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Zoning and Land Use Planning

John R. Nolon* and

Jessica Bacher**

Local Inclusionary Housing Programs: Meeting Housing Needs

Introduction

This article explores the expansive legal authority that local governments in many states have to meet housing needs directly by providing for the production of new affordable homes. There is not a great deal of scholarship on the subject as we approach it. The emphasis in the academic literature in the field of affordable housing is on top-down, systemic, or theoretical solutions: urging reforms in federal and state finance programs, imploring courts to penalize localities that engage in exclusionary zoning, describing in detail a variety of inclusionary zoning techniques, or explaining relevant theories or the economics of the issue of affordable housing.[1]

Our topic focuses instead on what individual municipalities can do to bridge the widening gap between income and housing costs. Like the impacts of climate change, which many municipalities are beginning to address,[2] the housing crisis is, in the first instance, a local phenomenon: fails to provide for local workers, prejudices the local economy, forces out seniors, and is beyond the reach of young families—the workers in local businesses and the moms, dads, daughters, and sons of local residents. Our article illustrates a full range of tools and strategies that the law and established practice place in the hands of local citizens and their elected officials to meet local housing needs. The information contained in this article gives local governments

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immediate options while waiting for systemic, top-down, and more theoretical solutions to work.

We describe a ''local inclusionary housing program'' and outline 10 steps that local governments and leaders can take to create and implement such a program. These steps are:

1. conducting a survey of housing needs within the locality and its immediate region;

2. creating a citizens' task force of leaders committed to meeting these housing needs;

3. establishing an advisory board of landowners and developers to help design economically and politically workable strategies;

4. adopting a housing component of the local comprehensive plan that contains a strategy for meeting defined housing needs;

5. adopting one or more of a variety of inclusionary zoning techniques;

6. identifying land and buildings that can be dedicated to affordable housing projects;

7. creating a local nonprofit housing corporation whose corporate objective is the implementation of the local housing strategy;

8. providing financial incentives directly to projects that meet housing needs;

9. using a variety of outside public and private financial techniques; and

10. adopting local housing regulations that ensure the success and continued affordability of all housing produced under the inclusionary housing program.

This approach to meeting housing needs turns the traditional approach to solving the nation's housing crisis on its head. While recognizing limitations in local capacity, it does not regard local governments as parochial and exclusionary obstacles to the accomplishment of federal, state, or judicial housing goals. Instead, it is based on respect for local land use traditions, the existence of extensive municipal legal authority to solve local problems, and recognition of the great diversity of local circumstance.

The article ends by proposing a state housing law that provides adequate legal authority for inclusionary housing initiatives and assists and rewards localities that commit themselves to using that authority effectively.

Step One: Housing Needs Survey and Analysis

We have been conducting training programs on affordable housing for local leaders for several years.[3] During our first such program, we asked our

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trainees if they were interested in solving their local housing problems and learning how other municipalities were succeeding in meeting their housing needs. We were baffled by the lack of interest, even hostility, that greeted these questions. Although our research showed that their communities had serious housing problems, the trainees weren't sure; in addition, they were suspicious of what we meant by the words ''affordable housing.''

Quickly, we changed our approach. We began with a different set of questions, asking:

1. What is the median price is of a single-family home in your community; what is the median rent of an apartment?

2. How many homes sell each year? What is the vacancy rate in existing apartments? How often do these units become available?

3. When a home sells in your community, who is the seller and who buys the home? Are the buyer and seller from different socioeconomic groups?

4. How many new homes do you think will be developed in your community over the next five years and at what prices?

5. Given this information, are any groups of people ''housed-out'' of the community? What groups? What is the income range of each group?

6. What are the consequences of losing these groups that are ''housed-out?'' Will the economy suffer? Where will teachers, firemen, policemen, and ambulance corps volunteers live? Will the elderly who have served the community for many years have to leave? Can young adults who grew up locally form households and afford to stay?

Consistently, our trainees now identify several groups with housing hardships: seniors, young families, local workers, firefighters, police, local volunteers, and municipal employees. They know instinctively what it means to their communities to lose these groups whom they regard as part of the critical fabric of community life and central to its future economic development.

By asking these questions, we encourage our trainees to define affordable housing for themselves. We learned that our use of the term ''affordable housing'' could mean any one of a number of things. To some, the term is defined by past experience where affordable housing meant mediocre architecture, high-rise buildings, crime, and litter-ridden neighborhoods. Some government subsidy programs define the term as housing affordable to households whose incomes do

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not exceed 50% or 80% of area median income. This implies that affordable housing is government-subsidized housing, defined by household income, and regulated by a distant bureaucracy. Others ask, since all the housing that is being built in their community is selling to someone, ''Isn't it all affordable?''

From a community-planning perspective, there is no fixed definition of affordable housing. Part of master planning is to determine who should live in the community. Does the community, for example, want young people who have grown up there and are forming households to continue to live there? Does it need workers entering the workforce and semi-skilled or service industry employees? What is to happen to its seniors who have lived in the community all their lives and must now sell their homes and live on limited income? Who else cannot afford to live in the community? What is the consequence of these groups not being able to live in the community? The question becomes whether there is housing stock in the community designed for and affordable to groups of people that are needed, wanted, or ought to live locally. If the answer is no, then affordable housing for this community means housing that is affordable to the people who are ''housed out'' but who are needed to create the kind of community its residents would like to retain or create.

The same questions arise and are considered by the community when a formal housing needs survey is commissioned by the local legislative body. Consultants can be hired to gather available data at the regional and local level and supplement that data with a housing survey conducted locally. Such a citizen survey serves the same purpose as our line of questions to our trainees, particularly if the survey is distributed broadly to local citizens and supplemented by community meetings. The survey serves not only as the starting point for developing a local housing plan to include these housed-out groups but as a critically needed citizen education program regarding the need for affordable housing.

Ideally, a local housing needs study is conducted as part of the comprehensive planning process. Fundamental to a comprehensive plan is a clear description of the current and future demographics of the

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community. Who lives here now? How are they housed? What are their present and future housing needs? If the population is aging, will they need new housing types at more affordable prices? Are young resident adults forming new households? Will they be able to live in the community in the housing stock currently available? Who works locally? Should housing be available to them? What is the current housing stock? How many homes of each type are there? What does this housing cost? What type of new housing are developers building? What does this housing cost? Is there a balance between those whom the existing and projected housing will accommodate and the current and future housing needs of those who live in the community today? What evidence of unmet housing needs in the region exists? What is the community's fair share of that need?

These are the questions planners are trained to ask to develop demographic projections and intelligent land use strategies for the community as part of the comprehensive planning process. Understanding current and future housing needs is an integral part of thinking through the kind of community a particular locality is becoming. Without a clear view of the community's future population and the type of households it will comprise, it is not possible to develop effective strategies for realizing the locality's most fundamental goals and objectives. With it, the community can engage citizens in defining affordable housing and forging a consensus to solve the locality's particular affordable housing problems.

Step Two: Creating a Citizens' Task Force

In 2004, the National Association of Counties asked county governments across the country to identify the greatest barriers to affordable housing for working families in their jurisdictions. NIMBY-ism (local opposition to projects in residents' ''back yards'') was listed as the greatest barrier by 75% of the respondents.[4] Many people—local citizens—do not like change and often fear for the worst when change, such as adding affordable housing in the community, is proposed. Armed with the results of the housing study carried out in step one, local affordable housing leaders can overcome this serious impediment to all housing initiatives. The survey

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serves to educate those who typically oppose housing projects about the need for such projects and the benefits of them to the community.

Local legislatures, in fact, often create a housing task force to help conduct the survey, study its results, build citizen awareness of local housing problems, and work with housing experts to develop an effective strategy for meeting local housing needs. This task force should work closely with a separately created advisory board of landowners and developers who can help greatly in developing strategies that are politically and economically workable.

Step Three: Advisory Board of Property Owners and Developers

Invariably, a local housing strategy relies on vacant or underused parcels of land or buildings that have outlived their purpose. In most communities, the majority of such land is privately owned. Most housing construction is going to be carried out by developers and home builders whose knowledge of the economics of residential building and operation is critical to a workable affordable housing plan. Without the support of landowners and local developers, proposals for affordable housing initiatives are much less likely to succeed politically.

By forming an advisory board of property owners and developers, the local legislature can ask questions about strategies that will work. If the local housing market is robust, will the economics of new housing development support a mandatory affordable housing requirement? How many of the units in a typical development can be required to be made affordable without adversely affecting a project's bottom line and its affordability for market-rate purchasers? What benefits can local law and processes offer developers to compensate for any adverse effect that an affordable housing mandate might have? Can the local government provide infrastructure, streamline the approval process, waive some land use restrictions, or take other actions to offset the cost to private developers of providing a modest amount of affordable housing in each project of a certain size? As an alternative, could the community produce more affordable housing by providing bonus densities to developers in exchange for a greater

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percentage of housing affordable to housed-out groups? What level of bonus works and what percentage of the bonus units can be made affordable and to what types of households?

The study of workforce housing undertaken by the National Association of Counties cited above listed the lack of support and cooperation of the private sector as another of the critical barriers to the production of workforce housing.[5] Inclusionary zoning programs are typically imposed on the private sector, often without warning or consultation. Local governments can effectively remove this barrier by engaging landowners whose properties are implicated and developers who will be required to provide the desired housing to become part of the solution and to shape the local housing program.

Step Four: Housing Component of the Comprehensive Plan

Local governments in all states have the legal authority to adopt and implement a comprehensive plan. Central to comprehensive planning is the identification of demographic and economic trends and the exploration of how land use regulations and strategies can achieve desired economic and demographic outcomes. Planners advise their communities that comprehensive plans should include housing and economic development components. Within each component, planners urge communities to establish long-term goals, short-term objectives, effective strategies to accomplish each objective, and an implementation plan: how the strategies are to be carried out.

A housing survey and the information gleaned from the citizens' task force and private sector advisory board are a strategic point of beginning for creating a housing component of the locality's comprehensive plan. The purpose of gathering and analyzing community opinion, collecting data, and conducting studies is to identify the critical issues that the community faces as well as its unique opportunities to address those issues. This information may reveal, for example, that the cost of housing is escalating or that the rental housing stock is not expanding and what groups are at risk. It will also indicate the unique characteristics, strengths, and opportunities that the community

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possesses. From this list, the board preparing the comprehensive plan can set its priorities. For example, the board's goal might be to provide an adequate supply of housing of various types and prices to meet the needs of the present and future population of the community. When this goal is read in light of the information contained in the housing needs study, it will then be possible to establish specific objectives for meeting that goal. An example is to produce 200 units of housing affordable to moderate-income working families and 100 units for senior citizens with limited incomes and to do so within the next three years.

To set realistic objectives, the board must carefully assess the resources available to the community in addressing its most critical issues. Including the entire community in the planning process and consulting with outside agencies are important methods of identifying such resources so that critical issues may be dealt with effectively. It is then possible to develop strategies to meet the established objectives. Strategies are actions designed to accomplish an objective. In each case, one or more actions may be suggested to attain the objective. For example, the plan can recommend that zoning incentives be given to private developers in exchange for the provision of affordable housing for moderate-income working families. Another effective strategy is to identify one or more housing developers with a proven track record of building affordable housing and helping those developers secure county, state, and federal financial assistance.

The final stage of the housing planning process is to outline specific steps that describe how strategies are to be implemented. An implementation plan designates the agencies or officials responsible for each action, identifies necessary resources, and establishes time periods for completing each action. By attempting to assign responsibilities, identify necessary resources, and adopt a time frame to accomplish specific actions, the community will discover whether strategies being explored are realistic. If they seem unrealistic, the community has the opportunity to devise new strategies to achieve the established objectives or to revise the objectives so that they are more realistic.

For example, the planning board might be assigned the

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task of developing a recommended incentive zoning provision for affordable housing within eight months from the effective date of the comprehensive plan. The municipal attorney can be assigned the task of researching the legal authority given to local governments to adopt incentive zoning programs. To effectuate the senior housing strategy, the mayor could be charged with forming a senior citizen housing task force to identify senior housing developers, visit their completed projects, locate available parcels of land suitable for senior housing, and recommend a developer capable of securing the resources needed to develop affordable housing for seniors.

Step Five: Inclusionary Zoning

Local governments have many options to choose from in adopting inclusionary zoning provisions and many questions to consider in doing so. Among these choices are whether to encourage or require developers to provide affordable housing; whether such housing should be rental or for sale; the incomes of the households that are to benefit from affordable housing; whether to stipulate that developers provide housing on site, off-site, or to contribute to a local housing trust fund; whether to create a preference scheme to ensure, for example, that local workers' needs are met first; and how long to perpetuate the affordability of the newly created units.

1. Defining Affordability. Communities that have completed a local housing survey have concrete data to use to define affordability. Some communities define affordability in relation to the salaries paid to those employed by the local government or to the results of a survey taken of local private sector salaries. Some communities reference the area median income based on the U.S. census as updated by the U.S. Department of Housing and Urban Development (HUD). Communities can embrace HUD's recommendation that the cost of renting or owning the home not exceed 30% of household income. This is a standard national approach based upon how much a household can spend for housing and still meet its other essential needs: food, clothing, education, healthcare, transportation, etc.

2. Mandatory Requirements: A typical approach to mandat-

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ing that developers include affordable units in their market-rate development is to require that projects containing more than 10 rental units set aside up to 10% of the units or floor area of new housing developments for affordable occupancy. These thresholds may, of course, change according to local needs and circumstances and the advice of the private sector advisory board. The law can stipulate further that the units are to be distributed throughout the development and not be significantly different from the market rate units. The law can provide that affordable units mirror the market rate units in size and number of bedrooms or come as close to meeting those standards as economically possible.

3. Bonus or Incentive Zoning Provisions: Another typical approach is to provide zoning incentives to developers to encourage them to provide housing meeting local affordability definitions. If the as-of-right provisions of a zoning law allow 100 residential units, the bonus provision can allow the developer 120 units with the stipulation that a percentage of the bonus units be made affordable. Another approach is to provide a density bonus that allows for an increase in the maximum floor area of rental housing. For example, if 10% of the required floor area for affordable housing is provided on site, then a 15% increase in the floor area square footage may be allowed; this may be accomplished by allowing the project to exceed the maximum building height by one floor.

4. Duration of Affordability: Local inclusionary zoning laws can require that the affordable housing units remain affordable for a certain period or that they remain affordable for the life of the building. The law can require that a restrictive covenant that runs for the life of the building must be recorded against the property before a building permit or a certificate of occupancy will be issued. The covenant provides that new renters must have incomes that match the local definition of affordability and that for-sale units only be sold to buyers to meet that definition as well.

5. Buy-Out Options for Developers: Some local laws allow affected developers to make payments in lieu of providing affordable housing units within the project. This option is generally limited to mandatory programs to soften the re-

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quirement but can be used in conjunction with bonus programs as well. Care must be exercised to ensure that the buy-out amount is sufficient to provide the affordable unit in another location and by another means. Some communities establish local nonprofit housing corporations to administer these buy-out funds and provide affordable units in a variety of ways. Buy-out provisions can be enforced by refusing to issue either building permits or certificates of occupancy to market-rate developers until their required payments are made.

6. Local Preferences: Some local inclusionary zoning laws require that the developers market the affordable housing units first to local workers or seniors or some other preference group identified in the housing survey. Where prohibitions on preferences in some federal and state housing subsidy programs are not a consideration, these occupancy priorities are legitimate, particularly when they are designed to accomplish the objectives of the housing component of the comprehensive plan and where they do not exclude any groups from occupying the affordable units after the preferences are satisfied.

Other zoning approaches to providing affordable housing exist.[6] A short list of some of the techniques follows.

Accessory Apartment Zoning Provisions: Municipalities may address affordable housing shortages by encouraging owners of single-family homes to construct accessory apartments on their properties. An accessory apartment is a second residential unit that is contained within an existing family home but is subordinate to the primary unit in size, location, and appearance. Accessory apartments are usually designed as a complete housekeeping unit that can function independently from the primary unit, with separate access, kitchen, bedroom, and sanitary facilities.

Accessory apartments may benefit existing homeowners, municipalities, and those in need of affordable housing. Accessory units provide additional housing opportunities for citizens of moderate income, while municipalities receive increased property tax revenues from existing single-family neighborhoods. Additionally, homeowners who construct accessory units benefit from rental revenue. This added source of income may provide owners with some re-

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lief from mortgage payments and maintenance costs, thereby making their own housing more affordable. This revenue and the security of having other occupants may make it possible for seniors to remain in their homes, aging in place.

ECHO Housing: Elder cottages, or ECHO units, are another affordable housing option that is typically targeted for seniors. ECHO cottages are small, separate living units located on the same lot as an existing single-family home. Like accessory apartments, ECHO units are subordinate to the main structure in terms of appearance, size, and location. Also, ECHO cottages are genuinely self-sufficient, with separate amenities and entrances, allowing them to operate independently from the main residence. Unlike accessory apartments, however, ECHO units are separate structures and are usually placed on a back corner of the lot.

ECHO units allow seniors a maximum amount of independence, while at the same time providing the support structure of being close to another family. ECHO cottages provide an attractive housing option for those seniors who do not require intensive, professional assistance, who are fairly mobile and still able to live independently. ECHO housing allows seniors to maintain independence and preserve privacy, while providing some level of care from family members who live on the principal lot.

ECHO housing provides seniors and homeowners with a number of benefits. ECHO units can serve as a moderate-income housing option for senior citizens in need of housing. Additionally, if the senior citizen is the owner of the primary house on the lot, that owner has the option of moving into an ECHO unit and renting out the primary residence. Utility costs may be lowered because ECHO cottages can draw water, electric, and sewage from the principal residence.

Floating Zones: A floating zone that allows affordable multi-family housing development can be added to the zoning ordinance to provide for affordable housing in districts not zoned for multi-family construction. Floating zones provide an alternative zoning classification for parcels of land that are proposed by developers to provide some element of affordability, as defined by the

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community. Where, for example, a developer owns 10 or more acres in a single-family zone, that developer can be authorized to build garden apartments but be required to buffer the development from the surrounding single-family homes. Under the floating zone device, a new affordable housing zoning district is created by the legislature, and then later, a developer may petition the legislature to apply the floating zoning district to a particular parcel.[7] Following detailed site plan review, the planning board may recommend to the legislative board that the zoning map be amended to allow the floating zone to apply to the subject parcel. Normally, for a parcel to be eligible for rezoning under a floating zone, it must be of sufficient size to ensure that the proposed development will fit properly into the surrounding area.

Cluster Development: Cluster development encourages flexibility of design and development of land. By allowing a developer to vary the dimensions of lots and mix housing types on the land to concentrate development in one part and leave the remainder undeveloped, clustering preserves open space and other natural features and lowers infrastructure costs for the developer. The overall density of the parcel may not be greater than under conventional zoning, but, under some cluster regimes, multi-family units or townhouses may be permitted in a single-family zone. This offers savings to the developer and presents an opportunity for the creation of affordable housing while preserving community character. Clustering gives developers a way of profitably mixing market-rate and affordable housing in the same project.

Planned Unit Development: Planned Unit Development (PUD), like cluster development, offers a flexible alternative to proposals for single-family, large-lot developments. Unlike cluster development, Planned Unit Development allows development to be arranged appropriately on multiple parcels of land and permits uses in addition to housing, including commercial and mixed uses. Through design flexibility and control, an appropriate neighborhood can be created, properly serviced by infrastructure, and appropriately landscaped and designed to protect surrounding areas from its impacts. Affordable

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housing provisions can be integrated into the PUD plan.

Senior Citizen Housing Zoning: The housing needs of many seniors are different from those of other households. Some seniors are fully independent but need and are willing to pay for a maintenance-free environment. Others suffer from severe health problems that require skilled nursing care. Between these extremes are persons who have a variety of needs for what is generally called ''assisted housing'' with special design amenities, such as community rooms and handicap accessibility, and with special services, such as the provision of housekeeping, meals, and limited health care. When a municipality has not addressed the need for specialized senior housing, residents who have lived in the community for much of their lives may be forced to leave when their housing needs change.

Since most conventional zoning does not allow buildings with these features and does not provide for services to be offered within residential structures, a new type of land use control is needed. For example, communities may alter the design and room configurations of their zoning to accommodate ''assisted housing.'' Local governments may zone to encourage multifamily units for seniors in need of housing uniquely designed and financed to be affordable.

Local governments use a variety of techniques to allow and encourage the private market to create housing responsive to the varied needs of seniors. They may create senior housing zoning districts, authorize local boards to issue special permits for senior housing in designated zoning districts, or create floating zones for the purpose. They may also allow for the creation of small cottages on single-family lots or separate apartments within single-family homes specifically to accommodate the needs of seniors.

Step Six: Identifying Land and Buildings for the Program

There are a number of ways that a community can provide new opportunities for affordable housing production not available to the private sector without municipal action or support. Office parks and commercial strips can be rezoned to provide for mixed-use development including affordable housing. Communities may

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host a number of charitable or other institutions whose property may be in excess of their needs or that may discontinue their institutional programs; these properties can be zoned for residential use, including affordable housing.

Various governmental agencies may own land in the community that is not needed for public use or that has excess acreage that can be subdivided and conveyed for affordable housing. Under the law of some states, governments may transfer title to these lands, or lease them, at below market rates, to private sector developers if the purpose of their use is affordable housing. Brownfields may exist in the community that local officials can help remediate and put back into productive use for beneficial purposes, such as mixed-income housing. State law may even allow the local government or a local public authority to accept the donation of land or to condemn title to parcels needed for public purposes, including the provision of affordable housing.

Step Seven: Local Nonprofit Housing Corporation

Local governments can set up a nonprofit housing corporation as an intermediary between the government and the public sector. Such a corporation can be established for the specific purpose of carrying out local housing policies. If that primary purpose is set forth in the corporation's certificate of incorporation, then it is tied directly into the local housing program that we describe in this article. Although the initial incorporators of the housing corporation may be appointed by local officials and one or two of the members of the board of directors may be ex-officio local government officials, the board of directors should be self-perpetuating, and its members selected by a process that is independent of the local government itself. Organized in this fashion, the housing corporation is obliged to serve the public purpose of furthering the housing policies of the local government, yet is an independent corporation, free from the legal constraints that limit the actions of local governments themselves.

State law routinely provides for the incorporation and operation of nonprofit corporations that serve charitable, educational, social, or other public purposes. State law may be more expansive in the case of

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housing development corporations and give them extraordinary powers to provide affordable housing. They may be legally capable of taking title to land owned by the local government at below market prices and without going through public bidding or auctions, and they may be eligible for subsidies, including the abatement of local property taxes for the housing projects they foster.

The City of New Rochelle, New York, for example, created the New Rochelle Neighborhood Revitalization Corporation (NRNRC) in 1979.[8] The certificate of incorporation of the NRNRC states that its purpose ''shall include the pursuit of the objectives of federal housing and community development legislation and similar state legislation, in furtherance of the local public policy objectives of the City of New Rochelle.'' At the end of each year, the NRNRC provides a full report to the City Council on its recent projects and those it proposes for the coming year. A resolution adopted by the City Council finding that a proposed activity is not in furtherance of the city's current housing policies will render that project ultra vires: beyond the corporate powers of the entity. This direct policy connection with the city helps to inspire confidence that the housing corporation can be trusted and relied upon to meet housing needs as the city and its citizens define them. As of 2004, the corporation developed or rehabilitated over 1,200 units of housing valued at more that $30 million.

The NRNRC has established a solid track record by securing grants and subsidies from state and federal housing agencies, securing favorable mortgages from private banks and banking institutions, using the proceeds of general obligation bonds and project revenue bonds, benefiting from payment in lieu of property tax agreements, joint ventures with private sector developers, and serving as the redeveloper of parcels of urban renewal land.

Step Eight: Providing Financial Assistance Directly

Depending on how affordable housing development corporations are organized, they may be eligible for financial concessions that can be provided directly by local governments. In some states, localities can issue housing bonds and use the proceeds to lower the

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cost of housing developments. In others, quasi-public housing development corporations qualify for real property tax abatements. Under a certain type of inclusionary zoning program, developers may buy out of their obligation to provide affordable housing directly by contributing money to a local housing trust fund. This fund, along with the proceeds of housing bonds, can be used to fund affordable housing projects advanced by a local housing development corporation or by other affordable housing projects. Such funds can be supplemented by donations from employers in the community who want to support housing production for needed workers.

Incentive zoning, of course, provides a financial incentive for developers to provide affordable housing directly. In some states, localities can use tax increment financing to float bonds the proceeds of which are used to provide needed infrastructure needed by affordable housing projects, such as water, sewer, and roads.

Step Nine: Outside Public and Private Financial Assistance

The households that are identified in a local housing needs survey as needing affordable housing typically have incomes that meet the guidelines of state and federal housing subsidy programs. Developers who build housing projects using those funds are intimately familiar with how these subsidies can be secured and how they can be used to create a variety of housing options at the local level. If one or more of these developers serve on the local housing advisory board, they can inform the community about programs that respond to local needs. By forming a local housing development corporation and hiring staff familiar with these programs, the local government can access the financial assistance available through state and federal agencies and use these resources where they mesh well with developments that satisfy identified local housing needs.

Resistance to governmentally subsidized housing projects typically develops because dedicated low- and moderate-income housing developers come to town and propose one or more projects. When the local newspaper first discloses such a plan, citizen opposition forms overnight. This is not the case when these same subsidy

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programs are accessed by developers who are invited to implement a local inclusionary housing program. Where inclusionary zoning, locally provided financing, low-cost land, and other local initiatives do not reach far enough to provide housing for those needed by the community, state and federal subsidies are more welcome.

Step Ten: Adopting Local Housing Regulations

When local nonprofit housing corporations or private developers provide affordable housing, local governments face several challenges. How does the locality guarantee that the occupants of affordable housing meet the income standards established by the local inclusionary housing program? When rental units or for-sale homes are produced under the program, what happens when they are sold or the initial tenant moves out? Is a waiting list of income-eligible households maintained? By whom? How? Are developers required to record deed restrictions on their developments obliging them to keep housing units affordable? For how long? What do those deed restrictions include and how are they enforced? If the local housing program is designed to give a priority to certain groups of households—such as teachers, municipal employees, police, or fire fighters—how are these preferences enforced?

All of these questions can be answered in local housing regulations adopted by the local legislature. When a developer applies for approval to build an affordable housing project, these additional regulations apply, and the project and developer are regulated by them. For example, local housing regulations may specify that a building permit is not to be issued until the requisite deed restriction that dedicates a certain number of units to affordable marketing is filed. Similarly, the regulations can prohibit the issuance of a certificate of occupancy for a building or unit until the income eligibility of the occupant is determined.

State Legislation that Builds Local Capacity to Meet Housing Needs

A criticism of meeting housing needs through local initiatives is that local governments do not have the capacity, political will, or the resources to provide housing to meet local

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and regional needs. In an attempt to address these legitimate concerns, state legislatures have taken a variety of steps to provide help and guidance to their municipalities. The following list is illustrative.

Needs Identification

The New Jersey Fair Housing Act of 1985[9] requires municipalities to fulfill a proportionate share of regional low- and moderate-income housing needs. An oversight committee formed by the Act, the Council on Affordable Housing (COAH), assesses current and future regional needs and is also responsible for ensuring municipal compliance. Each municipality must include a housing element in its land use plan that addresses its ''fair-share requirement'' within the guidelines set out by COAH.[10] Nebraska statutes charge the Department of Economic Development with the task of creating a comprehensive housing affordability strategy for the state, including the identification of housing needs.[11] The strategy describes how local land use controls affect the return on residential investment and define the role of local governments in implementing the state's housing policy. In California, the Department of Housing and Community Development determines ''the existing and projected need for housing for each region.''[12]

Comprehensive Plan Component

Arizona state law requires municipalities to include a housing element in their comprehensive land use plans. These housing plans must identify and analyze housing needs and provide for housing for households at all economic levels.[13] Comprehensive plans in Maine must provide for the development of affordable housing for low- and moderate-income households.[14] The Maine State Housing Authority provides technical assistance and information to assist in the development of provisions that effectively address the shortage of affordable housing. Municipalities are given the authority to develop regional comprehensive plans with neighboring municipalities. The Idaho Code directs, as part of the duties of the local planning commission, that different housing types be incorporated into the master plan, including a provision for low-cost conventional housing.[15] In

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addition, the plan should include an analysis of housing conditions and needs. Section 25 of the Illinois Planning and Technical Assistance Act provides grant money as an incentive to municipalities for affordable housing planning.[16] Delaware, Nevada, and California all require that local governments include a housing element in the comprehensive plan.[17]

Other Techniques

Property Tax Breaks

The Maryland legislature enables municipalities to provide real property tax exemptions when real property is used for affordable housing and other requirements under the statute are met.[18]

Conveying Public Lands

Arizona counties are authorized to sell, lease, convey, or otherwise dispose of real property at less than fair market value without holding an auction if the land will be used for housing for low-income households.[19] North Carolina counties may convey property to a public or private entity if the property will be used to provide affordable housing to persons of low or moderate income and covenants or conditions are included that assure this limitation.[20] Under the New Mexico Affordable Housing Act, municipalities and counties may donate land or buildings to provide affordable housing and are authorized to pay for the infrastructure necessary to support such projects.[21] In Nevada, a nonprofit organization may submit an application to the governing body of a city for conveyance of a property owned by the city to develop affordable housing for families residing in that city.[22] If the governing body approves such conveyance without consideration, it must enter into an agreement with the nonprofit organization requiring such organization to provide affordable housing for at least 50 years.

Trust Funds

Tennessee local governments are authorized to establish housing trust funds to provide affordable housing for low-income persons.[23] Loans or grants from the fund can be made available to nonprofit housing development corporations to develop affordable low-income housing.

Cluster Development

In Maine, municipalities are given the express authority to

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employ cluster zoning and explicitly encouraged to use it in conjunction with the development of affordable housing.[24]

Advisory Board

Colorado law authorizes and encourages local governments to establish affordable housing dwelling unit advisory boards. The board ''shall address the housing needs of low- and moderate-income persons, promote a full range of housing choices, and develop effective policies to encourage the construction and continued existence of affordable housing.''[25]

Ohio amended its Constitution to include the ''availability of adequate housing'' as a legitimate ''public purpose.''[26] One of the prerequisites for local governments engaging in housing activities is the establishment of a housing advisory board.[27]

Technical Assistance

Illinois adopted the Local Planning and Technical Assistance Act 2002.[28] The law's purpose is to provide technical assistance to encourage comprehensive planning, promote the use of model ordinances, and to support planning efforts in communities with limited funds.[29] The Department of Commerce and Community Affairs is authorized to provide technical assistance grants to local governmental units to ''develop, update, administer, and implement comprehensive plans, subsidiary plans, land development regulations . . . that promote and encourage the principles of comprehensive planning.''[30]

Appeals of Denials of Below Market Housing Projects

Several states, including Oregon, Massachusetts, Illinois, and Connecticut, have state statutory guidance for appeals of denials of below market housing projects. In Connecticut, the state legislature adopted the Affordable Housing Land Use Appeals Act of 1990 which requires that a locality that denies a developer's affordable housing proposal must show that the denial was ''necessary to protect substantial public interests in health, safety . . . and such public interests clearly outweigh the need for affordable housing.''[31] State law in Massachusetts establishes a Housing Appeals Committee to which developers of affordable housing can appeal local denials of their housing proposals.[32] The stat-

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ute requires that the denial be vacated if the Committee finds that it was not reasonable and not consistent with local needs. Under the Commonwealth's Low and Moderate Income Housing Law, certain entities who wish to build affordable housing may follow a streamlined application process.

The Illinois Affordable Housing Planning and Appeals Act seeks to ''encourage counties and municipalities to incorporate affordable housing within their housing stock sufficient to meet the needs of their county or community.''[33] The Act also allows developers to seek relief where local ordinances would otherwise prevent the development of low- and moderate-income housing, except in the case of ''non-appealable local government requirements'' that are essential to safeguard public welfare and safety. Furthermore, all ''non-exempt'' local governments (e.g., less than 10% of total housing dedicated to affordable housing) must develop an ''affordable housing plan'' that identifies the percentage of locally available affordable housing; designates lands appropriate for the development of affordable housing; and identifies goals, objectives, incentives, and other means that may be employed to comply with the Act.

A Model State Housing Law

A modest politically feasible approach to encouraging and enabling local governments to meet local and regional housing needs can be developed by combining several of the elements of these other state laws into a Local Housing Planning and Implementation Act. This law can guide municipalities in meeting local housing needs as part of a sound regional economic plan. Where localities fail to act, developers of affordable housing can use regional housing needs established under this Act to carry the burden of proving to courts that local zoning does not serve the interests of the people of the state. Since the power to zone is delegated to localities by the state, clear proof that localities are not meeting local housing needs might lead to appropriate judicial remedies.

The Act should designate a state agency to identify high-cost housing regions, to conduct regional housing need studies, to make housing data available to localities for their consideration, and to coordi-

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nate the provision of technical and financial assistance to localities within those regions. The Act should charge a state agency or other task force with the assignment of reviewing existing state housing laws to be certain that local governments have the authority to facilitate the creation of affordable housing using the techniques contained in the ten point program described above. Where existing laws and programs do not empower local governments to act effectively to meet housing needs, the agency or task force should be instructed to recommend appropriate initiatives to the state legislature. Following recommended reforms, municipalities will have access to a full tool kit of techniques for implementing a local inclusionary housing program.

Since most states delegate the power to adopt comprehensive land use plans to their local governments, localities can be encouraged by the Act to adopt housing components of those plans. Where they do adopt housing components, and where those components meet defined local and regional needs as identified by the state, local governments can be provided financial incentives such as enhanced revenue-sharing funds or priority eligibility for much desired transportation, water, sewer, open space, and other discretionary state funding.

Providing housing need data, technical resources, and financial assistance creates important incentives for effective local action. Local housing planning by itself will increase local awareness of the impact of current local zoning provisions on housing costs, of the economic and other reasons for creating affordable housing, and of the availability of numerous techniques that localities can use to create housing needed by young families, workers, the elderly, and others in search of housing in the region.

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[1]Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege,* 54 Emory L.J. 1231 (2005); Adam Gordon, *Making Exclusionary Zoning Remedies Work: How Courts Applying Title VII Standards to Fair Housing Cases Have Misunderstood the Housing Market,* 24 Yale L. & Pol'y Rev. 437 (2006); Brian R. Lerman, *Mandatory Inclusionary Zoning: The Answer to the Affordable Housing Problem,* 33 B.C. Envtl. Aff. L. Rev. 383 (2006); Benjamin Powell & Edward Stringham, *''The Economics of Inclusionary Zoning Reclaimed'': How Effective Are Price Controls?,* 33 Fla. St. U. L. Rev. 471 (2005).

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[2]Kirsten Engel, *State and Local Climate Change Initiatives: What is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?,* 38 URB. LAW 1015 (2006).

[3]The authors work with the Land Use Law Center at Pace University School of Law, which conducts four-day training programs for local leaders on a variety of land use topics including affordable housing.

[4]National Association of Counties, *Paycheck to Paycheck: Wages and the Cost of Housing in the Counties* (2004): http://www.naco.org/Content/ContentGroups/Publications1/Surveys1/Housing2/paychecktopck.pdf.

[5]*Id.*

[6]The Gaining Ground Information Database houses sample techniques for providing affordable housing and is available at http://www.landuse.law.pace.edu. Resources include accessory apartment ordinance, incentive zoning, senior citizen housing district overlay zone, and affordable housing floating zone.

[7]A floating zone device of this sort was upheld in Rodgers v. Tarrytown, 303 N.Y. 115 (1951).

[8]New Rochelle Neighborhood Revitalization Corporation, www.nrnrc.org; REINVENTING REDEVELOPMENT LAW 181 (Land Use Law Center, Pace University School of Law 2005), on file with authors.

[9]N.J. STAT. ANN. §§ 52:27D-301-329.

[10]N.J. STAT. ANN. § 52:27D-301.

[11]NEB. REV. STAT. § 81-1281.

[12]CAL. GOV. CODE § 65584.

[13]ARIZ. REV. STAT. § 9-461.05.

[14]ME. REV. STAT. ANN. tit. 30, § 4752.

[15]IDAHO CODE § 67-6508(l).

[16]20 ILL. COMP. STAT. ANN. 662/25.

[17]DEL. CODE ANN. tit. 22 § 702; NEV. REV. STAT. ANN. §§ 278.230, 278.250; CAL. GOV. CODE § 65583.

[18]MD. CODE ANN. TAX-PROP. § 7-506.1.

[19]ARIZ. REV. STAT. § 11-251.10.

[20]N.C. GEN. STAT. § 153A-378.

[21]N.M. STAT. ANN. § 6-27-5.

[22]NEV. REV. STAT. ANN. § 268.058.

[23]TENN. CODE ANN. §§ 7-8-101, 13-23-501.

[24]ME. REV. STAT. ANN. tit. 30-A, § 4326.

[25]COLO. REV. STAT. § 29-26-101.

[26]Ohio Const. art. VIII, § 16.

[27]OHIO REV. CODE ANN. § 176.04.

[28]20 ILL. COMP. STAT. ANN. 662.

[29]20 ILL. COMP. STAT. ANN. 662/5.

[30]20 ILL. COMP. STAT. ANN. 662/15.

[31]CONN. GEN. STAT. § 8-30g.

[32]MASS. GEN. LAWS ch. 40B, §§ 20-23.

[33]310 ILL. COMP. STAT. ANN. 67.

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