plan and Raleigh’s urban design guidelines) When it comes to site design, offer prescriptive minimum standards so any developer can follow them, *and* performance based standards with more flexibility for developers who want to invest in innovative, site sensitive, or distinctive design.

---

<sup>20</sup> For example, a sample ordinance for California local governments is recommended in *The California Inclusionary Housing Reader*, edited by Bill Higgins, Sacramento: Institute for Local Self-Government, 2003. Order at [www.ilsg.org](http://www.ilsg.org).

The Task Force Recommendations reflect a consensus of the members.<sup>21</sup> It is important to consider these recommendations as a package.

### **May 21, 2003**

At its final meeting, the Task Force received a report on forthcoming Guide from the Institute of Government. Researcher Hunter Schofield presented **Profiles of Eight Local Inclusionary Zoning Programs** (in Chapel Hill and Davidson, NC; Montgomery County, Md.; Fairfax County, Va.; Burlington, Vermont; Santa Fe, NM, and Longmont and Boulder, Colorado.) Law professors Anita Brown-Graham, and Thomas Kelly, summarized **Advice for Local Governments Implementing Inclusionary Zoning Programs in NC** (2 pages).

### **Recommendations from the Task Force Coordinator**

While our Task Force reflected a broad range of perspectives, we agreed overwhelmingly, perhaps unanimously, on the conclusions and recommendations above. I hope every local government in the Triangle will consider them as the work of a diverse group of generous and expert stakeholders who share local governments' interest in expanding "workforce" housing opportunities.

Attorneys from the UNC Law School, the Institute of Government, the NC Justice Center and the region's local governments have also provided valuable advice summarized here. We hope this will assist local governments as you amend your development regulations, area and comprehensive plans, and development review procedures.

Having spent a good portion of the past three years learning about inclusionary zoning and Triangle housing dynamics and regulations, I would offer six additional recommendations to local governments as you seek to expand the Triangle's stock of affordable housing in all large new developments.

1. Let's **incorporate affordable housing goals and requirements in all our plans**. Let's put a measurable goal and a minimum requirement for housing, and for affordable housing, in all our comprehensive plans, downtown plans, transit station areas, and mixed-use zones, as well as in development ordinances for new residential developments.

2. In the districts where local governments plan to build compact and some affordable housing, **the inclusionary requirement must apply uniformly to every similar development. It cannot be optional**. The reason we need uniform application is not because developers would not otherwise choose to

---

<sup>21</sup> See **Triangle Inclusionary Zoning Task Force Recommendations**, February 28, 2003. (Not all members of the task force were present. The group present did represent the all the categories of stakeholders, but local planners were underrepresented.)

build the lower priced dwellings. It is because they CANNOT otherwise build the lower priced dwellings. There are two main reasons why:

The first reason is neighborhood opposition. Here in the Triangle, it is becoming increasingly true that affordable housing near jobs must be attached housing. Nearly every proposal for “increased density” generates vocal, organized opposition from neighbors. Add lower priced dwellings and the proposal attracts even more animosity. Local governments cannot expect even the most sympathetic developer to propose affordable, compact development that local elected officials will not, in the end, support.

The second is many homebuyers’ preference for exclusivity. Local governments cannot expect even the most sympathetic developer to risk slower sales of high priced homes in a mixed-income development when local policies allow an “exclusive” development to take place across the road. If the whole community has a uniform requirement for mixed income developments, similarly situated developments in terms of proximity to jobs, school districts, and other amenities compete on a level playing field, each one building its share of moderately-priced homes.

We need to encourage strong neighborhood participation in making plans and development ordinances. Through the process of developing these tools, the community can take into account the need for a mix of housing types and prices in each development, and prescribe design, development, and community facility standards that make compact housing desirable. Then we need to zone suitable land for these compact developments so that as neighbors invest nearby, they know in advance what will develop, and developers know in advance what they can build.

3. In Montgomery and Fairfax Counties, where all large developments include a mix of housing types and costs, **the impact on the value of even the homes next door to the price restricted homes is imperceptible.** Neighbors of mixed income communities – as well as homebuyers *in* mixed income developments - have nothing to fear so long as the design of the development is compatible and rental complexes well managed.<sup>22</sup> Local planners and elected officials can **publicize this large and consistent body of research**, so the community can focus instead on design quality and property maintenance programs.

4. **We have looked far and wide for three years and have not found a single local “voluntary” or “optional” density bonus or other incentive program for affordable housing that generated any significant construction of affordable housing by otherwise unsubsidized builders.** Even large density

---

<sup>22</sup> We have reviewed dozens of research reports on property value changes in areas surrounding new low-income housing and have found only rare exceptions to the experience in the DC metro area, even when low-income housing is not integrated in the development, and when it is heavily subsidized.

bonuses, far larger than 25%, have demonstrated little appeal to market builders. (As we have seen in Massachusetts and other states, these ordinances can and often do significantly increase production by *subsidized* developers, so they should certainly be used for that segment of the housing market.)

Why? Probably mostly because of the considerations cited above, and sometimes because the bonus cannot in fact be built out due to other restrictions or constraints. The only cases we have seen a voluntary density bonus used extensively by unsubsidized builders is when other development regulations or approval procedures make the moderately-priced housing, in effect, required for any development approval. One notable exception is the rare community where a solid political consensus supporting inclusion persists over the years and comes to be the unquestioned, if informal, expectation. This expectation can be more powerful than a density bonus. Another exception is when affordable housing is a requirement for any rezoning that adds density – it is technically voluntary in that no one is forced to request rezoning, but it is required for all but very low density uses. Otherwise, voluntary density bonuses have been ignored. A community will not get mixed-income developments by simply adding or strengthening a density bonus and hoping that rational market developers will propose affordable housing.

**5. Land use strategies alone cannot provide housing for very low income households – and this is by far the largest segment of need.** We also need to incorporate space for affordable housing in every compatible new public facility, and subsidies for affordable housing in every capital facility program. We especially need to reserve increasingly scarce suitable land. Let's buy land near these public destinations that can be used – immediately or eventually – for housing. Our region is making strides in preserving land for open space, and reserving land for roads we plan for the future, but we lag far behind in capturing similar opportunities for affordable housing.

**6. North Carolina statutes need to be amended.** NCGS § 42.14.1 curtails the authority of local governments to make or enforce policies that restrict market rents except when: (1) regulating city- or county-owned property; (2) negotiating rent controls with private owners of subsidized housing; and (3) restricting rents in CDBG-assisted projects. I hope that local governments in NC will join forces to amend this statute to allow for rental housing developments in inclusionary programs, allowing landlords to take advantage of development incentives and in return provide lower rents for some of the apartments.

In the mean time, I hope the regional investments of the past three years in exploring inclusionary zoning leave Triangle local governments in a strong position to develop inclusionary programs in three steps:

A. Follow the guides from legal advisors to develop an inclusionary program that will be difficult to effectively challenge in court.

B. Use the case studies and study local market and regulatory dynamics to make sure the program will actually deliver a substantial amount of housing in the most desirable locations, and that compact development is desirable. This will build community support and thus reduce opposition.

C. The conclusions and proceedings of the Regional Task Force give strong indications that developers are looking for predictability, flexibility, streamlined approvals. They will build compact housing developments and a mix of housing types if they are persistently and consistently encouraged to do so. But local ordinances must allow design flexibility for compact development, and the regulatory framework and political decisions must predictably approve the development if it meets the established standards. Include stakeholders in developing a uniform program.

The Task Force and its legal advisors cannot promise that no one will challenge an inclusionary ordinance, or that any ordinance, no matter how well designed and politically popular, would survive a challenge. But both developers and opponents of growth have better things to do than sue the city. If local political leaders lead on this issue, they will find reasonable negotiating partners. Local governments in NC can negotiate effective inclusionary programs that will truly be a win-win for all the stakeholders, and will give no one motivation to sue.

We offer this work to you, the region's leaders, and hope you will find it a powerful stimulus to innovate and invest in using our planning tools to expand affordable housing, especially in job centers and areas with access to public transportation.



## Inclusionary Zoning Ordinance Components of Seven Locally Initiated Programs

Inclusionary Program & Date Enacted	Affordable Units Built or Approved	Threshold for Affordable Units	Applicable areas in jurisdiction	Affordable Set-Aside Requirement	Control Period	Alternatives to Satisfy Affordable Requirements			Density Bonus	Additional Development Incentives
						Fee In-Lieu	Units Built Off-Site	Land Donation		
<i>Boulder, CO 2000</i>	150	No threshold <sup>1</sup>	All	20%	Permanent	Yes	Yes for rental units	Yes	None	Fee waivers Waiver of growth cap <sup>2</sup>
<i>Burlington, VT 1990</i>	120+	5 units	All	15-25% <sup>3</sup>	99 years	Discretion of program <sup>4</sup>	Yes at 125% of requirement	No	15-25%	Fee waivers Density & lot coverage bonus
<i>Davidson, NC 2001</i>	138	No threshold <sup>5</sup>	Not in low-density districts	12.5%	30 years	Extreme cases <sup>6</sup>	No	No	Yes <sup>7</sup>	No
<i>Fairfax County, VA 1990</i>	2,341	50 units	High density areas with sewer	12.5% for sale <sup>8</sup> 6.5% rental	For sale 15 yrs. Rental 20 yrs.	Extreme cases	No	Extreme cases	10-20%	Flexible development standards
<i>Longmont, CO 1995</i>	623	5 units <sup>9</sup>	All	10%	For sale 10 yrs. Rental 20 yrs.	Yes <sup>10</sup>	Yes, case by case	Yes, case by case	None by right <sup>11</sup>	Fast track Fee waiver Flexible dev.
<i>Montgomery County, MD, 1974</i>	13,000+	35 units	High density areas with sewer	12.5-15%	For sale 10 yrs. Rental 20 yrs.	Extreme cases	Extreme cases <sup>12</sup>	Extreme cases	Up to 22%	Fee waivers Flexible design
<i>Santa Fe, NM 1998</i>	410	No threshold <sup>13</sup>	All	11-16%	30 years	Extreme cases	No	No	11-16% up to 50% <sup>14</sup>	Fast track Fee waivers Flexible dev.

<sup>1</sup> All private housing developments of five or more units must construct affordable units. Four units or less can contribute to the housing fund, provide one affordable unit or donate land.

<sup>2</sup> Projects containing 35% or more affordable housing are exempted from growth caps.

<sup>3</sup> Indexed to average price of market-rate units. Higher priced market-rate developments must have greater percentage of affordable units.

<sup>4</sup> At the sole discretion of the Development Review Board, the can be met by the developer's designee off-site

<sup>5</sup> All private housing developments of eight or more units must construct affordable units. Seven units or less can contribute to the housing fund.

<sup>6</sup> Extreme cases typically are environmental constraints on a parcel of land that prevent the inclusion of affordable units or use of density bonus.

<sup>7</sup> Affordable units are not counted when calculating the total density of the development – acts as quasi density bonus.

<sup>8</sup> This is the maximum set-aside requirement. The set-aside can be less depending on the amount of density bonus used.

<sup>9</sup> No threshold for projects in annexed areas.

<sup>10</sup> Longmont is unique in having a fee in-lieu contribution requirement that equals the full cost of constructing an affordable unit.

<sup>11</sup> Up to 20% by request. Determination must consider # of affordable units offered, duration of control period offered, demand for market-rate units, and project design.

<sup>12</sup> Project must produce more affordable units or decrease the cost of affordable units provided.

<sup>13</sup> Any subdivision of land has affordable housing obligation. Projects with 6 or more units (multi-family) or over 15,000 sq.ft. have an obligation to provide affordable units.

## Inclusionary Zoning Ordinance Components (Continued)

Inclusionary Program	Design & Construction Standards	Right of First Refusal			Targeted Income Groups		Flexible Design	Administrative Agency	Marketing	Formal Evaluation Process
		After Construction	During Control Period	End of Control Period	For Sale	Rental				
<i>Boulder, CO 2000</i>	Yes	N/A <sup>15</sup>	N/A	N/A	≤90 % AMI <sup>16</sup>	≤50% AMI	Yes	Local Government	Developer	Yes <sup>17</sup>
<i>Burlington, VT 1990</i>	Yes	Yes	Yes	No	≤ 75% AMI <sup>18</sup>	≤65 AMI	No	Local Gov. & Nonprofit	Local Gov. & Nonprofit	Yes
<i>Davidson, NC 2001</i>	No	No	No	No	≤50-80% AMI <sup>19</sup>	≤50-80% AMI	No	Nonprofit & Developer	Nonprofit & Developer	No
<i>Fairfax County, VA. 1990</i>	Yes	Yes	Yes	No <sup>20</sup>	≤ 70% MSA <sup>21</sup>	≤70% MSA <sup>22</sup>	Yes	Local Government	Local Government	No
<i>Longmont, CO 1995</i>	Yes	Yes	Yes	No	≤ 80% AMI	≤50% AMI	No	Local Government	Local Gov. & Developer	No <sup>23</sup>
<i>Montgomery County MD. 1974</i>	Yes	Yes	Yes	Yes	≤ 65% AMI	≤65% AMI	Yes	Local Government	Local Government	No
<i>Santa Fe, NM 1998</i>	Yes	Yes	Yes	Yes	≤ 50-79% AMI	≤ 50-79% AMI	Yes	Local Gov. & Nonprofit	Local Gov. & Nonprofit	No

<sup>14</sup> A one affordable unit to one market-rate unit match up to 50% above the underlying zoning is allowed. This is available to rental projects at the discretion of the City.

<sup>15</sup> Since Boulders affordable units are permanently price restricted there is no need for this component.

<sup>16</sup> Area Median Income

<sup>17</sup> The latest version of Boulders inclusionary zoning ordinance calls the City Manager to prepare a formal report and evaluation of the Program to Council by July 1, 2002

<sup>18</sup> Both Burlington and Santa Fe allow for some affordable units to be sold to individuals with higher incomes as long as average of all affordable units equals target income

<sup>19</sup> 30% of affordable units must be price for households at ≤50% AMI; 70% of affordable units must be priced for households at ≤80% AMI.

<sup>20</sup> Fairfax, Longmont and Montgomery have provisions to capture a percentage of profits from the first sale after control period ends.

<sup>21</sup> Metropolitan Statistical Area

<sup>22</sup> 33% of affordable units in multi-family projects must be leased to households at ≤50% MSA.

<sup>23</sup> Evaluation is not formally in the ordinance but reports are given to Council through quarterly benchmark process and at annual retreats.



## **Advice for Local Governments: Implementing inclusionary zoning Programs in NC - Summary**

May 21, 2003  
Triangle Inclusionary Zoning Task Force

### **Anita Brown-Graham**

Professor of Public Law and Government  
UNC Institute of Government  
962-0595 brgraham@iogmail.iog.unc.edu

### **Thomas A. Kelly, III**

Associate Clinical Professor  
UNC School of Law - Community Development Clinic  
(On leave 2003-04)

In August 2003, the UNC Institute of Government will publish a guide for local governments on implementing inclusionary zoning. The guide will provide legal advice and profiles of eight local inclusionary zoning programs. Professors Brown-Graham and Kelley provided this summary of their work in progress on legal considerations.

In North Carolina, local governments have only such powers as the legislature confers upon them either in a specific charter or pursuant to general state laws applicable to all local governments.

Prior to 1970, North Carolina followed "Dillon's Rule" to determine the scope of authority. Dillon's Rule limited authority to powers that were granted in express words; or necessarily or fairly implied in or incident to express powers; or essential to the accomplishment of the declared objects and purposes of the local government.

However in 1971, the General Assembly enacted a new "rule of construction" (in 160A-4), which provides that grants of power "shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect: Provided, that the exercise of such additional powers shall not be contrary to State or federal law or to . . . public policy."

We now think about local government authority as follows: While local governments must ultimately rely on their express statutory authority, North Carolina courts, should and most often do, allow local government the flexibility to choose reasonable means to carry out their expressly granted functions.

Moreover, when a local government's ordinance is challenged as outside of its delegated authority, the local government enjoys the benefit of the doubt in a court's determination.

So, in crafting an inclusionary zoning ordinance, attorneys must ask:

1. Are the additional and supplementary powers of inclusionary zoning reasonably necessary or expedient to meet expressly provided authority?
2. Is the exercise of such additional powers contrary to State or federal law or to public policy?

The legislature has expressly granted local governments the authority to zone, approve or deny subdivisions, and exercise general police power. Local inclusionary zoning programs further the goals of these expressly delegated powers.

In case of a court challenge to the local government's authority to enact them, whether or not the inclusionary ordinances are upheld will depend on two things:

1. How a court interprets the law the local government claims authorizes it to act.
2. Supporting evidence the local government has developed demonstrating a link between the ordinances, the provision of affordable housing and the goals of delegating law. (Make this as strong and explicit as possible.)

The local ordinance must also take a state statute into account that limits local government's power to restrict rents. N.C.G.S. 42-14.1 prevents any city or county from enacting, maintaining or enforcing "any ordinance or resolution which regulates the amount of rent to be charged for privately owned, single-family or multiple unit residential or commercial rental property," except under three conditions: "(1) regulating in any way property belonging to that city, county or authority, (2) Entering into agreements with private persons which regulate the amount of rent charged for subsidized rental properties, or (3) Enacting ordinances or resolutions restricting rent for properties assisted with Community Development Block Grant Funds."

The inclusionary zoning ordinance must be crafted so that it does not constitute a "taking." The idea of a taking comes from the Fifth Amendment to the United States Constitution. The Fifth Amendment prevents private property from being taken for public use without just compensation. A local government regulation is considered a taking if it prevents all economically viable use of the affected land.

Courts can be unpredictable. If a local ordinance is challenged, the result may well turn on particular programmatic aspects. The best you can do is balance the guidance of existing law and ordinance components that are effective at meeting the program objectives. The forthcoming guide will provide local governments a legal argument for a well-calculated risk.