

Regional Inclusionary Housing Initiative

Policy Tools Series

POLICY TOOL #1

DEVELOPING AN INCLUSIONARY ZONING ORDINANCE

Inclusionary housing programs can effectively create affordable housing in a variety of communities. The most common route to creating an inclusionary housing program is through a zoning ordinance that sets the specific requirements linking the development of new residential units with the creation of affordable housing units. This Policy Tool provides a brief overview of inclusionary housing and a detailed analysis of issues that need to be considered when developing an inclusionary zoning ordinance.

What is Inclusionary Housing? Inclusionary zoning requires residential developers to set aside a portion of the homes they build as affordable for low- and moderate-income families. In addition to increasing the supply of affordable housing, inclusionary zoning disperses affordable housing throughout the growth areas of a region. It enables low- and moderate- income families to live in homes indistinguishable from, and adjacent to, market-rate housing, and to live in communities with better access to employment and educational opportunities. Inclusionary zoning has been implemented in a variety of locales, ranging from older cities, such as Boston, to growing towns like Longmont, Colorado.

What are the benefits of Inclusionary Housing? Inclusionary housing programs help municipalities serve the needs of local employers, including business, schools, and the municipalities themselves:

- Businesses find it easier to hire and retain employees who are able to live within a reasonable commuting distance
- Municipal governments, school districts, fire and police departments benefit from employees living in the communities they serve because they are more invested in its future.

Inclusionary housing helps meet the needs of current and future residents:

- Senior citizens have the choice to remain in the communities where they have raised their children.
- Younger parents and single parent families can find homes in communities with good schools, parks and services.

Inclusionary housing is effective in a variety of housing market conditions:

- In gentrifying communities, the affordable units created through an inclusionary program can help offset the displacement of residents.
- In new and growing suburban communities, the inclusionary units can broadly disperse affordable housing needed by area jobholders and prevent exclusive communities.

ISSUES TO CONSIDER IN DEVELOPING AN INCLUSIONARY ZONING ORDINANCE

The development of an inclusionary zoning ordinance requires consideration of a range of variables. The local decision making process that tailors the ordinance to local conditions is critical. There is no perfect inclusionary zoning ordinance but rather a range of options that need to be viewed separately and then evaluated in terms of how they work together. The following report addresses each variable and options to be weighed in developing an effective ordinance. It should be used as a guidebook through these issues, not as a magic recipe.

#1 Findings

Many ordinances begin with findings about the need for affordable housing and planning study results. The section would summarize any planning process the community has undertaken, trends in housing stock, the need for and benefits of affordable housing, and the benefits anticipated by enactment of an inclusionary zoning ordinance. Findings sections are often lengthy. Below is language based on Sacramento's ordinance.

The City Council makes the following findings:

- It is a public purpose of the City to achieve a diverse and balanced community with housing available for households of all income levels. Economic diversity fosters social and environmental conditions that protect and enhance the social fabric of the City and are beneficial to the health, safety, and welfare of its residents.
- The City is experiencing an increasing shortage of housing affordable to low income households. New residential development does not provide housing opportunities for low income households due to the high cost of newly constructed housing in the City. As a result, low income families are *de facto* excluded from many neighborhoods, creating economic stratification detrimental to the public health, safety, and welfare. An increasing number of low income persons live in overcrowded or substandard housing and devote an overly large percentage of their income to pay for housing.
- The amount of land in the City available for residential development is limited by City General Plan policies and principles embodied in state law pertaining to general plans and annexation. Scarce remaining opportunities for affordable housing would be lost by the consumption of this remaining land for residential development without providing housing affordable to persons of all incomes.
- Therefore, to implement the City General Plan, to carry out the policies of state law, and to ensure the benefits of economic diversity to the residents of the City, it is essential that new residential development in the remaining new growth areas of the City contain housing opportunities to low income households, and that the City provide a regulatory and incentive framework which ensures development of an adequate supply and mix of new housing to meet the future housing needs of all income segments of the community.
(Sacramento)

#2 Statement of Purpose

Purpose Statements typically are broad policy directives. The first purpose statement below is based on language from Fairfax County, Virginia's ordinance, and the second statement is based on language from Boulder, Colorado.

This program is established to assist in the provision of affordable housing for persons of low and moderate income. The program is designed to promote a full range of housing choices and to require the construction and continued existence of dwelling units affordable to households whose income is 115% or less than the median income for the Chicago Standard Metropolitan Statistical Area. (Fairfax County)

The purposes of this chapter are to:

- (a) Implement the housing goals of the City Master Plan;
- (b) Promote the construction of housing that is affordable to the community's workforce;
- (c) Retain opportunities for people that work in the City to also live in the City;
- (d) Maintain a balanced community that provides housing for people of all income levels; and
- (e) Insure that housing options continue to be available for very low-income, low-income, and moderate-income residents, for special needs populations and for a significant proportion of those who both work and wish to live in the City. (Boulder)

#3 Definitions

The terms that follow are typical of those that are defined in inclusionary zoning ordinances:

Affordable Housing Price	Eligible Homebuyer	Median Income
Affordable Rent	Eligible Renter	Moderate Income
Affordable Dwelling Unit	Extreme Hardship	Permanently Affordable
Control Period	Housing Commission	Residential Project
Developer	Housing Trust Fund	Very Low Income
Development Agreement	Low Income	
Dwelling Unit	Market Unit	

#4 Threshold Size

Some ordinances limit their application to developments exceeding a threshold size. The first example below is based on language from Boulder's ordinance. In one sentence, it sets a threshold size, a set-aside percentage, and a period of affordability. The second is based on Burlington, Vermont's ordinance, and is notable because it applies to rehabilitation projects and the threshold level is applicable to development on more than a single site. Either example could be abbreviated to simply state what size developments trigger application of a set aside requirement.

Any development on a site larger than 10 acres or containing 50 or more dwelling units shall include at least twenty percent of the total number of dwelling units within the development as permanent affordable units. (Boulder)

The following residential development projects shall be Covered Projects and shall be subject to the requirements of this Article: all development of residential property larger than 10 acres or containing 50 or more dwelling units taking place through the construction of new structures or through the substantial rehabilitation of existing structures. Covered Projects shall include all development of residential property in excess of 10 acres or containing 50 or more dwelling units in the City by the same responsible party in any calendar year. (Burlington)

#5 Set-Aside—Targeted

A critical decision in developing an inclusionary zoning ordinance is the percentage of housing units required to be set aside as affordable. Often the set aside requirements are linked to specific income eligibility targets. Two examples of affordable housing set-asides targeted to specific income tiers follow below. The first example is based on language from Sacramento's ordinance. The second example, based on provisions of Davis, California's ordinance applicable to rental housing, also targets affordable housing to different income tiers, but varies the target percentages based on the size of the project. (Davis's numbers and percentages are used for ease of understanding.)

In developments covered by this section, the inclusionary housing component shall consist of affordable units leased or sold as follows: x% to very low income families (earning no more than 50% of area median income); x% to low income (earning more than 50% of area median income but no more than 80% of area median income); and x% to moderate income families (earning more than 80% of area median income but no more than 115% of area median income). (Sacramento)

A developer of multifamily rental developments containing 50 or more units shall provide at least 25% of the units affordable to low income households (earning more than 50% of area median income but no more than 80% of area median income) and at least 10% percent of the units affordable to very low income households (earning no more than 50% of area median income). A developer of multifamily rental developments containing between five and nineteen units, inclusive, shall provide 15% percent of the units to low income households and 10% percent to very low income households. (Davis)

#6 Housing Commission Right to Purchase

Some ordinances give the municipality and not-for-profit entities a right to purchase a fixed percentage of affordable units when they are first offered for sale or rent, so that they can keep the units permanently affordable. The first example below is based on language from Montgomery County, Maryland's ordinance, and the second is based on Fairfax County, Virginia's ordinance. (The percentages identified are Montgomery County's and Fairfax County's, respectively.)

The Housing Commission and any other not-for-profit corporation designated by the Commission has the option to buy or lease, for its own programs or programs administered by it, up to 40% percent of all affordable units. The Commission may buy or lease up to 33%. Any other designated corporation may purchase or lease any affordable units in the first 33% that the Commission has not bought or leased, and the remainder of the 40%. Units purchased or leased under this option shall be assigned to very-low or low-income persons. The Commission shall establish standards for designating not-for-profit corporations which shall require the corporations to demonstrate their ability to operate and maintain affordable units satisfactorily on a long-term basis. (Montgomery County)

The Housing Commission shall have an exclusive right to purchase up to one-third of the for sale affordable dwelling units within a development for a 90 day period beginning on the date of receipt of written notification from the developer advising the Housing Commission that a particular affordable dwelling unit is or will be completed and ready for purchase. The

remaining two thirds of the for sale affordable units within a development and any units which the Housing Commission does not elect to purchase shall be offered for sale exclusively for a 90 day period to persons who meet the income criteria established by the Housing Commission. After the expiration of 60 days of the 90 day period referenced above, the affordable dwelling units not sold shall be offered for sale to nonprofit housing groups, as designated by the Housing Commission, subject to the established affordable dwelling unit prices. (Fairfax County)

#7 Design and Building Requirements

Most ordinances require that affordable units be visually compatible with market rate units in the same development. The language below illustrates how this preference is drafted into an ordinance. The first example is based on Burlington's ordinance, the second is based on Sacramento's, and the third is based on Fairfax County's.

Affordable inclusionary units may differ from the market units in a Covered Project with regard to interior amenities and gross floor area, provided that:

- (i) these differences, excluding differences related to size differentials, are not apparent in the general exterior appearance of the Project's units; and
- (ii) these differences do not include insulation, windows, heating systems, and other improvements related to the energy efficiency of the Project's units;
- (iii) the gross floor area of the affordable inclusionary units is not less than minimum requirements established by the City.

(Burlington)

Inclusionary Units shall be visually compatible with Market Rate Units. External Building materials and finishes shall be the same type and quality for Inclusionary Units as for Market Rate Units. Upon application by the developer to the City, the City may, to the maximum extent appropriate in light of project design elements as determined by the Planning Director, allow builders to finish out the interior of Inclusionary Units with less expensive finishes and appliances. (Sacramento)

The Housing Commission shall develop specifications for the prototype affordable housing products both for sale and rental, which shall be structured to make the units affordable to very low-, low-, and moderate-income households. All building plans for affordable dwelling units shall comply with such specifications. Any applicant or owner may voluntarily construct affordable dwelling units to a standard in excess of such specifications, but only 50 percent of the added cost for exterior architectural compatibility upgrades (such as brick facades, shutters, bay windows, etc.) and additional landscaping on the affordable dwelling unit shall be included within recoverable costs, up to a maximum of 2 percent of the sales price of the affordable dwelling unit, with the allowance for additional landscaping not to exceed one half of the above-noted 2 percent maximum. (Fairfax County)

#8 Timing of affordable unit construction

Most municipalities require affordable units to be built concurrently with market units to ensure integration of affordable and market units, and to prevent developers from abandoning projects prior to completing the affordable units. The first example below is from Burlington's ordinance, and the second is from Montgomery County's.

Inclusionary units shall be made available for occupancy on approximately the same schedule as a Covered Project's market units, except that certificates of occupancy for the last ten percent of the market units shall be withheld until certificates of occupancy have been issued for all of the inclusionary units. A schedule setting forth the phasing of the total number of units in a Covered Project, along with a schedule setting forth the phasing of the required inclusionary units, shall be established prior to the issuance of a building permit for any development subject to the provisions of this Article. (Burlington)

The affordable dwelling unit agreement must include the number, type, location, and plan for staging construction of all dwelling units and other such information as the Commission requires to determine the applicant's compliance with this Chapter. The affordable dwelling unit staging plan must be consistent with any applicable land use plan, subdivision, plan, or site plan. The staging plan included in the affordable dwelling unit agreement for all dwelling units must be sequenced so that:

- (1) no or few market rate dwelling units are built before any affordable units are built;
- (2) the pace of affordable unit production must reasonably coincide with the construction of market rate units; and
- (3) the last building built must not contain only affordable units.

(Montgomery County)

#9 Fee In Lieu Formula

Some municipalities permit developers to pay a fee in lieu of developing hard affordable units. While some municipalities permit payment as a right, others require developers to show that constructing hard units would constitute a unique hardship, or that a fee would produce a greater benefit.¹ Because the fee paid is typically linked to the cost of producing a hard unit, fee in lieu formulas are necessarily dependent upon the local housing market. The first example below is based on the Boston Executive Order, and the second is based on Boulder's ordinance. The third and fourth examples, based on Montgomery County's and Brookline, Massachusetts' ordinances, respectively, authorize

¹ The following are summaries of the requirements that developers must satisfy to qualify to pay a fee in lieu of development in some municipalities:

Montgomery County: Developers may pay a fee in lieu if they can show that a resident's housing expenses for a hard unit would exceed what a participant in the affordable housing program could pay. A developer must justify why fees for facilities and services should not reasonably be excluded or reduced for affordable unit occupants. A fee paid must be sufficient to produce more units or units that are more affordable to low and moderate income families. The County has allowed fees in lieu of development on only 11 occasions.

Boulder: Fees in lieu of half of the required affordable units is permitted as a right. Developers may only pay fees in lieu of a larger percentage of units if a developer can demonstrate that payment of a fee would accomplish more benefit to the City than construction on site.

Santa Fe: Developers may pay a fee in lieu of developing hard units if they show that as a direct consequence of the inclusionary zoning ordinance they (1) are deprived of all economically viable use of their property as a whole, or (2) would lose money on the development as a whole and can demonstrate to the Housing Opportunity Program administrator's satisfaction that the loss is an unavoidable consequence of the affordable housing requirement.

a fee in lieu of development and provide that procedures for implementing such a fee shall be determined by administrative regulations.

Subject to the approval of the head of the relevant City agency, developers may also propose to achieve these affordable housing obligations by making a dollar contribution to an affordable housing fund calculated by multiplying the total number of dwelling units in the proposed residential development by 0.15, and by multiplying the result by the Affordable Housing Cost Factor, currently standing at \$52,000. This Affordable Housing Cost Factor is defined as the average total public subsidy per new construction affordable housing unit permitted in the City for the previous calendar year, and will be adjusted annually on July 1 of each year in an amount commensurate with the cost of producing affordable housing. (Boston)

Whenever this chapter permits a cash-in-lieu contribution as an alternative to the provision of a single permanently affordable housing unit, the cash-in-lieu contribution shall be as follows:

- (a) For each unrestricted detached dwelling unit, the cash-in-lieu contribution shall be the lesser of \$13,200.00, or \$55.00 multiplied by twenty percent of the total floor area of the unrestricted unit.²
- (b) For each unrestricted attached dwelling unit, the cash-in-lieu contribution shall be the lesser of \$12,000.00, or \$50.00 multiplied by twenty percent of the total floor area of the unrestricted unit

The city manager is authorized to adjust the cash-in-lieu contribution on an annual basis to reflect changes in the median sale price for detached an attached housing, using information provided by County Assessor records for the City. (Boulder)

In exceptional cases, instead of building the required number of affordable dwelling units, a developer may offer to contribute to the Housing Initiative Fund an amount that will produce significantly more affordable dwelling units. The procedures for considering and implementing contribution offers must be established by executive regulation. To implement an offer, the developer must sign an agreement with the Director of the Department of Housing and Community Development not later than a time provided in the regulations. (Montgomery County)

At the option of the City, the requirements of this Section may be met through a cash payment to the City or its designee in an amount based on the guidelines adopted as per (f) below if the cash payment is found by the City, in its discretion, to be advantageous to the City in creating or preserving affordable housing. Cash contributions shall be used only for purposes of providing affordable housing for very low, low, and moderate income persons. . . .

(f) The Planning Commission, in consultation with the Housing Commission and after public notice and hearing, shall adopt guidelines to aid in the interpretation and determination of the requirements of this Section. (Brookline)

#10 Cost Offsets

As is contemplated in the language below, some municipalities allow developers to request waivers from development standards such as set-back requirements, parking and landscaping requirements, or building material requirements, which reduce the cost of constructing affordable units. These cost offsets allow a municipality to decrease the

² The 20% floor area calculation reflects Boulder's 20% set-aside. The fee is based on 20% of the floor area of a development rather than 20% of the number of units. To determine the amount of the fee, Boulder conducted a study to determine the gap between the allowable sales price of an affordable unit and the actual cost to construct a unit; the gap figure was then lowered to a politically feasible amount.

burden placed on developers of affordable housing, and minimize the possibility of a developer showing that inclusionary zoning causes an excessive loss such that it effects a taking. The offsets in the examples below are incorporated into the ordinances, but municipalities may implement cost offsets in a variety of ways. For example, Brookline does not include offsets in its set-aside ordinance, but provides for an offset—a floor area bonus—in a separate ordinance. Though I am not aware of a municipality which has done so, an ordinance could generally authorize cost offsets which would be detailed in administrative regulations.³ The first example below is based on the Santa Fe ordinance, and incorporates cost offsets mentioned in the Highland Park Affordable Housing Plan. The second is based on provisions in the Sacramento ordinance, and lists offsets from that ordinance to provide a sense of the range of offsets available.

Impact fees, building permit fees, and tap-on fees (or portions thereof) may be waived for affordable units, subject to agreement of the entities receiving revenues from such fees. Any developer of affordable units may submit a request for a waiver of other City development standards, and the City shall respond within thirty calendar days of its receipt. The City shall approve a waiver if each of the following requirements are met:

- (a) The proposed waiver will make the housing more affordable. The developer must show how real costs will be reduced and how the savings will be passed on affordable home buyers or renters.
- (b) The proposed waiver does not compromise health, safety or welfare as determined by the City.
- (c) Vehicular and pedestrian circulation, storm drainage and utilities are provided for adequately.

(Santa Fe)

Upon application as provided herein, (1) the City shall make available to a Residential Project Developer a program of waiver, reduction or deferral of development fees, administrative and financing fees for affordable units; (2) the City may modify for affordable units, to the extent feasible, in light of the uses, design, and infrastructure needs of the Development Project, standards relating to road widths, curbs and gutters, parking, lot coverage, and minimum lot sizes; and (3) the City may, to the maximum extent appropriate in light of project design elements, allow builders to finish out the interior of affordable units with less expensive finishes and appliances. The Planning Director may issue Special Permits for Inclusionary Projects, and shall develop further procedures for streamlining and priority processing which relieve affordable units of permit processing requirements to the maximum extent feasible consistent with the public health, safety, and welfare. The developer may apply to the City's Housing Trust Fund for assistance in the financing and development of the affordable units in a development. (Sacramento)

#11 Density Bonus

A number of municipalities grant a density bonus—permission to develop more units than zoning would otherwise allow. Like other cost offsets, density bonuses may decrease the likely success of a taking claim by mitigating the economic impact of developing affordable housing. Though some communities tout density bonuses as the most effective cost offsets, others that do not desire denser development avoid them

³ Such a provision could look much like the Montgomery County and Brookline provisions which authorize fees in lieu of development, but leave determination of a fee formula or amount to administrative regulations.

altogether. Some municipalities automatically award a density bonus to developers of affordable housing, while others permit smaller developments as of right without any set-aside, and set up larger developments with increased density as a desirable variance, to which an affordable housing set-aside is attached. The first example below, based on Cambridge, Massachusetts' density bonus, follows the former strategy, and permits developers to split the additional density between affordable and market rate units. The bonus is structured so that the developer's profit on additional market units directly offsets the loss on affordable units. The second example is based on Somerville, Massachusetts' ordinance, and follows the latter strategy. In Somerville, up to 7 units may be developed as of right, but development of 8 or more units requires a special permit and a concomitant obligation to set aside 12.5% of all units as affordable. Some argue that structuring a density bonus as a variance with an accompanying affordable housing set-aside may prevent the set-aside from being labeled an exaction—a land use decision conditioning approval of development on the dedication of property to public use. This is advantageous because exactions are more vulnerable to taking claims than zoning of general application.

To facilitate the objectives of this Section, modifications to the dimensional requirements in any zoning district shall be permitted as of right for an Inclusionary Project, as set forth below:

- (i) The Floor Area Ratio⁴ (FAR) normally permitted in the applicable zoning district for residential uses shall be increased by 40% percent, and at least 50% of the additional FAR should be allocated for the Affordable Units required by this Section. In a Mixed Use Development, the increased FAR permitted in this paragraph (i) may be applied to the entire lot; however, any gross floor area arising from such increased FAR shall be occupied by residential uses, exclusive of any hotel or motel use.
- (ii) The minimum lot area per dwelling unit normally required in the applicable zoning district shall be reduced by that amount necessary to permit up to 2 additional units on the lot for each 1 affordable unit required by this Section.⁵

(Cambridge)

The affordable housing requirements of this Article shall apply to all residential developments seeking special permits with site plan review to develop 8 or more dwelling units, whether new construction, substantial rehabilitation, or adaptive reuse. Developments shall not be segmented or phased in a manner to avoid compliance with these provisions. Developers providing more than 12.5% of the total units in the development as affordable units may apply for an additional density bonus under the terms of this Article. Bonuses may be awarded on the basis of a 2 to 1 ratio of market rate units to affordable housing units. For every additional unit provided beyond the 12.5% required, 2 additional market rate units may be authorized.

(Somerville)

⁴ Floor Area Ratio is the ratio of gross floor area (the sum, in square feet, of the gross horizontal areas of all floors of a building) to the total area of the lot.

⁵ Implementation of a density bonus under this section would work as follows: Assume a 50 unit development, and a 20% set-aside. Thus, 10 of the 50 units must be affordable. Paragraph (ii) of the density bonus above awards a bonus of two market units for every one affordable unit, so 70 units would be permitted. In addition, paragraph (i) would permit a 40% increase in the lot's FAR, which corresponds to the 40% increase in units over the original 50. If considered in reference to the base number of units, the developer essentially gets 10 additional market units to offset the 10 required affordable units.

#12 Marketing

Some ordinances and regulations provide extensive instructions for marketing to and certifying buyers and renters of affordable units. The first example below is based on Santa Fe's ordinance pertaining to for-sale units, and provides broad guidance with regard to marketing. The second example is based on Santa Fe detailed regulations which implement the ordinance.

- A. Developers shall market affordable homes in accordance with the requirements set forth in the administrative procedures. There shall be an efficient matching of the incomes of prospective affordable unit buyers to specific affordable unit prices. There shall be a reasonable matching of the household sizes of prospective affordable unit buyers to the sizes and types of affordable units. Any marketing materials shall clearly state the policies of the affordable housing program with regard to the pricing of affordable units and buyer eligibility.
- B. In marketing affordable units the City or seller shall give preference to individuals who are citizens of the City or are presently employed or under contract with an employer within the City.
- C. The City or its agent shall maintain and make available lists of prospective affordable unit buyers who have passed preliminary prequalifications for financing. For affordable developments for which the city expects immediate effective demand to outstrip supply, the city or its agent, at the city's sole discretion, may establish and maintain an equitable process for allocating rights to purchase the homes. For developments other than those described above, the developer shall establish and maintain an equitable process of marketing homes, including waiting lists where demand exceeds supply.
- D. Prior to executing a purchase contract for any affordable unit, the prospective affordable unit buyer shall be certified as meeting affordable housing program requirements by the City or its agent. The certification process shall be set forth in the administrative procedures. Developers and affordable unit buyers may execute only purchase agreements that are approved as to form by the City and include language provided by the City which shall require that an appropriate disclosure form be provided to and explained to the affordable unit buyer prior to execution of the contract. The disclosure form shall explain any deed restrictions, restrictive covenants and/or liens that are placed on the affordable unit to ensure long-term affordability. (Santa Fe ordinance)

Developers shall market affordable homes in accordance with the following requirements:

- (1) There should be an efficient matching of the incomes of prospective affordable home buyers to specific home prices, as follows:

Household income of a buyer should not exceed the price level of a home by more than five percent. For example, only households with incomes at or below 65 percent of median income should be allowed to buy a home made affordable to households at 60 percent of median income. Thus, lower priced homes will be reserved for lower-income households. Alteration of this requirement may be based only on the unavailability of a qualified buyer with the required level of income for a period of 30 days or more after the home was legally ready for occupancy (assuming good-faith marketing efforts by the developer to find a qualified buyer).

- (2) There should be reasonable matching of the household sizes of prospective affordable homebuyers to the sizes/types of affordable homes as follows:

3 BR, 1.5 BA ----- Minimum household size = 4

4 BR, 2 BA ----- Minimum household size = 5

The City shall not market or sell an affordable home to a household which is smaller than the household sizes indicated, unless the City approves in writing fewer persons based on the unavailability of a buyer of the proper household size for a period of 30 days or more after the home was legally ready for occupancy

(assuming good-faith marketing efforts by the developer to find a qualified buyer), or the demonstrated need of a household for a dwelling unit with more bedrooms than allowed in this section.

- (3) In marketing affordable homes the City or seller shall give preferences to individuals who are citizens of the City or are presently employed or under contract with an employer within the City.
- (4) Brochures, advertisements and other marketing materials shall clearly state the policies of the affordable housing program with regard to the pricing of affordable units and buyer eligibility.
- (5) The City or its agent may maintain lists of prospective affordable homebuyers who have passed preliminary pre-qualifications for financing. Such lists will be made available to developers for marketing purposes.
- (6) For developments for which the City expects immediate effective demand to outstrip supply, the City or its agent, at the City's sole discretion, may establish and maintain an equitable process for allocating rights to purchase the homes. For example, the City could require a lottery or use of a ranked waiting list.
- (7) Prior to executing a purchase contract for any affordable home, a prospective buyer must be certified by the City or its agent as meeting program requirements. The certification must have been made within 90 calendar days immediately prior to the full execution of the purchase contract. Developers may sign purchase contracts with non-certified prospective buyers, conditional upon certification within 10 working days, if the developer is reasonably certain that he prospective buyer can be certified.
- (8) Developers and buyers of affordable units may execute only purchase contracts that are approved for form by the City and include language provided by the City, which will require that an appropriate disclosure form be provided to and explained to the buyer prior to execution of the contract. The disclosure form will explain any deed restrictions, restrictive covenants, and/or liens that are placed on home to insure long-term affordability.

(Santa Fe regulations)

#13 Administration of Affordability Control

Original sales prices and rental rates for affordable units are typically regulated so that that a low- or moderate-income purchaser or renter need not spend more than 30% of his or her income on housing expenses. Most municipalities also impose price restrictions which keep units affordable when they pass to new occupants. The first three examples below deal with the resale pricing of for-sale affordable housing. The first example is from Highland Park's Central Avenue Senior Development, and the second is based on the Boulder and Montgomery County ordinances. The third example is based Santa Fe regulations, and provides only general guidance on the subject of resale pricing. The last example, based on language from the Sacramento and Santa Fe ordinances deals with maintaining affordability of rental units, and is less complicated.

The resale price shall be the lower of:

- (a) the then-fair market value of the unit as determined by an appraisal performed by an appraiser approved by the Housing Commission taking into account applicable use and occupancy restrictions which may be binding on the unit; and
- (b) the purchase price under the agreement by which the unit owner purchased the unit, increased by an amount equal to the lesser of (i) three percent (3%) for each year (or part thereof) after the closing date during which the unit owner resided in the unit and (ii)

inflation as measured by the Consumer Price Index (All Urban Consumers, All Cities average, residential real estate) for the period of time that the unit owner resided in the unit.

(Highland Park, IL)

The resale price of any permanently affordable housing unit shall not exceed the purchase price paid by the seller of that unit plus:

- (a) A percentage of the unit's original purchase price equal to the increase in the cost of living since the unit was purchased by the seller, as determined by the Consumer Price Index;
- (b) The fair market value of improvements made to the unit by the seller⁶;
- (c) Customary closing costs and costs of sale; and
- (d) Costs of a real estate commission paid by the seller if a licensed real estate agent is employed.

(Boulder/Montgomery County)

The City requires that developers impose resale controls which are designed to achieve the following purposes:

- (a) reducing the potential for windfall profits by an owner-occupant;
- (b) recapturing any such windfall profits for use in an approved housing trust fund;
- (c) providing incentives for owner-occupants to resell to lower-income households, which are most in need of affordable housing;
- (d) maintaining the affordability of affordable units to subsequent buyers to a reasonable extent, while considering the sellers' rights to reasonable returns on equity; and
- (e) preventing speculative profits on affordable units by renting them to another household.

(Santa Fe)

The owner of affordable rental units shall be responsible for certifying the income of eligible tenants to the Housing Commission at the time of initial rental and annually thereafter. Rental rates shall be in accordance with the formula set forth in the administrative procedures.⁷ This requirement shall be made applicable to successors in title, if any, by means of a deed restriction. (Santa Fe/Sacramento)

Municipalities typically maintain affordability through deed restrictions or covenants recorded against the property. These affordability controls often specify that a unit must be sold or rented to an income eligible buyer at an affordable price; others give the municipality a right of first refusal to purchase affordable units. For a discussion of the validity and permissible duration of such affordability controls, please see the attached memorandum from BPI intern, Rebecca Onie.

⁶ In evaluating whether to allow sellers to recoup the value of capital investments in their homes, municipalities weigh a desire to provide sellers with some of the benefits of ownership against a desire to keep the sale price of the unit affordable. Some ordinances, such as Montgomery County's, Fairfax County's, and Santa Fe's do not impose restrictions on the capital expenditures homeowners may recover upon the sale of their homes. In contrast, Davis, California, in its lone for-sale development with resale restrictions, does not allow homeowners to recoup capital investments. (Davis is rethinking this issue with regard to future developments.) Boulder requires homeowners to obtain city approval for capital improvements, and limits recovery of expenditures to approximately \$1000 for each year the homeowner has owned the property. (Boulder's 2001 Homeownership Capital Improvements Policy is attached.)

⁷ Both ordinances target rental rates at 30% of a family's income less an allowance for tenant-paid utilities.

#14 Other Issues for Consideration

Land Dedication

Another possibility that may interest some municipalities is allowing a developer, at the City's discretion, the option to satisfy some of his affordable housing obligation via dedication of land to the City's contemplated land trust. For example, under Boulder's ordinance developers may satisfy their affordable housing obligation either by:

- (1) conveying land to the City of equivalent value to the fee-in-lieu contribution that would otherwise be required, plus an additional fifty percent, to cover costs associated with holding, developing, improving, or conveying the land; or
- (2) conveying land to the City that is of equivalent value to land upon which the required affordable units would otherwise have been constructed. Such land must be zoned to allow construction of at least as many affordable units as would otherwise have been required.