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Shaping an Inclusionary Zoning Ordinance for Post-Katrina New Orleans

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Shaping an Inclusionary Zoning Ordinance for Post-Katrina New Orleans

A Thesis

Submitted to the Graduate Faculty of the
University of New Orleans
in partial fulfillment of the
requirements for the degree of

Master of Urban and Regional Planning

by

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B.A. University of South Carolina, 2000

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Glossary

Deed restriction- controlled price on a unit for a set period of time (Mandelker, 2005)

Density bonus- allows a developer to build more units than the zoning permits, ideally allowing the developer to recoup the cost of building affordable units

Exclusionary zoning- zoning that promotes land uses that may exclude multi-family or affordable housing including minimum lot sizes, and minimum number of bedrooms

Fair share- term taken from the Mount Laurel decisions in New Jersey, court ruled that all municipalities must provide a certain percentage of affordable housing (Mandelker, 2005)

Inclusionary housing- term for inclusionary zoning used frequently in California

Inclusionary zoning- a technique to provide affordable housing by requiring a developer to build affordable, or inclusionary units, mixed in with market-rate units, typically developers are offered incentives like a density bonus

Set-aside- the number of units required to be affordable in a given development

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Abstract

This thesis examines the Louisiana legislature's justifications for supporting inclusionary zoning to address the shortage in affordable housing since hurricane Katrina and compares the model ordinance, passed in 2007, to ordinances in San Francisco, Denver, and San Diego. These large city ordinances offer an assessment of older versus newer ordinances as well as strict versus lenient provisions within a mandatory ordinance.

This thesis acknowledges the model ordinance is strong and accepts its recommendation to convene a housing task force to study implementation in New Orleans. In order to maximize the benefits of inclusionary zoning this task force should be convened quickly to undertake local housing market research to determine the right set-aside, threshold, and incentives to create a strong mandatory ordinance. This group must also focus on implementing key model ordinance provisions like setting aside units for very low-, low- and moderate-income households within each development and determining the ideal density bonus.

Keywords: Affordable housing, inclusionary zoning, Post-Katrina New Orleans

Chapter 1

Introduction:

Examining the need for affordable housing pre and post-Katrina

Time for change

In 2006 the Louisiana legislature decided that something must be done about escalating housing costs all over the state to ensure that Louisiana as a whole can attract the workforce needed to rebuild, and equally as important, to adequately house the resident population. The legislature decided joined the ranks of Massachusetts, California, New Jersey, Connecticut, Florida, and Virginia (Rusk, 2005) and passed enabling legislation allowing a municipality to adopt an inclusionary zoning ordinance (Act No. 810). Like each state listed above, Louisiana does not *require* a municipality to create an inclusionary zoning ordinance, but rather passed this legislation to protect a locality employing this tool from legal action aimed at halting such efforts. Act No.810, passed in the regular session of 2006, enables, “any municipality or parish with land use or zoning ordinances or regulations to adopt ordinances for inclusionary zoning for affordable housing.” This legislation begins by officially recognizing that the city of New Orleans as well as the State, both suffer from an acute lack of affordable housing and further recognizes that inclusionary zoning is one tool that should be applied to increase that supply.

In 2007 the Louisiana House of Representatives went one step farther and passed House Concurrent Resolution No. 123, a model inclusionary zoning ordinance for the state of Louisiana. The purpose of this model legislation is to create a framework that can be adopted

and if needed, adapted to fit the unique needs of municipalities throughout the state. This is a proactive step toward increasing the statewide supply of affordable housing, but how can it best be applied to New Orleans?

Research methods

The research problem this thesis addresses is to determine how the model inclusionary zoning legislation should be adapted in order to produce units of affordable housing in post-Katrina New Orleans. The purpose of this research is to use national models to determine common strengths and weaknesses of inclusionary ordinances in order to shape a successful ordinance for New Orleans. The research questions help achieve this purpose and address this problem are as follows:

Question 1) Why did the Louisiana legislature choose inclusionary zoning and how does the model ordinance recommend it be implemented?

Question 2) What lessons can New Orleans learn from other cities in order to shape an ordinance that will produce affordable units?

Thesis outline

This thesis begins with an examination of the need for affordable housing pre and post-Katrina by comparing prevailing wage levels for several occupations with the rising cost of housing in the region. The second chapter defines inclusionary zoning and explores arguments for and against this method for supplying affordable housing within the literature. The third chapter examines the justifications for support of inclusionary zoning put forth by the Louisiana legislature. Chapter four compares the model ordinance to ordinances from San Francisco, Denver, and San Diego to determine what regulations are working in these large cities and if

they should be applied to an inclusionary ordinance in New Orleans. These ordinances were chosen because they are large cities and vary in age and leniency in provisions. Chapter five, the conclusion, examines how this information can help shape an inclusionary zoning ordinance in New Orleans.

Poverty pre-Katrina

Hurricane Katrina exposed a level of poverty unknown to many Americans; the signs however were evident before this disaster. Even when compared to the relatively high levels of poverty in Louisiana as a whole New Orleans showed signs of crisis. The 2000 census reports that 27.9% of people in New Orleans were living in poverty, compared to 19.6% for Louisiana, and 12.4% for the nation as a whole. A closer look at demographics in the region show that the median household income in Orleans Parish in 2000 was \$27,133, an amount 35% lower than the national median household income and 17% lower than the median household for Louisiana (GNOCDC).

A look at income distributions in 2000 also reveals the extent of poverty in New Orleans before Katrina. In 2000 the largest concentration of residents to occupy a single income bracket fall into the faction making less than \$10,000 annually. A full 21% of the population, in 2000, is grouped here (GNOCDC). Compare this to a state percentage of 15.7% and a national percentage of 9.5% earning this meager annual wage and the level of poverty in New Orleans becomes clearer. One could argue however, that lower median wages were indicative of a reduced cost of living and that residents in Orleans Parish were able to adequately feed, clothe, and house themselves even at reduced median wages. To explore one facet of this argument, adequate housing, let us briefly review the cost of housing pre-Katrina.

Housing costs pre-Katrina

The Department of Housing and Urban Development defines affordable housing as housing that demands 30% or less of pre-tax monthly income (HUD Community Planning & Development). Employing this standard to an individual making an annual income of \$9,999 means that, in 2000, 21% of residents in New Orleans should spend not more than \$250 a month on housing costs. In fact, according to the GNOCDC in 2000, 40.5% of residents grouped in the less than \$10,000 income bracket paid more than 30% for either “selected owner costs or gross rent”.¹ Both selected owner costs and gross rent are census definitions used to better gauge the real cost of rental housing and homeownership. Many in this income bracket likely received housing assistance in the form of Section 8 vouchers or units in public housing projects; without this assistance the 40.5% figure would likely be higher.

A more complete look at the cost of housing in New Orleans before Katrina can be gained by examining selected homeownership and rental costs for all income levels in New Orleans. Indeed, using 2000 census figures Popkin, Turner, and Burt (2006) report that 56% of all very low income households (not just those making less than \$10,000) in New Orleans paid more than half their income for housing in that year. The authors state that, “both owners and renters were equally disadvantaged, with majorities of both groups facing excessive housing cost burdens” (Popkin, Turner, Burt 2006 p. 2). However, the GNOCDC *Housing affordability by owner/renter status (2000)* data table reveals that when examining all income brackets, homeownership was more easily attained in New Orleans than the state or the nation. Of those who owned property 31.6% paid over the HUD recommended affordability level of 30%, a percentage lower than for Louisiana and the nation as a whole (GNOCDC). The HUD standard

¹ Selected owner costs include mortgage payments in addition to insurance costs, utility payments, condominium fees and other costs associated with homeownership. Gross rent is defined as rent plus an estimated average of utilities the renter is expected to pay (Census 2000, Sample Characteristics).

of affordability was clearly more difficult to achieve for renters in New Orleans, as compared to Louisiana and the nation, with 68.4% paying more than the affordable standard (GNOCDC).

The above housing costs are for Orleans Parish, which includes only the City of New Orleans, however, affordable housing is a regional problem. A review of key area wages in the New Orleans-Metairie-Kenner MSA is necessary to put the regional cost of housing in perspective. The MSA consists of seven parishes: Orleans, Jefferson, Plaquemines, St. Bernard, St. Tammany, St. Charles, and St. John the Baptist.

Wages and housing costs pre-Katrina

Census data for 2000 shows that the median family income for the MSA was \$42,626; higher than the Orleans Parish figure and also higher than the state level. Table one shows however, that of the occupations employing 10,000 people or more in 2000 the majority paid far below the regional median family income, indicating that low wages were likely a regional problem. Occupations employing 10,000 people exclude minor employers and begin to focus on some of the most popular occupations in a region. Taken together the prevailing wages in these occupations will likely have a major effect on wage levels in a region as a whole.

Bureau of Labor Statistics (BLS) data reveal that the two occupations employing the largest proportion of people in the MSA in 2000 were retail salespersons, employing 17,640 people, and cashiers, employing 15,560 people. These two occupations generated a mean annual wage of \$18,130 and \$13,880 respectively. The third largest occupation in the New Orleans MSA at this time was general and operations managers, making a mean annual wage of \$58,190. Of all ten occupations employing 10,000 people or more, only general and operations managers and registered nurses earned more than the median family income of \$42,626 in 2000. The mean annual salary for the remaining eight occupations combined equals \$16,503. The HUD standard

of affordability applied to this group of working poor would leave \$412 for housing per month.

Table two shows that in 2000 this group could afford up to a one-bedroom, which poses a space constraint on more than two very close people.

Table 1: Occupations in New Orleans MSA employing 10,000 or more in 2000

Median family income				\$42,626
Total employment		607,529*		
Occupation	Number of employees	Percentage of total employment	Mean annual wage	
Waiters & waitresses	10,510	2%	\$13,720	
Combined food preparation & serving workers including fast food	10,180	2%	\$13,840	
Cashiers	15,560	3%	\$13,880	
Janitors & cleaners except maids & housekeeping cleaners	11,150	2%	\$15,330	
Security guards	10,010	2%	\$16,210	
Retail salespersons	17,640	3%	\$18,130	
Office clerks, general	12,200	2%	\$19,550	
Secretaries, except legal, medical & executive	11,590	2%	\$21,370	
Registered nurses	11,420	2%	\$45,870	
General & operations managers	15,230	3%	\$58,190	

Source: U.S. Department of Labor, Bureau of Labor Statistics New Orleans, Metairie, Kenner, LA 2000 Occupational Employment Statistics Metropolitan Area Occupational Employment and Wage Estimates and U.S. Census Bureau, 2000. Median Family Income in 1999 dollars, Summary File 3 (SF 3)

In fact, only general and operations managers and registered nurses could afford, at the HUD standard, a two bedroom apartment at the fair market rent (FMR) of \$521 (HUD). In other words, 250,320 residents in the New Orleans MSA, or 18.7%, of the workers in the region could not afford the FMR for a two-bedroom unit in 2000. Table two shows that the situation continued to worsen from 2000 to 2005 as the FMR for a two-bedroom apartment in the New Orleans MSA rose from \$521 to \$676 (HUD). The housing loss caused by Katrina would cause this number to rise even more.

Table 2: Fair Market Rents New Orleans 2000-2008

FMR	Efficiency	One- bedroom	Two- bedroom	Three- bedroom	Four- bedroom
FY 2000	\$365	\$418	\$521	\$709	\$858
FY 2001	\$369	\$423	\$527	\$717	\$868
FY 2002	\$446	\$512	\$637	\$867	\$1,050
FY 2003	\$461	\$529	\$659	\$896	\$1,085
FY 2004	\$463	\$531	\$661	\$899	\$1,089
FY 2005	\$522	\$578	\$676	\$868	\$897
FY 2006	\$725	\$803	\$940	\$1,206	\$1,247
FY 2007	\$755	\$836	\$978	\$1,256	\$1,298
FY 2008	\$764	\$846	\$990	\$1,271	\$1,314

Source: Greater New Orleans Data Center. 2008 author reproduction, Fair Market Rents by Unit Bedrooms.

Wages and housing costs post Katrina

BLS data show that in May 2006 only five occupations could claim 10,000 or more employees, down from ten in 2000, but wages for these five occupations had risen. Does this change support the notion of a smaller more affluent region after Hurricane Katrina? To examine this question table two shows that of these five occupations, registered nurses again makes the list of occupations paying above the median family income, which in 2006 was \$47,754 (American Community Survey), however, this time it is the only occupation in that position. The remaining four occupations employing over 10,000 people did benefit from improved wages. And for some the increase in wages was tangible, a 27% increase for retail salespersons, 14% increase for cashiers, and a 7% increase for office clerks; registered nurses, however, received a less than 1% increase overall. It is likely, however, that these wage increases were absorbed by the higher cost of living in the region following the storm. The Brookings Institute's August 2006 *Katrina Index* reports that the large number of housing units severely damaged in Hurricane Katrina had the effect of pushing up rents in the metro area. By August 2007 Brookings reports that FMR rents had risen 39% from pre-Katrina levels. By November 2007 this percentage had increased to 46% percent. This steep rise in rent likely absorbed the wage increases for these four occupations. In 2006, HUD set the FMR for a two-bedroom unit at \$940, that number has continued to rise to \$978 for a two-bedroom apartment in 2007 and to \$990 for a two-bedroom unit in 2008.

Table 3: Occupations in New Orleans MSA employing 10,000 or more in May 2006

Median Family Income			\$47,754
Total employment			454,550
Occupation	Number of employees	Percentage of total employment	Mean Annual Wage
Cashiers	13,270	3%	\$15,760
Office clerks general	10,840	2.4%	\$21,010
Laborers & freight, stock, & material movers hand	10,680	2.3%	\$21,570
Retail salespersons	14,950	3.3%	\$23,000
Registered nurses	10,300	2.3%	\$58,580

Source: U.S. Department of Labor Bureau of Labor Statistics New Orleans, Metairie, Kenner, LA – May 2006
Occupational Employment Statistics Metropolitan Area Occupational Employment and Wage Estimates

Average sale price single family home

Rental prices spiked following hurricane Katrina and have stayed high but the average sale price for a single family home in Orleans parish has hit highs and lows since the storm. The *Katrina Index* (2006) shows that in the region as a whole home sale prices have risen, but Orleans and St. Bernard Parishes have experienced much more volatility in their badly flooded markets. The index also shows more fluctuation in home prices on the more heavily flooded East bank of Orleans as compared to the West bank.

Using data from the New Orleans Metropolitan Association of Realtors for August 2006, the *Katrina Index* shows that the average sale price for a single-family home in the East bank of

Orleans was 28% lower than that number in August 2005.² The average single-family home sale price for the West bank of Orleans, which experienced comparatively little flooding, experienced an increase of \$1,548.³ Through 2006, and into 2007, average single-family home prices for the East bank were beginning to stabilize below the 2005 average price for a single family home. For example, in June 2005 that price was \$273,032 for the East bank. In June 2006 the average had dropped to \$245,214, and by June 2007, the average single-family home price had fallen another 8% to \$226,761. A long-term analysis of average home sale prices for both banks of Orleans Parish could reveal the affect of substantial flooding, or its absence, on the housing market.

Lack of affordable housing a barrier to recovery

Unfortunately, the drop in average home sales prices below the pre-Katrina average for the East bank of Orleans Parish does not constitute affordable housing for the workforce that this city must attract in order to rebuild. Popkin, Turner, & Burt (2006) recognize a low wage workforce is particularly vital to rebuild New Orleans, and without adequate housing this population cannot return and contribute to the recovery. As the lower number of workers represented in table two illustrates many such workers have been unable to return, giving businesses a smaller pool of workers from which to draw and, in turn, forcing higher wages.

The resulting exclusion of thousands of former, and potential, workers and residents affects the entire regional economy, which depends on workers and consumers to survive and thrive. The Brookings Institute acknowledged this need for workforce housing in the *Katrina Index (2006)* writing: “without housing for returning families and workers, as well as new

² August 2005 Average sale price single family East bank \$244,793; August 2006 Average sale price single family West bank \$175,126

³ Aug 2005 \$205,621 Aug 2006 \$206,073

temporary workers, it would be nearly impossible for businesses to stay open and the economy to come back” (p. 3).

Two industries critical to the recovery that rely on a consistent pool of low wage workers (such as the bulk of those making up tables one and two) are Construction and Leisure & Hospitality. These industries have made significant progress, relative to other industries, toward regaining their labor pool since Katrina; the lack of affordable housing, however, remains a persistent barrier to full recovery. In the *Katrina Edition* of the Metropolitan New Orleans Real Estate Market Analysis, Miestchovich (2006) reports that Leisure & Hospitality experienced the largest job loss, losing 52.5% of its pre-Katrina employment in September 2005. Miestchovich writes that, as of February 2006, this sector was rebounding, having added 32.3% of its pre-Katrina employment. Miestchovich acknowledges however, that housing remains crucial to the continued growth of this industry. He writes, “...one of the most pressing issues for Leisure & Hospitality is having a sufficient number of workers to operate facilities. The availability of workers; however, is directly linked to the availability of suitable housing. Housing continues to be a strategic linchpin for the region’s recovery” (p. 9).

The sector has continued to rebound, according to Lieutenant Governor Landrieu’s *Louisiana Rebirth Scorecard*. As of January 2007 30,000 hotel rooms in New Orleans were open, out of a pre-Katrina total of 38,000. This impressive achievement shows a brisk pace of recovery for this industry and for the city, because importantly, low-income minorities give the city much more than clean hotel rooms. To illustrate this fact Popkin, Turner, and Burt (2006) write, “much of what creates the unique and vibrant New Orleans culture grows directly out of its lower-income and minority communities and their many deep rooted families” (p. 9).

But the question remains, how many native New Orleanians have returned to the city and reclaimed their former low wage jobs? Bozzo (2007) writes in the article “A tale of two cities: New Orleans after Katrina” that many low wage workers have not returned to New Orleans and concludes that hotels have filled vacancies by employing contract laborers. Bozzo further suggests that many displaced New Orleanians are unable to return because of the slow pace of rebuilding due, in large part, to a shortage in construction laborers resulting in an overall shortage in the construction of new housing. Bozzo also writes that the shortage of construction workers, and in particular general contractors, is slowing the ability of homeowners to rebuild. And Bozzo concludes that the lack of affordable housing is keeping these workers away.

Miestchovich (2006) agrees that the Construction sector took a hard hit from Katrina. In September 2005, the industry lost 7,400 jobs, down from 30,200. By February 2006, Miestchovich writes, that sector had regained 5,600 jobs. This is an under representation of the actual number of employees however, as it only counts employees with Louisiana based firms, leaving out the large number of migrant workers and out of state firms that have relocated (Miestchovich, 2006). Due to the scale of destruction, and the subsequent rebuilding, it is vital to increase the size of the construction industry beyond its pre-Katrina numbers. In a more recent tally Roberts (2006) reports in the New Orleans *CityBusiness* “Help wanted New Orleans” that by June 2006, 6,100 workers had returned to the Construction industry. Roberts writes that this represents an uncharacteristically slow rebound for a construction industry following a disaster, it is not clear, however, whether Roberts has factored in the absence of out of state and migratory labor in this tally. Still Roberts observes that, “[w]hat normally happens in the immediate aftermath of the storm, you not only have the construction sector back, you have it

back plus some... The real oddity for New Orleans is the fact that construction employment is still a third below what it was pre-Katrina” (New Orleans CityBusiness, June 2006).

Even if Roberts has not accounted for the large number of non-local contractors and related workers in the state his observation still carries weight. If many more non-local firms have pushed into the market than is typical in a post disaster environment that may suggest that local firms and workers have been unable to return to the area or unable to resume their normal activities. If that has been the case in post-Katrina New Orleans and the region it may be an indicator of this disaster’s wide ranging and long-term effects. Such long-term effects could be a shift in the racial make-up of the city as large numbers of black residents are unable to return and an influx of Hispanics move in. Roberts (2006) concludes that, “it’s easier to attract unskilled laborers to the New Orleans area but the wages are not high enough to tempt skilled workers” (New Orleans CityBusiness, June 2006). Roberts (2006) further writes that, in general, workers are not keen to leave good paying jobs to be paid the same amount but live in a trailer, or an expensive apartment. This may be true of the displaced as well as new comers.

All told, in September 2005, total nonfarm employment fell “by 217,300 jobs or 35.5%” for the region affected by Hurricane Katrina (Miestchovich, 2006 p. 8). Miestchovich writes, “never in U.S. history has a disaster caused such a large and widespread loss of jobs” (p. 8).

There can be no doubt that the lack of affordable housing continues to adversely affect the recovery of New Orleans by denying much needed workers a safe and affordable place to live. One way to gauge the degree of the effect of high housing costs on the recovery of the city is to return to a review of prevailing wages, this time for jobs critical to the recovery, and determine how these wages measure up against increased housing costs.

As mentioned, Construction and Leisure & Hospitality are key industries in the economic recovery of New Orleans but many other occupations such as firefighters, police, and teachers are also key and workers in these occupations are also struggling with high housing costs. Table three shows wage estimates from the BLS, as of 2006, for nine occupations selected because of their direct impact on an improved quality of life.

Of these nine occupations it is clear that firefighters, teachers, and police officers are crucial to the rebuilding of a safe and healthy city, but others such as hotel/motel desk clerk, are particularly important to the local tourist economy in New Orleans. For a childcare worker earning \$14,500 a year this fair market rent is 61% above the affordable standard set by HUD. Further, the annual salary required for \$940 to be 30% of monthly income is \$37,600; social workers and construction come close but even these comparatively high paying jobs cannot cross this threshold.

Table 4: Median family income and wage estimates, jobs critical to recovery New Orleans, MSA, 2006

Median Family Income	\$47,754
Childcare Worker	\$14,500
Hotel/Motel Desk Clerk	\$17,020
Medical Assistant	\$21,140
Preschool Teacher	\$22,190
Firefighter	\$28,390
Police	\$32,520
Construction	\$34,460
Social Worker	\$36,020
Librarian	\$46,620

Source: U.S. Census Bureau, 2006. American Community Survey. Income in the Past 12 Months in 2006 dollars (S1901). New Orleans, LA Summary file 3 (SF 3) and Louisiana Bureau of Labor Statistics, 2006. Wage Estimates.

Factors in high housing costs

Comparing wage data to FMR for a region can tell part of the story of the housing burden facing a region, but it cannot tell the full story of post-Katrina New Orleans. In total in Orleans Parish, 67.4% of all occupied rental units received some damage in Katrina, and 34.5% of these received severe damage, defined as more than \$30,000 in damage (Unified New Orleans Plan). Pre-Katrina over 50% of the population were renters and, as discussed, many of these renters were low-income making the scale of the loss more clear.

Rental properties of all types are temporarily, and some permanently, off the market, therefore, market forces demand that the rental properties now available rent for top dollar. This puts a strain on many sectors of the population but none more so than those barely making ends meet before the storm. This population has, in a growing number of cases, been unable to find shelter in the new rental market and is now homeless.

Using their January 2007 Point in Time Survey, Unity of Greater New Orleans estimates that the number of homeless in Orleans Parish has doubled since the storm, from an estimated 6,000 to approximately 12,000 people. Unity further reports that, because the Point in Time Survey did not count those people inhabiting abandoned houses or doubling up with relatives and friends this number is almost certainly an under representation of the actual figure. Homeless advocates in New Orleans also now refer to the “Katrina Homeless” described as those unable to secure and maintain shelter due to the rise in rents, those unable to return home to New Orleans due to the rise in housing costs and those chronic homeless, unable to secure and maintain shelter before Katrina.

Conclusion

In 2006 the Louisiana legislature embraced inclusionary zoning as a powerful tool to build affordable housing throughout the state, and in 2007 the legislature revealed the model ordinance, a guide designed to lead local municipalities through adoption of a strong mandatory inclusionary zoning ordinance. This thesis has begun by determining the need for affordable housing in New Orleans, both before and after, hurricane Katrina. A comparison of wage levels to rising housing costs reveals that even before Katrina housing costs were beginning to pinch many families.

Subsequent chapters explore the Louisiana legislature's justifications for support of inclusionary zoning and determine whether these reasons are supported by the literature. Another compares the model ordinance to three large city ordinances in San Francisco, Denver, and San Diego. This comparison reveals strengths and weaknesses of the model ordinance to help determine which aspects of this legislation should be adopted and which may need to be adapted to best meet the affordable housing needs of New Orleans. The next chapter, however, explores the literature surrounding inclusionary zoning and reviews arguments for and against this method of supplying affordable housing.

Chapter 2

What is inclusionary zoning?

An introduction and examination of arguments for and against

The chapter begins with a look at why the Louisiana legislature chose to support inclusionary zoning as a tool to supply much needed affordable housing. This chapter explores the policy and practice of inclusionary zoning through the literature in support and in opposition to this method. The literature surrounding inclusionary zoning can be divided into several distinct categories: those which examine, and ultimately support, the legal and economic justifications for inclusionary zoning; those which use economic justifications to argue against inclusionary zoning; and those which critique the above two categories while ultimately reserving judgment. This chapter pulls from each of these categories of research in order to define inclusionary zoning and its purpose, place it in the context of U.S. housing policy, and explore the main arguments for and against this tool for providing affordable housing. Ultimately, this chapter begins to explore the fact that, in order to be successful and produce units of affordable housing, an inclusionary zoning ordinance must be tailored to meet a municipality's unique needs.

Defining inclusionary zoning

Inclusionary zoning is a zoning regulation, often passed in the form of a city ordinance, aimed at increasing the amount of affordable units in a locality by “requiring or encouraging” a developer to set aside a certain percentage of units for low and moderate income households. Incentives are typically provided to the developer to help achieve this end (Mandelker, 2005; Schwartz, 2006 p. 192; Mallach, 1984). These low- and moderate-income units are termed a “set aside,” as defined by Burchell and Galley (2000) as “the share of units allocated to [low and moderate income] households” (p. 1). The authors state this set-aside is intended to make a

semi-permanent contribution to the number of affordable units in a locality. Typically, the percentage of units determined to be “set aside” as affordable in a given development is between 10 and 15 percent. Some ordinances, however, require as much as 35 percent be set aside as inclusionary (Padilla, 1995; Kautz, 2002). A high set-aside may seem like a boon to those seeking to build a maximum number of affordable units, but if set too high it may effectively halt development. This issue will be examined more closely later in the chapter.

A municipality can legislate the length of time a unit remains affordable, often termed a deed restriction. A typical deed restriction on the resale of an affordable unit is 10 to 30 years (Schwartz, 2006). For a rental unit this term fluctuates from a relatively short 10 years to a length of 99 years, and in some jurisdictions rental units are permanently restricted (Schwartz, 2006; Porter, 2004). The length of a deed restriction for homeownership opportunities can be controversial (Tombari, 2005). If the deed restriction is short and the housing market is robust a buyer could resell the unit for a potentially hefty profit. This unit now represents one less affordable unit and the seller bought low and sold high as a consequence of local legislation. If the deed restriction is too long the owner may be denied the opportunity to build equity because he or she participated in this housing program.

A potential homeowner or renter always has choice of whether to purchase or rent an inclusionary unit, but whether developers are “required or encouraged” to provide these units depends on whether the ordinance is mandatory or voluntary. Padilla (1995) defines a mandatory ordinance as that which “require[s] that a developer set aside a certain percentage of inclusionary units as a condition of approval of the developer’s project” (p. 5). Voluntary ordinances, on the other hand, rely solely on incentive packages to entice developers (Padilla, 1995). Consequently, mandatory ordinances are widely recognized as producing more

affordable housing than voluntary ordinances (Lerman, 2006; Rusk, 2006). Mallach (1984) found, in a California study, that despite reluctance on the part of developers when mandated to produce affordable units they were “able to make inclusionary programs work...” (p. 126). Mallach further writes that, “few, if any, builders will produce units that conform to the *Mount Laurel II* standards in the absence of explicit regulatory standards and conditions” (p. 126). These standards demand that each municipality produce its fair share of affordable housing. Mandelker cites a specific *Mount Laurel II* standard that requires “[a] ‘minimum’ of 20% of the units [...] be ‘affordable’ for the project to be considered ‘inclusionary’” (p. 441). Other standards listed in *Mount Laurel II* include mandatory set-asides and density bonuses. In keeping with these standards most mandatory ordinances offer incentives to help cover the developer’s costs, the most common is a density bonus (Rusk, 2006). Padilla (1995) describes the ideal density bonus this way, “...it must allow a developer to build enough units so that the cost of building inclusionary units can be recouped, at least in part, through the production of more market rate units than would otherwise be permitted” (p. 13). Other incentives commonly offered include fee waivers, a pass on parking restrictions, and an expedited permitting process (Padilla, 1995; Mandelker, 2005; Rusk, 2006). Lerman (2006) writes that mandatory ordinances allow a community greater choice in the type and variety of incentives that will be provided, which may be more beneficial for the community. In addition to differences in how ordinances are structured, there are also differences in the terminology used to describe this approach to affordable housing.

Inclusionary zoning versus inclusionary housing

The term inclusionary zoning is sometimes used interchangeably with the term inclusionary housing. Padilla (1995) defines inclusionary housing as those programs that require

a developer to set aside a defined number of units for very low-, low-, and moderate-income households. She further writes that these programs generally provide incentives to the developer, a definition that seems not to differ at all from the standard inclusionary zoning definition. Mallach (1984) writes however that, though the two terms are similar, they are not synonymous. He defines both terms in relationship to each other and sees them as dependent on each other. Essentially, he writes that an inclusionary housing program, which will define how the housing goals are to be achieved, must be backed up by an inclusionary zoning ordinance. Mallach writes “an inclusionary zoning ordinance [...] is a necessary condition for an inclusionary housing program; [an inclusionary housing program] is not, [...] likely to be sufficient in itself for the resulting effort to be considered a legitimate program” (p. 2). Calavita & Grimes (1998) use the definitions put forth by Mallach (1984) for their California based study deciding to use the term inclusionary housing to further differentiate this program from other similar programs in the state. Most authors, while recognizing that the term inclusionary housing is sometimes used (particularly in California), choose to use the term inclusionary zoning instead (Porter, 2004; Rusk, 2006; Schwartz, 2006; Kautz, 2002; Burchell & Galley, 2000; Lerman, 2006; Powell & Stringham, 2004; Mandelker, 2005, and others). Possibly, the term inclusionary zoning is more widely used precisely because of Mallach’s contention that the zoning ordinance is a necessary condition of any inclusionary housing program. This thesis uses the term inclusionary zoning, except in the case that the researcher cited uses the term inclusionary housing.

Inclusionary zoning has also, although less frequently, been associated with the term “fair share,” popularized by the Mount Laurel I and II decisions which mandated that each New Jersey municipality provide their fair share of affordable housing (Porter, 2004; Schwartz, 2006). This

association is based on the *Mount Laurel II* New Jersey Supreme Court's identification of zoning as a contributor to the lack of affordable housing in many jurisdictions. That court specified that inclusionary zoning be tried as a solution; however, the court stopped short of mandating inclusionary zoning for all municipalities (Mallach, 1984).

The purpose of inclusionary zoning

Beyond simply creating affordable housing, a central purpose of inclusionary zoning is to create economically and socially integrated communities; a goal stated in current federal housing policy (HUD, 2006; Padilla, 1995; Mallach, 1984). In many jurisdictions these ordinances are adopted in an attempt to specifically combat the effects of years of exclusionary zoning tactics (Dietderich, 1996; Lerman, 2006; Burchell & Galley, 2000). Mandelker (2005) defines exclusionary zoning as “the use of zoning ordinances by (primarily) suburban municipalities to exclude housing that is affordable to lower-income households” (p. 411). This exclusion by income also often resulted in exclusion by race (Porter, 2004). In order to correct this situation and to reap the benefits incurred by the creation of mixed income communities, inclusionary ordinances often require that affordable units be built on site concurrent with market rate units. Inclusionary units should also be seamlessly integrated into market rate design and dispersed throughout the development (Padilla, 1995; Calavita & Grimes, 1998). Some ordinances allow for the construction of off-site units, but many require that the developer employing this option build more units than would be required on site (Kautz, 2002; Padilla, 1995). Most municipalities allow for a developer unable to comply with the ordinance to pay a fee to a housing trust in lieu of constructing the units. A potential pitfall of this provision is that the overseer of the housing trust must also be a manufacturer of affordable housing in order to make sure the dollars actually become units (Padilla, 1995). Overall, the purpose of inclusionary

zoning is to give local municipalities the tools to help address the national shortage in affordable housing.

Inclusionary zoning, historical context

Inclusionary zoning began in the late 1960s and early 1970s, and was first instituted in mostly affluent suburbs in response to the prevalence of exclusionary zoning in these areas (Porter, 2004; Goetz, 2003; Lerman, 2006). Lerman (2006) and Porter (2004) point out three main factors which further explain the initial popularity of inclusionary zoning: the support of the social justice movement toward housing equality; reduced federal support for the construction of affordable housing; and the move of localities to enact exactions on new development. Exactions are defined by Mandelker as the requirement that a developer “provide, or pay for, some public facility or other amenity as a condition [for the right to develop]” (p. 652). Porter (2004) writes that at the outset inclusionary zoning laws “stemmed primarily from these concerns—opening up the suburbs to minority residents and boosting production of affordable units” (p. 213).

The first inclusionary zoning ordinance was mandatory and passed in 1971 in Fairfax County, Virginia (Kautz, 2002; Burchell & Galley, 2000). The ordinance was overturned by the Virginia Supreme Court in 1973 based on the court’s finding that the ordinance, in seeking to regulate socioeconomic factors in the municipality, had overstepped the legal purpose of zoning (Porter, 2004; Kautz, 2002). Montgomery County Maryland, also an affluent suburb of Washington D.C., dismissed this ruling in creating their mandatory ordinance in the same year, based on that jurisdiction’s assertion that all zoning regulations have socioeconomic ramifications (Porter, 2004). The Montgomery County, Maryland Moderately Priced Dwelling

Unit ordinance is widely considered to be one of the most successful,⁴ (Schwartz, 2006; Mandelker, 2005; Lerman, 2006; Burchell & Galley, 2000) and certainly one of the longest running, mandatory inclusionary zoning ordinances in the country. The Fairfax County ordinance remains a voluntary ordinance (Burchell & Galley, 2000).

The reduction in federal funding for affordable housing that began in the 1970s, and was virtually complete by the 1980s, spurred local and state governments toward inventive solutions for addressing their own affordable housing shortages, independent of federal funds (Calavita & Grimes, 1998; Kautz, 2002; Dietderich, 1996; Padilla, 1995; Mallach, 1984). It is not surprising then, that by requiring little, or in many cases no, public dollars, inclusionary zoning has proven to be a favored solution. As mentioned previously, *Mount Laurel II*, the New Jersey Supreme Court ruling, is credited with increasing the popularity of inclusionary programs by mandating that municipalities use “inclusionary devices such as mandatory set asides” (Kautz, 2002 p. 4) in order to meet its fair share of affordable housing (Mandelker, 2005). The California legislature used this ruling to adopt its own requirement that each municipality include a “housing element” in the Master Plan (Kautz, 2002 p. 4).

Certainly, *Mount Laurel II* and the actions taken by the California legislature helped popularize inclusionary zoning, but it was the housing crisis itself that brought important new advocates, the middle class, to the fight (Mallach, 1984; Kautz, 2002). Housing affordability had become a major issue for the middle class by the 1980s, especially in California (Kautz, 2002; Padilla, 1995). As the middle class added their support to the more traditional supporters, namely affordable housing advocates and the poor, many ordinances were adopted (Mallach,

⁴ The Moderately Priced Dwelling Unit (MPDU) ordinance is successful both in the number of overall units produced but also in the fact that by benefiting from its partnership with the local housing authority the county is able to produce units affordable to very low-income households, in addition to the typical low-to-moderate housing created (Montgomery County Maryland Housing and Community Affairs).

1984). Mallach (1984) writes, “by the early 1980’s both a legal and a political climate had been established in which inclusionary housing programs [...] logically followed from the perceived needs of a substantial part of the population coupled with the growing perception by both lawyers and planners that local land use regulations represented an appropriate, indeed, *the* appropriate, means by which those needs should be addressed” (p. 11).

As the housing crisis continued into the 1990’s, inclusionary zoning ordinances began to gain popularity as an urban, not just suburban, solution to providing affordable housing. In the late 1990’s Boston, San Diego, Denver, Sacramento, and San Francisco all adopted mandatory inclusionary zoning ordinances (Brunick, Goldberg, Levine 2003). In 2005 New York adopted a voluntary ordinance, and in 2006, after a long campaign supported by housing advocates, labor unions, service providers and others, Washington D.C.’s zoning commission approved a mandatory inclusionary zoning ordinance for that city (Angotti, 2006; Policy Link: CMIZ).

A recent movement is for state legislatures to adopt inclusionary zoning ordinances. For housing advocates these ordinances would ideally be mandatory and would affect all new construction over a certain number of units statewide (Rusk, 2005). Rusk stated in a keynote speech at the 2005 National Inclusionary Housing Conference that, “a half dozen states have laws that encourage inclusionary housing in various ways. California, New Jersey, Massachusetts, Connecticut, Florida, and Virginia [...] but no state has yet passed an unambiguous, mandatory [inclusionary zoning] law.”

By the close of the 2006 regular legislative session Louisiana had adopted enabling legislation for a voluntary statewide inclusionary ordinance. By the close of regular session 2007 the legislature had adopted a model inclusionary zoning ordinance aimed at assisting

municipalities in the adoption of local ordinances. This model legislation is examined in depth in the next chapter.

Despite its popularity, inclusionary zoning is not without its critics. The section below discusses the main arguments against inclusionary zoning and examines how supporters of this tool respond to its critics. This section also discusses an intractable criticism of inclusionary zoning-- that it only creates housing for moderate or low-income households, excluding the most vulnerable very low-income population.

Arguments against inclusionary zoning

The main arguments against inclusionary zoning state that these ordinances will not create affordable housing, and worse, may even reduce the amount of affordable housing available, while raising the cost of all housing in the affected area (Ellickson, 1985; Powell & Stringham, 2004; Miller, 2006). Opponents further contend that inclusionary zoning places the burden of building affordable housing unjustly on the private sector. Opponents also argue that, by reducing the overall amount of housing constructed, it will, in the long run, hurt the intended population (Powell & Stringham, 2004; Ellickson, 1985).

These standard arguments against inclusionary zoning are largely derived from Ellickson's (1981) *Irony of Inclusionary Zoning* (Dietderich, 1996; Porter, 2004; Kautz, 2002). Kautz (2002), a supporter of inclusionary zoning, writes that these arguments have had a more detrimental effect on the use of inclusionary zoning than the few "legal attacks" (p. 6). However, Dietderich (1996), in his critique of Ellickson, maintains that these arguments do not follow economic theory, nor do they draw from empirical evidence.

Reduces construction and raises prices?

In *Irony* Ellickson (1985) uses economic theory to demonstrate that inclusionary zoning raises prices and slows or stops production, thereby proving it cannot be an effective response to the need for affordable housing (Dietderich, 1996; Kautz, 2002). Kautz (2002) calls this argument “Ellickson’s most devastating charge” (p. 7). Dietderich (1996) addresses this charge by dissecting Ellickson’s methodology. In order to understand this methodology, and Dietderich’s critique of it, it is important to first review its underlying theory.

Ellickson (1985), and other detractors of inclusionary zoning, assert that constructing new housing for the poor is an inefficient way to supply affordable housing. Rather, these researchers support the filtering theory, which can be simplified thusly: when a luxury home is built a family vacates a home of lesser value, freeing up that home for new occupants. The process is triggered by the building of a luxury home; therefore from a policy perspective, the construction of a luxury home will benefit low and moderate income households just as much as the construction of an affordable home (Dietderich, 1996). Further since the sale of a luxury home puts a sizable sum of money into the local market, and moreover since an affordable unit likely requires some kind of subsidy, it makes more economic sense to build the luxury home. This theory, however, presupposes a single linear housing market in which each family moves up one notch to a better house as soon as that house becomes vacant (Powell & Stringham, 2004; Miller, 2006; Dietderich, 1996).

There are many problems with the concept of one linear housing market, not the least of which is that it does not reflect the actual activity in the housing market (Dietderich, 1996). Dietderich (1996) explains that the housing market cannot be fairly represented as a single linear market because it is actually many income-specific markets. The housing market is more justly

represented as a place where income equals bid against each other for particular types of spaces (Dietderich, 1996), rather than simply purchase one level up on an open market.

A more damaging criticism of the filtering theory, however, is revealed when one examines how a tight housing market operates. In tight markets, those with high demand and a limited supply, housing prices continue to appreciate (Padilla, 1995). As home prices continue to rise, households that might have moved to a better quality house are instead paying more for the same quality. As a consequence this theory necessarily leaves the poorest quality housing for those with the lowest incomes (Padilla, 1995).

Proponents of the filtering theory also subscribe to the multiplier effect; in fact the one is implicit in the other. The multiplier effect states that because households with higher incomes necessarily have more resources, they will benefit society as a whole more when given additional resources. The larger the home the higher the property tax yield, also large homes may support jobs such as maids and gardeners. The multiplier effect drives the thesis that it is more beneficial to produce one luxury home than any number of affordable homes (Dietderich, 1996). Filtering theory and the multiplier effect work together to challenge the idea that producing homes that command low property taxes is counter productive to improving housing for the masses. Providing one luxury house, the theory explains, allows everyone in society to move up one notch in the housing market. However, as mentioned, in tight housing markets where prices continue to rise, and do not lower, it may not be possible for a household to move up to better quality housing. This effect also does not address the reality of the market, discussed by Dietderich, that income equals often bid for a certain kind of space, thereby driving up the price even more.

By placing his faith in the multiplier effect and the filtering theory Ellickson (1985) was able to declare that based on his economic analysis inclusionary zoning does not contribute to, and may reduce, the overall number of homes in a given area (Dietderich, 1996). However, as Dietderich reveals, Ellickson was not counting the number of homes constructed at all. Rather, because his methodology rests on the theory that it is more beneficial to build one luxury home rather than, for example, two affordable homes, he calculated not the actual number of houses built, but the *value* of those houses (Dietderich, 1996). Using this type of analysis if the number of affordable homes built is less than the value of a certain number of luxury homes that could have been built then the affordable housing adds less to the overall housing supply, despite the fact that more affordable homes than luxury homes were actually built. Dietderich calls this method of calculating home construction, which does not actually reveal the number of homes constructed, but only the value of those homes, Ellickson's "technical mistake" (p. 18).

Many opponents, however, contend that inclusionary zoning reduces the overall number of houses built (Powell & Stringham, 2004; Miller, 2006). Many cite Ellickson's research in this assertion but others, such as Powell and Stringham, use as examples counties or municipalities that have adopted inclusionary zoning to prove it does not really build units.

Basolo and Calavita (2004) offer a criticism of one such article, Powell and Stringham's (2004) *Housing supply and affordability: do affordable housing mandates work?* The original article tracked 50 jurisdictions in the Bay area which have inclusionary zoning ordinances and concluded that the numbers show that housing production dropped within one year of adopting an inclusionary zoning ordinance (Powell & Stringham, 2004). In this critique, Basolo and Calavita point out that Powell and Stringham failed to compare jurisdictions with inclusionary to those without and therefore the study lacked a control group completely. The authors

determined without such as control group it is impossible to determine that inclusionary zoning is the cause of the housing production decline. The authors also point out that the lack of long term data (the study takes place over one year) means that the research could be showing an “overall downward trend in housing production in the Bay Area” (p. 9) or that the ordinance was adopted at a downturn in the housing cycle, rather than proving that the adoption of inclusionary zoning caused production to wane. Basolo and Calavita write that frequently inclusionary ordinances are adopted at the beginning of an economic downturn. This is due to the time it takes to garner political support for an ordinance; political support that is gained through a public outcry at the rising cost of housing usually caused by an economic boom. Basolo & Calavita (2004) write, “[f]or example, fifteen of the IH [inclusionary housing] programs in the Bay Area were passed between 1989 and 1992, just before or at the very beginning of the economic recession of the early and mid-1990s” (p. 9). The authors cite that housing production regionally dropped dramatically during this period. The study is further limited in that data collected on the cities is incomplete (Basolo & Calavita, 2004).

All ordinances not the same

A more common argument advanced by proponents to address the criticism that inclusionary zoning reduces the number of units constructed, is to point out the variability between ordinances. Proponents argue that because each ordinance is unique to its own municipalities needs at that time it is impossible to compare whether ordinances in general are adversely affecting the housing market (Kautz, 2002; Padilla, 1995). Due to this variability there is a lack of empirical evidence pointing to the strength or weakness of these ordinances broadly. For example, voluntary ordinances, which are widely held to produce few affordable units, should not be compared with mandatory ordinances. Likewise, mandatory ordinances

themselves cannot necessarily be compared to each other. They can, and do, differ in many respects depending on how each ordinance is written.

Some mandatory ordinances may well curb construction because of unreasonable mandates or land use regulations that stymie construction (Mallach, 1984). Mallach writes that in order to be successful at creating affordable units an ordinance must “*establish a reasonable and non-excessive goal for the development of low- and moderate-income housing...*[italics in original]” (p. 107). In New Jersey, for example, some jurisdictions have set unattainable goals for their inclusionary ordinance, such as mandating that 40 percent of all units on land zoned multifamily be affordable. This lofty percentage likely would dissuade developers from developing this land at all. Indeed, Mallach writes, “this ordinance has been in effect since 1977, in a municipality well situated for development, and has yet [as of 1984] to stimulate construction of a single unit in the zone governed by this provision” (p. 107).

Demanding that an ordinance mandate a “reasonable” number of affordable units recognizes that a critical factor in determining whether an ordinance actually creates such units rests on whether the developer can produce the required units and still make some profit on the market rate portion (Mallach, 1984). Land use regulations can also inhibit the production of affordable housing under inclusionary zoning. Mallach (1984) sites another jurisdiction, also in New Jersey, that imposed minimum lot sizes and other exclusionary tactics through land use regulations which effectively ruled out the use of the inclusionary zoning ordinance also in place. The ordinance itself mandated a reasonable amount of affordable housing for new development, however, seemingly unrelated though exclusionary land use restrictions prevented its use. Still other mandatory ordinances may be written to require construction of a reasonable number of inclusionary units, without restrictive land use regulations, but may completely lack enforcement

procedures to ensure that the ordinance will be followed (Mandelker, 2005). The reality of inadequately written ordinances does not serve as an indictment of inclusionary zoning as a tool for producing affordable housing, however. Rather, it enforces the point that the structure of the ordinance is vital to determining whether it will actually produce affordable units.

Still, the presence of so many variables in any given ordinance, and thus the difficulty in comparing ordinances, has led proponents to conclude that it is not possible to determine with certainty what effect inclusionary zoning has on the availability, or price of housing in markets in general (Kautz, 2002). Kautz writes, “because of a number of variables, the available evidence does not demonstrate conclusively that inclusionary zoning either lowers overall housing production or increases it, nor whether it raises the market price of housing or reduces land costs” (p. 8).

Three common components?

Another major objection raised by Dietderich (1996) to Ellickson’s (1985) analysis is that he ignores these important differences among ordinances, and reduces all inclusionary zoning ordinances to three common components, which Dietderich (1996) contends “have little in common with the majority of inclusionary zoning programs” (p. 14).

According to Ellickson (1985), the three shared elements of inclusionary zoning are: 1) that inclusionary zoning acts as a tax on new home construction; 2) that it is one more land use restriction which slows growth; and 3) that inclusionary ordinances escape government scrutiny.

Opponents to inclusionary zoning see it as erecting barriers to new development, thereby impeding the construction of new housing, in this way it acts as a tax on new home construction (Ellickson, 1985). Powell & Stringham (2004), in supporting this contention, refer to inclusionary zoning as a double tax on developers. Developers are taxed once when they are

mandated to build below market rate housing, and taxed again when market rate housing sells at a slower pace because of the presence of below market residents (Powell & Stringham, 2004). Dietderich (1996), however, dismisses the charge that inclusionary zoning is a tax, citing that in many cases developers actively seek inclusionary devices. Dietderich concedes that some regulatory requirements do act as a tax for developers. He writes, however, "...it does not follow that such an analysis can be applied to rules which remove restrictions on lot use and allow developers to build at higher density" (Dietderich, 1996 p.15).

In many areas, however, the drive to protect property values is a factor that prevents the construction of affordable housing. Padilla writes that this sentiment can affect affordable housing across the state of California by supporting anti-affordable housing legislation. Padilla writes, "many states have legislation which deters the construction of affordable housing" (3). One way this is accomplished in California, she writes, is by requiring residents to vote on whether housing funded with 50 percent public funds (i.e. subsidized housing) can be built in their neighborhood. These votes inevitably fail.

Far from seeing inclusionary zoning as removing restrictions, most critics see it as one more land use regulation to impede development. This argument maintains that all land use regulations should be abolished, clearing the way for unfettered development (Powell & Stringham, 2004; Miller, 2006). This argument further maintains that the private sector, by following prevailing economic laws, will necessarily produce as much affordable housing as needed. Extensive land use laws are a factor in most localities, even those with out inclusionary zoning, so it is difficult to test this hypothesis.

There are, however, many examples that demonstrate affordable housing is not produced without a mandate. Kautz (2002) describes the housing crisis in California that began in earnest

in the 1980s, as a time when exclusionary policies and other factors such as a rise in the cost of building materials, drove up the cost of land. As a result, the private sector could not produce enough market rate housing to keep up with demand--much less affordable housing. Kautz (2002) credits the *Mount Laurel II* decision with spurring the California legislature toward addressing the need for affordable housing all over the state.

In addition to viewing all inclusionary zoning ordinances as a tax on development, Ellickson (1985) views them all as a subsidy to the poor. In a similar objection other opponents see inclusionary zoning as wealth distribution (Kautz, 2002; Dietderich, 1996). Dietderich argues that this may be the case but it is only the reversal of pro-middle class homeowner policies that have actively excluded the poor, largely by excluding multifamily housing units. Dietderich (1996) writes that if the playing field were level, people with lower incomes might have more and better housing options, “persons with low to moderate incomes, who live at higher density, can often outbid the wealthy for suburban land. Although such competition is illegal under most exclusionary zoning rules...”(p.14).

Dietderich is alluding here to laws on the books in many suburban areas that exclude multifamily housing. Other inclusionary proponents also agree that the use of exclusionary zoning tactics, such as zoning large swaths of land single family residential, makes “profitable sites for [multifamily housing] artificially scarce” (Dietderich, 1996 p. 6). This inflates the value of suburban homes and amounts to a subsidy paid by buyers of multi-family housing to single-family homeowners. Therefore, rather than seeing inclusionary zoning as a subsidy to the poor, supporters view it as a tool to correct land use regulations which have excluded the poor and minorities for years.

The third component, which Ellickson (1985) argues is common to all inclusionary zoning ordinances, is that they escape the government scrutiny and oversight normally accompanying large government spending projects (Dietderich, 1996). Proponents are quick to point out, however, that inclusionary zoning is not a government program. This tool is crafted by the municipality, which writes and implements the ordinance to their specifications. Indeed, these ordinances represent local control to supply affordable housing through the private sector. Dietderich (1996) refers to this as the “peculiar genius of inclusionary zoning” (p. 14).

Free market in housing?

Dietderich (1996) points to Ellickson’s (1985) assumption that there is a free market in housing as yet another flaw in his economic analysis of the effectiveness of inclusionary zoning. Zoning practices which mandate minimum floor areas, minimum lot sizes, and zone an excessive amount of land for non-residential uses were ruled in *Mount Laurel I* to drive up the cost of housing and therefore ruled exclusionary (*Mount Laurel I*). These types of exclusionary tactics are used in communities all over the country, Dietderich argues. These regulations put restrictions on the market affecting prices. Therefore, even without the presence of inclusionary zoning, there is no free market in housing (Dietderich, 1996). Dietderich maintains that Ellickson’s economic theory is flawed essentially because he and other opponents ignore the market effects caused by exclusionary zoning. Namely, that exclusionary practices drive up the cost of (primarily) suburban land and therefore drive up the cost of construction thereby limiting the amount of construction that takes place. Based on this analysis Dietderich contends that, “market forces operating under inclusionary zoning rules should create more affordable housing than market forces operating under the rules applicable in most American regions now” (p. 5).

More affordable housing will necessarily be built, the argument goes, because inclusionary zoning mandates (or allows) that affordable housing will be built in areas where it was prohibited.

Who pays?

Ellickson (1985) maintains that inclusionary zoning puts the burden on the private sector. Which party ultimately carries the burden-- the developer, the market rate homeowner or renter, or the landowner-- depends on the desirability of the community employing inclusionary zoning (Ellickson, 1985; Kautz, 2002; Dietderich, 1996). Most supporters agree that, absent a density bonus large enough to cover all production, the cost of inclusionary zoning must be borne by one, or all, of these groups. For example, if a community is highly desirable the developer will be able to pass the cost of supplying affordable housing on to the market rate renters and homeowners (Padilla, 1995; Kautz, 2002; Dietderich, 1996). If the community is not highly desirable the developer will have to: 1) theoretically absorb all of the costs of supplying affordable units or 2) pass the cost on to the landowner in the long term by paying less for land in the future (Kautz, 2002; Padilla, 1995). Furthermore, Ellickson contends, because a developer will not absorb all the costs for supplying affordable units and because landowners, in many cases, will hold onto land until a suitable price is offered, affordable housing will not be built.

In her analysis of Ellickson's (1985) argument Kautz (2002) cites economic studies conducted by cities and researchers, which found that in the long term the cost of inclusionary zoning is borne by the landowner, not the developer or the homeowner/renter. In the short term, Kautz explains, if the developer can pass the cost on to the buyer, which depends on the strength of the market, he/she will. Kautz (2002) and others write that the real argument is whether it is "unfair" for the landowner to bear the cost of supplying affordable housing through inclusionary

zoning (Padilla, 1995; Calavita & Grimes, 1998). Kautz (2002), Calavita & Grimes (1998), and Padilla (1995) all write that it is not an unfair expectation, largely because as Kautz (2002) writes, “[...] land values are primarily a reflection of the community’s economic activity, and the government’s investment in infrastructure, rather than a result of the landowner’s efforts...” (p. 8). Padilla states, additionally, that the “bundle of rights” afforded through ownership of land has not been determined by the courts to include a right to a particular value for that land (p. 14). And finally, Calavita & Grimes (1998) state that any rise in land values is attributable to the forces outlined by Kautz (2002) above and is therefore “unearned.”

Fundamentally, opponents of inclusionary zoning see it as passing a societal responsibility on to the private sector. But proponents see inclusionary zoning as a way to provide affordable, integrated housing that requires little, if any, public funds. Those in favor of inclusionary zoning contend that landowners cannot pick only those land use regulations and ordinances which inflate their land values while spurning those which require that they give back some of the “windfall” profits provided through the use of exclusionary zoning (Kautz, 2002; Padilla, 1995; Dieterich, 1996; Porter, 2004).

Workforce housing

An intractable criticism of inclusionary zoning is that it only builds housing that is affordable to low- and moderate-income residents, leaving out very low-income residents. In fact, the City of Madison, WI acknowledges that, where the city council seeks to promote affordable housing for all income levels, units produced under the inclusionary ordinance will likely only be affordable to households earning between \$35,000 to \$55,000 annually, a figure higher than incomes earned by very low-income households in this area (The City of Madison inclusionary zoning program). Indeed, many municipalities find that, because the strength of an

inclusionary zoning ordinance ultimately rests with its usability for developers, it is easier to encourage the construction of low- to moderate-income housing. This is because housing that is affordable to very low-income residents is necessarily more expensive for the developer, and therefore requires more incentives and subsidies, and hence more work. As a consequence, very low-income units are not built as frequently using inclusionary ordinances. For this reason, inclusionary zoning is sometimes referred to as “workforce” housing, as opposed to simply affordable housing. Brunick and Webster (2003) and Padilla (1995) acknowledge that it is difficult to produce very low-income units using inclusionary zoning. They contend however, that by addressing the housing needs of the low- and moderate-income populations inclusionary zoning allows more public funding to be reserved for the housing needs of very low-income residents. Porter (2004) cautions that this is not cause for celebration, as housing funded with public dollars is often very slow to materialize.

To say that very low-income units are not often built using these ordinances implies that this action does, at least sometimes, occur. Indeed, one of the most successful inclusionary zoning ordinances in the country, Montgomery County Maryland’s Moderately Priced Dwelling Unit (MPDU) ordinance, has devised a solution for producing this category of unit. Starting in 1989, when the deed restriction on a for sale MPDU was met, and that unit was resold at market value, a portion of the resale of the MPDU would be put into a housing bank (Montgomery County Maryland department of housing and community affairs). This portion is equal to half of the “excess” revenue gained from the resale. In this way, the loss of one affordable unit directly contributes to the creation of another in this county. In addition, the Housing Opportunities Commission (HOC) in Montgomery County can buy up to 33% of all MPDUs to increase the supply of public housing. Qualified non-profits can buy up to 40% of the units HOC did not

purchase. Units purchased by HOC or non-profits are affordable to those earning 50% of the area median income (AMI), while the standard MPDUs are affordable to those earning 65% or less of AMI (Brown, 2001). HOC relies on several funding sources to buy these units including federal and state funds, private investment and local bond initiatives. This creative solution demonstrates that, when carefully tailored to meet a community's needs, inclusionary zoning can be a very effective tool to address the full scope of affordable housing needs in a locality.

Arguments in favor of inclusionary zoning

Some main arguments in favor of this method for supplying affordable housing assert that these ordinances support smart growth initiatives further the federal policies of deconcentrating poverty and creating mixed income communities, and most importantly, increase the supply of affordable housing (Porter, 2004; Dietderich, 1996; Padilla, 1995; Kautz, 2002; Burchell & Galley, 2000; Calavita & Grimes, 2000, and others). Furthermore, proponents state, these goals are achieved using little or no public funds. Those in favor also maintain that the use of deed restrictions in inclusionary zoning ordinances has contributed to a lasting solution to the affordable housing crisis (Padilla, 1995).

The Smart Growth Network defines smart growth as developing a land use model that creates, or preserves, dense neighborhoods with a mix of uses, retail, general commercial, office space and including a variety of housing options to open the neighborhood up to more varied income levels. These neighborhoods rely on existing infrastructure and encourage pedestrian usage while reducing sprawl. Many proponents of inclusionary zoning state that by creating affordable housing in areas where it has been absent these ordinances increase the housing to jobs ratio, thereby reducing sprawl (Burchell & Galley, 2000; Porter, 2004; Padilla, 1995). This was particularly true when inclusionary zoning was primarily used to build affordable housing in

the job rich suburbs. Montgomery County also found that adding affordable housing to developments helps to create the density needed to support a town center, thereby adding new jobs and reducing the tendency to create bedroom communities (Burchell & Galley, 2000). Burchell & Galley (2000) write, “a large development containing inclusionary zoning often allows for mixed-use and transit oriented development, while protecting surrounding open spaces” (p. 4), policies that the American Planning Association recognizes as furthering smart growth (APA 2002). Transit oriented development is housing located near a public transportation, frequently light rail, designed to encourage use of this mode.

Inclusionary zoning is also heralded as a means to achieve the federal policies of deconcentrating poverty and creating mixed income communities. The Department of Housing and Urban Development is concerned primarily with deconcentrating poverty in federally owned public housing (HUD, 2000), but the tenets of policies supporting this initiative apply to all concentrations of blighted housing. Rubinowitz and Rosenbaum (2002) write that these pockets of poverty, due to concentrations of blight, decrease the tax base for an area ensuring that local schools remain under funded. The resulting cycle of violence aided by a poor education system and inadequate job prospects is well documented and inclusionary zoning is potentially one tool to break that cycle. Axel-Lute writes in *Zoning for housing justice* “proponents of inclusionary housing hope that it will mitigate the effects of poverty by giving lower-income families access to better schools and job opportunities in less economically disadvantaged areas” (NHI, Shelterforce, 2003).

Proponents argue that in addition to deconcentrating poverty is it vital to create mixed income communities; they argue that inclusionary zoning is an important tool to accomplish this goal. Rather than simply moving pockets of poverty from one area to another, proponents argue

that inclusionary zoning can create economically and racially mixed communities. The success of mixed income communities, however, is not without controversy and like an inclusionary ordinance, success depends on factors such as "...local housing market conditions and [...] the physical and demographic characteristics of individual housing developments (Schwartz and Tajbakhsh 1997, p. 1). The question of whether mixed income communities are able to achieve goals such as improved school performance for children and a generally improved quality of life for very low-income people is an important question for further research but not one that will be explored here.

Arguably the strongest case for inclusionary zoning is that it does produce affordable housing. As one of the most successful inclusionary zoning ordinances in the country, Montgomery County Maryland is an instructive example of what is possible. Brown (2001) writes that, "as of 1999 HOC has purchased 1,441 moderately priced dwelling units, nearly 14% of the total number of affordable housing units created. These units are counted among the 3,805 existing moderately priced dwelling units" (p. 14).

This figure does not, of course, represent the total number of units that have been created since this ordinance took effect in 1974. The Montgomery County Department of Housing and Community Affairs reported in 2005 that since its inception that ordinance has created over 12,000 affordable housing units. In neighboring Fairfax County, VA between 1991 and 2003 that ordinance created 1,746 affordable units (Brunick and Webster, 2003). Davis, CA has produced 1,502 since 1990 (Brunick and Webster, 2003). The Nonprofit Housing Association of Northern California reported that, as of 2003, the 15 jurisdictions producing the highest number of inclusionary units have collectively produced over 16,000 units. These jurisdictions make up part of the 101 jurisdictions with mandatory inclusionary ordinances on the books in California.

Additionally, this report points out that the six jurisdictions with voluntary ordinances have produced little, and in some cases no affordable units. This fact recalls that the strength of an inclusionary ordinance lies in the details of how it constructed.

Conclusion

Inclusionary zoning is most simply described as a package of incentives to assist a developer in the creation of affordable housing. The most common incentives employed are a density bonus, a waiver on parking requirements, and a rapid permitting process. A density bonus allows a developer to build more than the density zoned for an area. Allowing the developer to build beyond the zoning regulations helps to offset the cost of building affordable units. Inclusionary zoning ordinances can be voluntary or mandatory but it is widely accepted that mandatory ordinances produce more affordable units (Mallach, 1984; Kautz, 2002; Nonprofit Housing Association of Northern California).

Inclusionary zoning began in the 1970s, first in Fairfax County, VA, where the ordinance was quickly repealed, and next in Montgomery County, Maryland where the ordinance continues to gain strength and has produced over 12,000 affordable housing units in this expensive suburb of D.C. The *Mount Laurel I and II* decisions have also served to legitimize this tool.

Opponents of inclusionary zoning claim that it does not produce affordable housing and that it will likely reduce overall home production and drive up existing home prices. Powell and Stringham (2004) write in a report for the Reason Foundation, a libertarian think tank, that of the 50 jurisdictions studied in California all reported a drop in construction after the first year of adopting an inclusionary ordinance. Basolo and Calavita (2004) respond in their critique of this study that Powell and Stringham neglected to use a control group of jurisdictions that had not passed an inclusionary ordinance and therefore could not rule out the possibility of area-wide

downturn. Basolo and Calavita (2004) further note that inclusionary ordinances are often passed after several years of a steadily growing housing market. Frequently residents are not interested in passing this type of ordinance until several years of increasing housing prices have made such a measure critical to provide affordable housing. For an ordinance to be successful at creating affordable housing it must be mandatory but if the number of affordable units required is unwarranted these units will not be built and the ordinance will not be successful. Similarly, the incentives offered must be suitably appealing to developers in order to make compliance feasible.

The next chapter explores the justifications for supporting inclusionary zoning put forth by the Louisiana Legislature and uses the literature to determine whether inclusionary zoning can be expected to accomplish the goals laid out. Through this examination of the justifications the strengths and limitations of inclusionary zoning are explored.

Chapter 3

Examining the justification for inclusionary zoning in Louisiana

This chapter begins by reviewing Act 810 to explore the legislature's rationalizations for choosing inclusionary zoning as one method for supplying affordable housing throughout the state. The reasons used to justify support will be studied in respect to the literature to consider whether, and if so how, inclusionary zoning could be expected to fulfill these promises. In the 2006 regular session of the Louisiana legislature Representative Cheryl Gray authored House Bill 1399 titled the, *Louisiana Inclusionary Zoning and Workforce Affordable Housing Act*. Gray, joined by Representatives Murray and Shepherd, worked to pass H.B. 1399 which became Act 810 in July 2006.

The Act begins by acknowledging that in many areas of Louisiana "there is a serious shortage of decent, safe and sanitary residential housing available at prices or rents that are affordable to low and moderate income families" (p. 1). The Act goes on to describe this shortage as a "danger to the health, safety, and welfare of all residents of the state and [as] a barrier to sustainable economic development..."(p. 1). The Act further recognizes that this situation existed before the storm, but has worsened due to the dramatic loss of housing stock as a result of hurricanes Katrina and Rita.

From here the language in the Act quickly moves to identify the three main reasons for supporting inclusionary zoning:

- 1) An anticipated and long lasting residential construction boom
- 2) Tool produces mixed income communities, which provide better housing, job and school options for residents
- 3) Tool builds on the expertise of private developers

This chapter explores the literature to determine if these are sound justifications for supporting inclusionary zoning.

Anticipating a construction boom

Act 810 states an anticipated construction boom as the first reason to support inclusionary zoning. But is a future construction boom a good reason to support inclusionary zoning?

Brunick (2004) writes that “inclusionary housing harnesses the power of the marketplace” (p. 3). Indeed this is its design, to require developers already constructing housing developments to also build affordable units, but even mandatory inclusionary zoning ordinances call for the impetus of market activity in order to take effect. With an effective ordinance in place, if a locality does experience a housing boom, the increased construction will lead to an increase in affordable housing. To illustrate this point Brunick and Webster (2003) write that if Chicago had adopted a fairly strict inclusionary ordinance (requiring a 25% set-aside and triggered by 5 or more units in a development), between the years 1998 and 2003 this ordinance would have produced an estimated 12,775 affordable units. The authors report that this is a conservative estimate of the affordable units that could have been constructed during these boom years, however, not everyone agrees.

Authors like Ellickson (1984), Powell and Stringham (2000) and others contend that the private sector will produce affordable units, if not through new construction then through filtering. Brunick and Webster (2003) use U.S. Census and Multiple Listing Service data for Chicago to show advocates of private market approaches that the construction boom in Chicago failed to produce affordable units in the absence of a mandatory inclusionary ordinance. The authors demonstrate that the decade long construction and population boom for that area resulted in a reduction in the total number of rental units by 2,500. Many of these units became condos

unaffordable to the previous renters. Further, between 1995 and 2003, the authors write that an unbridled housing market produced 1,471 units that were affordable to 65% of households in Chicago. This represented 10% of the housing need for this population (Brunick & Webster, 2003). During this same period 259 units out of a total 14,674 were affordable to residents of Chicago earning 50% of the area median income (AMI). This represents 2% of the housing need for that population (Brunick & Webster, 2003).

The fact that the Louisiana Legislature lists an anticipated (and long-term) construction boom as an impetus to support inclusionary zoning seems to show that this group sides with those that believe the market must be compelled to produce needed affordable housing. At the same time it passed Act No. 810, the legislature also increased the number of low-income housing tax credits aimed at increasing the production of affordable housing. It seems the legislature is hoping to “harness the power of the marketplace” and entice private developers to build affordable units. But two years after Katrina the region is still waiting on a building boom, and still waiting for these remedies to be tested in the marketplace. However, to take advantage of a construction boom and produce affordable units inclusionary zoning must be in place when this boom occurs. Therefore the question of whether an anticipated construction boom is a suitable reason for support leads to a next logical question: Can inclusionary zoning gain traction with local leaders in a national and regional housing slump?

Calavita, Grimes, and Mallach (1997) contend that it is easy to support inclusionary zoning when housing production is up, but less easy to sell this concept to developers and politicians in the face of a housing downturn. The authors write that in a strong housing market using the private sector to produce affordable units, through the use of an inclusionary ordinance, seems like a more secure funding source for the production of affordable housing than piloting

the murky waters of federal appropriations. Therefore in strong markets, according to Calavita, Grimes and Mallach (1997), inclusionary zoning enjoys developer and political support. A market slump, however, often leads developers, and subsequently local leaders, to shun any tool viewed as an extra demand put on developers. A housing market downturn shows that this tool is not actually a more secure source of funding at all but its strength is tied to both market and political whims. Calavita, Grimes, and Mallach (1997) write, as the market cools, so to may developer and political support.

Louisiana's local leaders are likely feeling the need to stimulate housing construction at all costs in order to begin to replace what was lost. It is doubtful, given the potential pro-developer mindset often accompanied by the desire for growth at any cost, that inclusionary zoning can gain support at the local level during a housing market downturn. As Basolo and Calavita (2004) explain, however, inclusionary zoning ordinances are often passed during downturns in the housing cycle. This is due to the amount of time required to gain political support for the measure (Basolo & Calavita, 2004). The authors write that frequently support begins to build in strong housing markets when prices are high. In many cases, however, the amount of time required to build sufficient support means that, by the time the ordinance gains wide support, the housing cycle has declined. According to the Center for Community Builders (n.d.) it is important to have an inclusionary zoning ordinance in place as the housing market begins to improve, but in order to produce the maximum number of affordable units, it is essential that the ordinance be in place before the construction boom really takes off. As Porter (2004) writes, "state mandates can only go so far in persuading local governments to establish a positive context for production of affordable housing" (p. 248). The legislature has done their

part to prompt the adoption of this tool before an anticipated construction boom begins, now the onus rests with local leaders to accept the challenge.

Building mixed income communities

The second reason the legislature listed for supporting inclusionary zoning is that, when compared to pre-Katrina concentrations of poverty, “mixed income communities have proven to hold better social outcomes for all residents” (Act No. 810). This assertion is followed by the acknowledgement that inclusionary zoning is one tool to “deliver economically integrated housing development” (p. 2). Does the literature support the contention that inclusionary zoning produces economically integrated communities?

Porter (2004) writes that inclusionary zoning began as an effort to make suburban housing available to low-income inner city residents so that they may reap the benefits of a better school system and increased job opportunities. But he feels the goal of significant suburban integration has failed, and uses the unsuccessful implementation of the *Mount Laurel II* mandate as one example of this failure. Porter writes that *Mount Laurel II* did not help achieve the mandate that each municipality provide their fair share of affordable housing in part through the use of inclusionary zoning in this case due to the continued resistance of local governments. This resistance eventually succeeded in largely reversing the fair share mandate by pushing through a law allowing municipalities to sell up to half of their affordable housing requirement to another municipality (Porter, 2004).⁵ Porter writes that, in effect, this law promotes segregation because the areas buying these unit requirements are frequently cities with large poor and minority populations. Calavita, Grimes and Mallach (1997) agree that, in the case of *Mount Laurel II*, inclusionary zoning has not been effective at creating mixed-income developments.

⁵ This is the Council On Affordable Housing’s “regional contribution agreements” passed as an amendment to *Mount Laurel II* and enacted in 1993 (Porter, 2004 p. 235).

Porter cites their conclusion, “[i]f the underlying goals of the *Mount Laurel* decision are held to be reducing urban-suburban disparities and fostering racial and economic integration with metropolitan regions [inclusionary housing] has not substantially succeeded” (p. 245).

Large-scale local opposition is the factor blamed here for the ineffectiveness of inclusionary zoning to achieve the goal of creating mixed-income developments, but in many areas inclusionary zoning has triumphed over anti-affordable housing attitudes and has contributed to the creation of mixed income neighborhoods. Burchell and Galley (2000), Padilla (1995), Rusk (2006), Porter (2004), Calavita, Grimes, and Mallach (1997) and others, contend that inclusionary zoning produces mixed-income communities that “can lead to a host of positive social and economic outcomes such as improved schools, decreased crime, and reduced poverty...” (Brunick, 2004 p. 3). As illustrated by Porter (2004) and Calavita, Grimes and Mallach (1997), however, it cannot be assumed that the presence of an inclusionary zoning ordinance necessarily leads to the creation of viable mixed-income communities; rather there are specific guidelines that must be adhered to in order to successfully meet this goal.

Porter (2004) writes that one such guideline for realizing a mixed income neighborhood through inclusionary zoning requires that an ordinance obligate developers to build affordable units on site. Many ordinances allow developers the option of producing units off-site, though typically this requires the production of more units than would be required if built on-site (Kautz, 2002; Padilla, 1995). This is sometimes, as in the case of the Montgomery County ordinance, allowed only in hardship cases (Housing and Community Affairs). Porter however, cautions against this provision because “...it tends to defeat the goal of distributing affordable housing throughout the community and increasing neighborhood housing diversity” (p. 229). In other cases developers are allowed to pay a fee in-lieu of producing the required units, usually to a

housing bank, if they can demonstrate a hardship. Porter cautions against this measure also, saying that this arrangement puts the onus for development of the units back onto the public sector, which in many cases slows down the potential production of those units considerably. Porter does acknowledge however that in some cases these measures are the only way to produce the needed units.

Padilla (1995) writes that many courts and scholars have acknowledged the link between economic and racial integration, and as a consequence, many inclusionary zoning ordinances seek to scatter affordable units through out the development. Padilla writes that scattering the units is important to achieve the actual economic integration sought, but also to avoid negative connotations and potential negative reactions that a cluster of affordable units in a development may invoke. For these reasons affordable units must also be seamlessly architecturally integrated into the development in terms of design.

Affordable units that cannot be easily detected tend to minimize the fear that the presence of these units will lower property values (Padilla, 1995). Many ordinances require this external architectural cohesion; however, in order to ensure the development of these units is still feasible for the developer they are generally not required to have the same internal features (Padilla, 1995; Brunick, 2004). Many ordinances also allow that the affordable units can be smaller than the market rate ones (Porter, 2004), however some do require that the square footage remain comparable. The Burlington Vermont ordinance requires a set square footage of 750 sq ft for a one-bedroom unit, 1,000 sq ft for a two bedroom and up to 1,250 sq ft for a four-bedroom unit. This stringent requirement has allowed only 150 units to be produced between 1990 and 2003 (Brunick, 2004).

Rusk (2006) writes that it is in the developer's best interest to use creative solutions to provide architecturally cohesive units in order to down play any negative reactions that may slow the purchase of those and other units. Inclusionary zoning also helps cities curb gentrification spurred by the return of suburbanites to the city. Porter (2004) writes that the move back to the city resulted in a loss in the overall number of rental units in many places, as once affordable units are converted to condos. Inclusionary ordinances adopted in Boston, Denver, New York, and San Diego, have helped these cities curb this displacement by including affordable units in the construction of infill, renovation, and redevelopment (Porter, 2004).

Barring New York, whose ordinance is voluntary, the cities listed above have adopted mandatory ordinances with varying degrees of success. Brunick (2004) writes in *Zoning Practice* that within two years of passing their ordinance, between 2002 and 2004, Denver had either constructed, or had in the pipeline, 3,400 affordable units. Brunick (2004) reports that as of October 2004, San Diego had constructed 1,200 affordable units and Boston only 246, but that city raised \$1.8 million in in-lieu fees dedicated to the future construction of affordable housing. By 2006, San Diego would have collected \$9 million in in-lieu fees to devote to construction of new inclusionary units (McLaughlin, 2006). Whether these units are contributing to the goal of building mixed-income communities depends in part on whether these units are built on-site, scattered throughout the development, and architecturally consistent with market rate units (Porter 2004; Rusk 2006; Brunick 2004; Padilla 1995).

Building on skills of private developers

The final reason listed by the legislature for supporting inclusionary zoning is that this tool accomplishes the goals of producing affordable housing in a strong market, building economically diverse communities and deconcentrating poverty by relying on the expertise of

private developers and compensating them for their contribution. Some view the public sector as incapable of producing high quality affordable units in a timely manner (Porter, 2004). Indeed, the federal government has moved firmly away from producing any housing units at all, focusing instead on supply side affordable housing strategies such as section 8 and other mobility programs aimed at moving residents from failing neighborhoods to areas of low poverty (Rubinowitz and Rosenbaum (2000). The HOPE VI program, designed to replace high rise public housing with low rise mixed income communities is the closest the federal government has come in many decades to building new units of public housing (Schwartz, 2006). This federal policy shift, and the resulting view that the public sector cannot sufficiently produce housing, has likely influenced the legislature to support a tool that depends on the private market to produce housing units.

Another reason for support of inclusionary zoning is tied to developer compensation for inclusionary units. The fact that many inclusionary zoning ordinances compensate developers for the construction of these units may have helped Act 810 gain the support needed to pass. Sufficient incentives for developers can help to curb the argument that this requirement is a taking of property without just compensation. Density bonuses and fast tracked permitting are two common ways that developers are compensated for building affordable units through inclusionary zoning. Cash incentives can also be offered though such a bonus is less common.

A density bonus is one of the most common incentives offered through inclusionary ordinances (Schwartz, 2006). In California 91% of localities with inclusionary ordinances offer density bonuses, which allow a developer to build more than the allowable density in an area (Calavita et. al (2004)). The size of the bonus generally ranges between 10% and 20%; a few cities allow 25%, and Cambridge Mass allows a 30% density bonus (Brunick and Webster,

2003). This incentive, or cost offset, can be very lucrative in a robust housing market, essentially allowing developers to build more units than otherwise allowed (Schwartz, 2006). Brunick and Webster write, “in Montgomery County, Maryland, for example a developer receives a 17-22% density bonus based on the percentage of affordable housing included in the development” (p. 33).

Calavita et. al (2004) report in a study of inclusionary programs in California, that density bonuses require the ability to expand a project either outward or upward which is not always possible, either because of a physical lack of room or neighborhood opposition to a development seen as high density. Increased density is important for many localities because it can increase the housing to jobs ratio, lower commuter times and increase the local tax base. Parking and setback requirements however are two factors that may physically limit the expansion of a project to full allowable density. Other factors that may limit density mentioned in this study are market driven, such as the desire for open space and common facilities.

Fast tracked permitting is another typical cost offset that can greatly speed up a project. In post-Katrina New Orleans and elsewhere the speed of a project determines its price as the cost of raw materials goes up everyday. The ability to avoid construction delays caused by a lag in the permitting process can result in substantial savings here and elsewhere. In California over 40% of municipalities with inclusionary ordinances employ this tool (Calavita et. al 2004).

An uncommon, though seemingly effective incentive is a cash subsidy. Brunick (2004) calls Denver’s inclusionary program “one of the most successful to date for a city this size” (p. 4). Because Colorado prohibits fee waivers of any kind this program provides cash subsidies for developers (Brunick, 2004). A developer gets \$5,000 for every affordable unit built up to 50% of the total units built in a new development or included in a substantially rehabilitated existing

structure (Article IV Affordable Housing). If the unit is affordable to households earning 60% AMI then the developer receives \$10,000 per unit. These subsidies come out of a “special revenue fund” and once this fund is empty the subsidies will cease (Article IV Affordable Housing). Developers unwilling or unable to build the units required must pay the fund half the cost of developing each affordable unit. Perhaps this steep in-lieu fee is one reason Denver’s ordinance is producing actual units at a rapid rate.

Brunick and Webster (2004) write that inclusionary zoning as a whole has the benefit of adding “certainty, predictability and a level playing field for developers” (p. 33). The authors contend that many projects change greatly in size and scope before construction begins but an inclusionary ordinance offers the affordable set-aside as a constant factor in the equation. The incentives, or cost offsets, associated with these units can help make the whole project a more reliable undertaking (Brunick & Webster, 2004). The authors also state that in times of a slow housing market the affordable units help to keep developers afloat, as these units typically sell or rent quickly.

Conclusion

The Louisiana legislature chose to support inclusionary zoning in part because it will facilitate the building of affordable units in a construction boom; an accomplishment the private housing market will not necessarily achieve. Inclusionary zoning is not without its weaknesses, however. Two crucial weaknesses are that it is tied to the strength of the local housing market and demands a strong political will in order for an ordinance to be adopted. Currently, both the national and regional housing markets are in a downturn, consequently it is difficult to gather support for measures which may be construed as putting extra demands on developers. Yet, it is important that the campaign on the local level for an inclusionary zoning ordinance begin now,

to ensure that this ordinance is in place when the anticipated construction boom materializes. If local leaders do not put this measure in place now, residents may have to endure another boom and a further reduction in affordable units before such a measure can be implemented.

The legislature also supports inclusionary zoning because it encourages the development of mixed income communities. This is not a foregone conclusion however, and certain steps must be followed to ensure that the affordable units produced under an inclusionary ordinance do further the goal of building economically diverse neighborhoods. Affordable units must be seamlessly integrated into a development both in their outward appearance and in their location. If units are clustered in one part of the development the benefits of economic integration are lost. Also when affordable units are clustered neighbors may perceive they are inferior in design or construction and may identify them as a drag on property values. Another reason the legislature stated for supporting inclusionary zoning is that it relies on private developers to do what they do best, build homes, and it compensates them. Through this support the legislature is acknowledging that the days of publicly funded construction of affordable housing are over and that a private market approach is possible; but in most cases this private market approach requires compensation to gain support.

The next chapter compares three inclusionary zoning ordinances, each from a major city - San Francisco, Denver, and San Diego-- to the model ordinance passed by the Louisiana legislature in 2007. The model ordinance is designed as a tool to assist municipalities with the adoption of a mandatory inclusionary zoning ordinance. As such chapter four will compare these three city ordinances to the model ordinance passed by the state to determine which regulations are working in major cities and establish whether they are included, or should be included, in an ordinance for New Orleans. Establishing which regulations work for these

different cities may help inform the shape of a successful, mandatory inclusionary ordinance for New Orleans.

Chapter 4

Crafting the best ordinance for New Orleans

This chapter examines the recommendations put forth in the model ordinance, which is designed to guide municipalities through adoption of a successful mandatory inclusionary zoning ordinance. This model ordinance, House Resolution No. 123 (H.R. No. 123), is a road map to implementation at the local level and, as such, this chapter studies each of its fourteen sections and compare the content and recommendations therein to the content and specifications put forth in inclusionary ordinances from San Francisco, Denver, and San Diego, each of which has important lessons to impart to New Orleans. Comparing the model ordinance to other city ordinances will reveal this legislation's strengths and weaknesses, and help to determine those aspects that should be adopted outright, and which must be adapted to create a successful mandatory inclusionary ordinance for New Orleans.

Of the three established large city ordinances this chapter reviews, one has undergone developer and court scrutiny, one has been subject to recent revisions aimed at increasing the reach of the inclusionary ordinance, and one has produced thousands of units in its first two years. Each has been in effect for varying lengths of time, the longest sixteen years, the shortest six years, with varying degrees of success. These ordinances were chosen because they are large cities, have been in effect for varying lengths of time and because some are stricter than others, although all ordinances reviewed are mandatory. Each of these ordinances will help inform an ordinance in New Orleans.

The San Francisco Residential Inclusionary Affordable Housing Program (Ordinance No. 101-07) is a long-standing program, in effect since 1992, which has been recently strengthened with revisions passed in 2006. This chapter will compare the 2006 ordinance to the model

ordinance to determine which of these recommendations may already be included in the model ordinance and to determine which aspects may be suitable for New Orleans. Denver's inclusionary zoning ordinance (Article IV Affordable Housing) is notable for producing 3,395 affordable units in its first two years (Brunick, 2004). This chapter will review the incentives and requirements included in this ordinance as compared to the model ordinance to decide if there are recommendations not represented in the model ordinance that could be beneficial for an inclusionary zoning ordinance in New Orleans.

A review of San Diego's ordinance (Ordinance No. 0-2003-135), which created 1,200 units between 1992 and 2004, (Brunick, 2004) offers an example of how to tackle resale restrictions, deed restrictions and other particulars of inclusionary programs, and a lesson in how to keep inclusionary ordinances out of court. In addition to its legal challenges, San Diego is notable for operating two inclusionary ordinances, one in the North City Future Urbanizing Area (FUA) and one that applies to the rest of the city; this chapter will focus on the ordinance that applies to those areas not deemed FUA.

Using the fourteen sections of the model ordinance this chapter compares the contents of each section to the specifications put forth in one or all of the large city ordinances reviewed. This chapter begins at the start of the model ordinance with an examination of three sections that define the need for the ordinance before the regulations begin: statement of need, statement of purpose and a statement of findings. These sections are compared to the other large city ordinances to determine how these ordinances were justified and defined. This review helps to establish how these sections should be written for an ordinance for New Orleans.

Next this chapter examines several key definitions that begin with the regulations and then move into an in-depth examination and comparison of the following key ordinance elements

- Thresholds and set-asides
- Income eligibility
- Incentives
- Requirements for resale
- Determining qualified buyers
- Affordable housing standards
- In-lieu fees
- Alternatives
- Compliance
- Owner and renter occupied
- Adjustments and waivers
- Development review process

Each of these key ordinance elements from the model ordinance is compared to the large city ordinances in order to learn from, and build on, the hard work of others to ensure that New Orleans adopts an ordinance that produces affordable units.

First: State the need for affordable housing

Like Act No. 810, the model ordinance begins by recognizing the acute need for affordable housing across the state; it recognizes the current dearth of low cost housing as a “...danger to the health, safety and welfare of all residents of the state...” (H.R. No. 123 p. 1). Much like in Act No. 810, the presence of a construction boom and the positive social benefits of mixed income communities are both cited as reasons to support inclusionary zoning (H.R. No. 123). San Francisco’s ordinance also finds that inclusionary zoning benefits the city at large through the construction of mixed income communities, but San Francisco’s ordinance does not

indicate an expectation for increased development, perhaps because demand has traditionally been high in the Bay area. Like Act No. 810, the model ordinance highlights that the provision of incentives to developers contributes to the success of this method for providing affordable housing. The legislation finds that it is “beneficial and constructive” for localities across the state to deconcentrate poverty and build more affordable housing (H.R. No. 123 p. 1). It further finds that it is the responsibility of the legislature to offer detailed suggestions to assist localities in crafting an inclusionary ordinance that helps meet these goals (H.R. No. 123).

Denver and San Diego’s ordinances begin with a similar statement of need. For example, Denver’s ordinance finds that new housing development is not serving households earning 100% of area median income. This development pattern has resulted in a failure “to implement the housing goal of the Denver Comprehensive Plan 2000” (Article IV Affordable Housing p. 1). San Diego’s ordinance finds that because inclusionary zoning successfully created inclusionary housing in the FUA, a citywide inclusionary ordinance should be adopted (Ordinance No. 0-2003-135). The next section that an inclusionary ordinance contains is the statement of purpose.

Next: State the purpose

Increasing jobs to housing ratio

Like most ordinances, inclusionary ordinances begin by clearly stating their purpose; the model ordinance is no exception. Early within its statement of purpose this ordinance recommends that the number of inclusionary units created be tied to a proportional increase in the number of new jobs and housing units in the area (H.R. No. 123). Where this provision is unique among the ordinances reviewed, the intent conveyed is not. This provision recognizes that affordable housing is needed for workers across the state (where the city ordinances reviewed recognize that affordable housing is needed for workers across the city) and therefore

recommends that job growth in one area should directly lead to growth in affordable housing (H.R. No. 123). Because development, even through a mandatory inclusionary program, first requires the developer's inclination to build, it is difficult for a municipality to enforce this type of recommendation except through increased incentives for inclusionary development in areas with increasing job growth. None of the ordinances reviewed specifically offer increased incentives for development in areas undergoing job growth, possibly because market demand and normal housing market cycles may ensure increased development occurs with increased job creation, but the need for increased affordable housing in areas with increased job creation is not a foregone conclusion and therefore is noted in each of the ordinances reviewed.

The model ordinance acknowledges that affordable housing linked to job growth improves the housing to jobs ratio, which encourages smart growth principles like a reduction in sprawl. San Francisco's ordinance recognizes this as "Objective 1 of the Housing Element" portion of their General Plan (Ordinance No. 101-07 p.16). This objective essentially recognizes that development will increase with a boost in job creation, and inclusionary zoning will ensure that a portion of that development is made permanently affordable.⁶ Denver's ordinance highlights rapid regional growth as another reason for linking the production of affordable housing to job growth. That area experienced a spike in growth throughout the late 1990s that drastically increased the cost of land and construction, driving up the price of housing and seriously limiting the affordable housing stock (Article IV Affordable Housing).

Establish consistency

Within the "purpose" section the model ordinance recognizes the need to "establish consistent regulatory guidelines for private market contribution to the affordable housing stock in

⁶ Even if individual units are not permanently affordable the presence of the program will ensure that, as long as qualifying development occurs, affordable units will be made available.

accordance with [that jurisdiction's] comprehensive plan" (H.R. 123 p. 3). Two important points are housed in this statement: one is that a successful ordinance requires consistent rules for developers, and two, that an important component of a successful ordinance is community and developer support; support more easily granted if the need for affordable housing is clearly stated by a community backed planning process.

To elaborate on the first point, like the other mandatory ordinances reviewed, the model ordinance does not explicitly recommend a mandatory ordinance over a voluntary one, however the language in this and subsequent sections clearly outlines that this is a mandatory ordinance. This call for consistent rules is one such example. Brunick (2004) writes that mandatory ordinances are often praised for giving developers a more sure footing and providing "predictability." Mandatory requirements put developers on a "level playing field" so they know what is expected going into the development (Brunick, 2004 p. 15). They also know they can count on incentives granted for the production of affordable units (Brunick, 2004). This can increase confidence in slowing real estate markets, as affordable units are usually the first to rent or sell (Brunick, 2004). A second clue that the legislature is recommending adoption of a mandatory ordinance comes in subsequent ordinance language, "approval of any subdivision plat or issuance of any building permit for a covered residential development *shall* be subject to the provisions of this section" (H.R. No. 123 p. 7, emphasis added). This "shall" makes the following section mandatory and by so doing gives this model ordinance a fighting chance at success.

If the model ordinance had recommended voluntary compliance, developer fulfillment would be hard won. Kautz (2002) states plainly that voluntary programs produce fewer units because "developers have no incentive to participate in a voluntary program unless they are

better off as a result of such participation” (p. 6). Both Kautz (2002) and Brunick (2004) acknowledge that if given a large enough incentive voluntary programs could work, but the size of the incentive required is impractical, making this type of inclusionary ordinance largely ineffective. San Francisco, Denver and San Diego’s ordinances all communicate their mandatory nature by simply stating that the developer shall create the specified number of affordable units in any project that meets the threshold (Ordinance No, 101-07; Article IV Affordable Housing; Ordinance No. 0-2003-135).

The second important point housed in this statement calling for a mandatory ordinance is the provision that the ordinance should refer to a need already stated in a comprehensive plan. Each of the ordinances reviewed fulfill this requirement, referring several times to the need for affordable housing as documented in the master or general plan. Tying inclusionary zoning to a documented need is likely an attempt to legitimize this tool by linking it to a publicly vetted planning process (Mandelker, 2005). Both the plan and the policy require public support to be effective, and by linking a policy to a widely vetted comprehensive plan both will gain legitimacy (Mandelker, 2005).

The ordinance for New Orleans could reference the pre-Katrina master plan, which states the need to “concentrate on providing affordable, up-to-code housing and on eliminating abandoned buildings through renovation” (Policies and Strategies-- Existing Neighborhoods p. 3). Post-Katrina, the Unified New Orleans Plan and the neighborhood planning processes undertaken by Lambert Advisory and SHEDO, LLC acknowledge the need for affordable housing on a district and neighborhood level and should also be referenced by the authors of an inclusionary ordinance in New Orleans to achieve this goal. These plans received extensive public comment and have consequently gained a measure of legitimacy. For these reasons, the

authors should make clear references to these plans to establish inclusionary zoning as one policy to help achieve the goal of providing affordable housing for New Orleans.

Third: State the findings

Justify inclusionary zoning

Another key element of an inclusionary ordinance is a “findings” section. This section functions in part as a buffer against legal attacks by clearly making the case that inclusionary zoning is a necessary policy to address an outstanding community problem. Porter (2004) cites Kayden’s observation, “cities adopting mandatory programs, especially those without compensatory incentives, should prepare a compelling case that construction of private, market-rate housing units affects specific community interests addressed by the inclusionary requirements” (p. 218).

In other words, in order to avoid legal challenges this section should find that, as a particular tool, inclusionary zoning can help solve the documented need for affordable housing in a community. If this case is solid, imposition of this ordinance on future development will not be deemed arbitrary or capricious. To achieve this goal, the model ordinance uses this section to advise localities to reference an inability to retain a diverse workforce without the development of additional affordable housing. In the case of New Orleans, this recommendation is easily justified. Many planned projects such as the Biomedical district, a project anchored by the creation of a new Veterans Affairs Hospital and adjacent new Louisiana State Teaching Hospital, depend on several tiers of wage earners, which in turn require a wide range of housing options in order to thrive.

The model ordinance not only suggests that workers may be leaving the area due to a lack of affordable housing but suggests that each locality should conclude that future development

devoid of affordable units is detrimental to the sustained health of the respective region. Development without affordable units increases commuting time and the associated negative environmental affects of decreasing the jobs to housing ratio (H.R. No. 123). Negative fiscal impacts of insufficient worker housing are also recommended to be included, such as, fewer taxes due to workers' inability to find housing within the jurisdiction, which in turn affects that locality's ability to support new market rate development (H.R. No. 123). The model ordinance also recommends a locality establish the need to expand both rental and homeownership opportunities, as well as the need to house very low, low, and moderate income households. Each of these recommendations should be reflected in an ordinance for New Orleans in order to better justify the existence of the ordinance, but it should not stop there. Denver's ordinance goes a step farther stating that, before that city's ordinance, new construction did not meet the need for scattered affordable units. Most new construction was for the luxury market, and any affordable units built were clustered, thereby enforcing the negative social impacts of concentrated poverty (Article IV Affordable Housing). Denver's ordinance concludes, "without a program requiring moderately priced housing to be built, it is unlikely based on current trends that developers will provide such housing on their own initiative, leaving Denver citizens without sufficient affordable housing" (Article IV Affordable Housing p. 1). This statement acknowledges that before the ordinance development was not meeting the housing needs of all citizens and further recognizes that an inclusionary ordinance is necessary to build the needed units. This type of statement should be included in the findings section for New Orleans to ensure that the ordinance can better withstand any potential legal proceedings.

San Francisco's ordinance also acknowledges in the *Findings* section that inclusionary zoning cannot address the citywide need for affordable housing by itself, but rather that this tool

is only part of the solution. Other programs including traditional housing subsidies will still be needed in San Francisco and New Orleans to create effective housing policy. This sort of admission is crucial to the public understanding of what inclusionary zoning can be expected to achieve and this language should be included in an ordinance for New Orleans.

Housing task force

Another important component of the findings section in the model ordinance is the acknowledgement that a housing task force must be established with the goal of “recommending an appropriate mixed-income housing program” (H.R. 123 p. 5). Some of the programmatic details this housing task force is charged with establishing are:

- Appropriate incentives;
- Determine appropriate threshold number of units to trigger the ordinance;
- Percentage of affordable units to be set-aside;
- Length of deed restriction on those units;
- Terms for resale;
- Income groups targeted for rental and for-sale units;
- Provisions for alternatives to on-site construction of required units and more.

The importance of a housing task force is demonstrated by the work of two groups in San Francisco that were able change key ordinance requirements to better achieve the goals of the master plan. This change was allowed because of an ordinance provision requiring the Board of Supervisors to conduct an annual review of the performance of the ordinance; in this case the Board of Supervisors acts as the housing task force.

The Association of Bay Area Governments (ABAG) first began the process of reviewing the city’s inclusionary program and was later joined by the Board of Supervisors for the City of

San Francisco (Ordinance No. 101-07). The findings of each group are included in the text of the ordinance with lengthy descriptions that date five years before adoption of the 2006 revisions. The Board of Supervisors reassessed the extent of the need for affordable housing and in light of increasing needs, decreased the size of a development which triggers the ordinance from 10 to 5 units, increased the required set-aside from 10% to between 12% and 15%, and required that inclusionary units built after 2006 remain permanently affordable (Ordinance No. 101-07). These units can no longer be sold at market price, after 2006 the price for inclusionary units sold is set by MOH at an affordable level. The San Francisco ordinance tasks the Board of Supervisors with revisiting the programmatic details annually to ensure that the ordinance is up to date and can still provide affordable units as needed. The Board stays engaged and can strengthen or weaken the ordinance to keep it relevant to market cycles. The ordinance also requires that the Board annually assess the effect that inclusionary policies are playing on the market (Ordinance No. 101-07).

Before an inclusionary ordinance can be written for New Orleans the recommendation from the model ordinance to create a housing task force must be enacted so that the initial program can be designed. Following San Francisco's lead, however, this group should be required to revisit these calculations annually to ensure they stay current in a rapidly changing market place. Above all, it is crucial for the housing task force to defer to Mallach's (1985) definition of a successful ordinance as one that establishes a "reasonable and non-excessive goal" for creating affordable units (p. 107)

Provisions of the ordinance begin with definitions

Defining affordability

Another section common to most inclusionary ordinances is the list which defines key terms. Most ordinances contain this section but not all ordinances define key terms in the same way. For example, the model ordinance defines “affordable ownership cost” as gross homeowner costs that do not exceed 30% of monthly income (H.R. 123 p. 5). Devoting 30% of monthly income to rental costs is widely considered affordable and some agree this is the right number for costs associated with homeownership also, but others suggest that a larger percentage of monthly income must be set-aside for homeowner costs.

The Greater New Orleans Community Data Center (GNOCDC) writes that there is no “magic number” to determine affordability for ownership costs but states that 28% of monthly income is the mortgage industry standard for affordability to cover mortgage costs only. Other housing costs, such as insurance, could increase total housing costs to 36% of monthly income, notes GNOCDC, but the data center has settled on 30% of monthly income as their threshold for affordability for both homeowner and renter costs. The Office of Housing and Urban Development (HUD) has also established 30% of monthly income as the standard for affordability for homeownership. The San Francisco ordinance, however, relies on a more cautious figure of 33% of monthly income to devote to monthly homeowner costs (Ordinance No. 101-07). Suggesting that a higher percentage of monthly income be set-aside for homeowner costs may reflect higher insurance costs or higher mortgage payments in this area. Because some insurance providers have drastically increased their rates in New Orleans and the region, a higher percentage of monthly income may also be required to devote to the costs of homeownership in this area.

For defining low-, moderate- and very (or extremely) low-income households the model ordinance recommends using HUD's standard definitions. In 2007 HUD defined "extremely low-income" households as earning no more than 30% of the area median income which, according to the HUD's calculations for this period, was a maximum salary of \$17,100 for a family of four in the seven parish New Orleans region. A family of four in the same region earning a "very low income" salary makes 50% of AMI or \$28,500, and a four person family making the "low," 80% of AMI, income limit makes \$45,600 a year in the seven parish New Orleans region (HUD FY 2007, Income Limit Area Median Income). The housing task force must assess the real cost of homeownership taking into account mortgage, insurance rates, and average home maintenance costs to determine if these HUD definitions capture the reality of current market dynamics in New Orleans.

Importance of a procedures manual

In order to keep these income limits current and readily accessible to the public, San Francisco publishes a procedures manual that includes income limits as well as all the information that a potential landlord, home buyer, or renter participating in the program would need to know to stay compliant (City and County of San Francisco, Procedures Manual 2007). The ordinance adopted for New Orleans should also make a provision for a procedures manual that would be updated annually and would serve as an accessible guide to the public on the requirements of the program. San Diego also requires a procedures manual, and both San Francisco and San Diego include annually updated calculations for the minimum number of bedrooms per person required and the minimum square footage for inclusionary units. San Diego's procedures manual also provides a guide to calculating utility allowances (Inclusionary Housing Procedures Manual, 2007).

Model ordinance recommends an inclusionary housing plan

Another important term defined by the model ordinance is the “inclusionary housing plan,” which includes the “location, structure...proposed tenure...and size of the market-rate, and/or inclusionary units and the basis for calculating the number of inclusionary units” (H.R. 123 p. 12). The recommendation here is to require developers to present a plan that clearly lays out how the mandated inclusionary units will be incorporated in the development. The model ordinance then requires the developer to enter into an “inclusionary housing agreement” that includes details about every affordable unit in the development and maintains provisions for monitoring the continued affordability of the units (H.R. 123 p.12). Denver’s ordinance adds to this type of an inclusionary housing agreement by also requiring the purchaser of an inclusionary unit sign a “memorandum of acceptance” stating they accept the following conditions: “the property value and resale are restricted and shall set forth the control period, the maximum purchase price calculation, the eligibility requirement, [and] penalties for violation...” (Article IV Affordable Housing p. 8). This type of signed agreement between seller and buyer should be required at the point of sale in an inclusionary ordinance for New Orleans, in addition to the recommended agreement between the developer and the city, to better ensure ordinance compliance.

Key ordinance elements

Thresholds and set-asides

Section four of the model ordinance covers general requirements for an inclusionary program; this section records how many units in a development should trigger an ordinance often referred to as the “threshold”, and records the size of the set-aside in the development. The model ordinance does not recommend a certain threshold number or a percentage set-aside but

has recommended the housing task force in the locality adopting the ordinance determine these numbers. This is the best course of action; the local housing task force must examine the strength of the housing market in the city and the region examining the size, type, location, and price of units for sale and for rent to determine the best set-aside and threshold amounts. The housing task force, for example, could study the size of successful developments-- that is, developments that rent or sell units quickly-- within the city to determine a reasonable threshold number. Table 8 offers a summary of several key ordinance elements for each of the ordinances reviewed.

In determining the appropriate set-aside percentage, the housing task force should consider that an ordinance that requires a high percentage set-aside might produce more affordable units than an ordinance with a low threshold number and low percentage set-aside (Brunick, 2004). This is because a high set-aside percentage means that for each development that actually gets built a greater number of inclusionary units must be built. Relying more heavily on each development project including a small number of inclusionary units requires a higher volume of individual development projects than one that requires more units from each development successfully completed.

Denver however has been successful with a small set-aside and a high threshold. According to Brunick (2004) in its first two years that ordinance created 3,400 affordable units with a required set-aside of 10% affecting developments with 30 or more units (Article IV Affordable Housing). Porter (2004) and Brunick (2004) show with two separate studies that a set-aside of 10% is fairly typical. Out of eighteen cities studied, seven have a set-aside of 10%, four have a set-aside of 15%, and two have a set-aside that allows for a range of 15% to 20% or 25%. Of the remaining seven cities studied two require a set-aside of 50% of the projected units,

and three require a 12.5% set-aside. The same two studies, however, show that the majority of these cities reviewed have a threshold size of ten units or less (Porter, 2004; Brunick, 2004). Further, four cities require inclusionary units to be built in a development of any size, two require these units in developments with fifty units and two require inclusionary units in developments of thirty to thirty-five units. The deed restrictions for these cities range from perpetuity to ten years with five cities requiring permanent deed restrictions and three only restricting the unit for ten years; the other nine cities fall between thirty to ninety-nine years but Denver, included in both studies, requires rental units to be restricted for 15 years and for-sale units a short 10 years. The relatively low set-aside, high threshold and short deed restriction suggests that Denver was, and is, counting on lots of development activity to sustain an adequate pool of available and affordable housing. The high numbers of units initially created also suggests that this gamble has paid off through the construction of a high level of residential development. If however, that city finds the nationwide housing slump drags on and new construction remains slow, lengthening the deed restriction and increasing the set-aside required in each development while also lowering the threshold trigger could help to sustain the pool of affordable housing.

Another factor that may have contributed to the high number of inclusionary units created in Denver could be a result of the policy decision to include significant redevelopment of existing units as well as new construction in the definition of projects that trigger the ordinance (Article IV Affordable Housing). In addition to new construction of 30 or more units, Denver's ordinance is triggered by substantial rehabilitation (50% or over) of an existing building (Article IV Affordable Housing). Due to the continued presence of significant amounts of blighted property throughout the city two years after Katrina, it would be a good idea for New Orleans to

adopt this kind of provision. Making inclusionary incentives available to developers engaged in substantial rehabilitation of properties could encourage infill development and help to address the pockets of blight in every neighborhood in the city. Implementing inclusionary zoning through substantial rehabilitation projects could also help ensure that inclusionary housing is spread throughout the city as well as utilized in different land use patterns.

As of 2006, San Francisco's ordinance requires buildings of five units or more to include 15% inclusionary units (Ordinance No. 101-07). Contrary to Brunick's assertion, this low threshold number and high percentage set-aside has only succeeded in producing approximately 450 for sale and 150 for rent "below market rate units" as of 2007 (Mayor's Office of Housing). In order to accurately test Brunick's (2004) assertion however, many ordinances would need to be measured with a control for local housing market cycles and ordinance variations.

Some cities include different threshold or set-aside requirements for different building types. Both Denver and San Francisco have special requirements for high-rise buildings. In Denver, a building over three stories with elevators and 60% of its parking structured is required to offer inclusionary units at 95% of AMI for purchase, up from the usual 80% (Article IV Affordable Housing). This may be due to the increased cost of construction for high-rise buildings. San Francisco requires a building of over 120 feet high to include 12% of the units as affordable to the targeted household, as opposed to 15% for shorter buildings (Ordinance No. 101-07). Many condominium developments in these communities are over 120 feet high and therefore enjoy these comparatively looser inclusionary requirements. One reason for the different requirements could be that producing inclusionary units in these developments is onerous and more expensive than low-rise development.

Table 5: Requirements for San Francisco, Denver, San Diego and Model Ordinances

	San Francisco	Denver	San Diego	Model Ordinance
Adopted	1992	2002	2003*	2007
Owner Occ.				
				Units in each dev. affordable to mod, low, & very low ex. \$45,600, \$28,500 & \$17,100**
Eligibility	100%- 120% AMI	80% AMI	100% AMI	
Over 3 stories	n/a	95% AMI	n/a	n/a
Threshold	5 units	30	10+ units	Housing Task Force
Set-aside	15%	10%	10%	Housing Task Force
		Build units .5 miles from commuter rail build units in same statistical neighborhood	Can transfer to another developer, built within same community planning area	Area must have greater need for afford. housing, census tract less than 15% poverty
Off site	20% set-aside, built w/in one mile of original dev.			
Over 3 stories	12%	n/a	n/a	n/a
Deed Restriction	Perpetuity	10 years	15 years	Perpetuity
Renter Occ.				
				Units in each dev. affordable to mod, low, & very low ex. \$45,600, \$28,500 & \$17,100**
Eligibility	80% AMI	65% AMI	65% AMI	
Over 3 stories	n/a	80% AMI	n/a	n/a
Threshold	5 units	30	10+ units	Housing Task Force

Table 5: Requirements for San Francisco, Denver, San Diego and Model Ordinances cont.

	San Francisco	Denver	San Diego	Model Ordinance
Set-aside	15%	10%	10%	Housing Task Force
Over 3 stories Deed Restriction	12%	n/a	n/a	n/a
	Perpetuity	15 years	55 years	Perpetuity
Incentives	Refund fees for environmental review, conditional use permits, building permits	10% density bonus, expedited processing, cash subsidy, reduction in parking requirements	None	Density bonus, convert detached single family unit, refund of conditional use permits, environmental review, municipal fees, expedited processing, reduced parking requirements

*North City Future Urbanizing Area ordinance adopted 1992.

** HUD Income limits for family of 4, 2007

Income eligibility

Besides determining the threshold and set-aside levels another crucial question for an inclusionary ordinance to address is what income levels will be targeted. Ultimately the income levels targeted depend both on the local housing market and on the type of need in an area (Porter, 2004). Of the ordinances reviewed here, Denver targets income levels of 65% and 80% of AMI⁷ for rental and for-sale units respectively, and San Diego targets 65% and 100% of AMI for rental and for-sale units. San Francisco's ordinance targets income levels of 80% of AMI or less for rental units and 100% to 120% for for-sale units.

San Francisco's ordinance has been criticized for not creating diverse communities possibly in part because landlords or developers pick the tenants. Shaw (2006) argues that these landlords pick the same types of people to group together, frequently young couples with no children, which excludes many needing affordable housing (Shaw, 2006). This is especially prevalent, Shaw (2006) writes, in the series of new high-rise condo developments cropping up in the downtown. This situation is not unique to San Francisco however, indeed none of these ordinances as written can ensure that a varied income mix, and therefore potentially a varied mix of races, ages, occupation, or family status will be achieved. Indeed, Porter (2004) finds that frequently inclusionary ordinances serve those already living in a neighborhood rather encouraging an influx of new residents. The model ordinance however addresses the need for true economic diversity in an innovative way that in-turn may enable racial and ethnic diversity to thrive as well.

The model ordinance recommends the units set-aside as inclusionary in any given development be divided three ways—one fraction will be affordable to moderate income

⁷ As previously mentioned, an exception is made for buildings over 3 stories with 60% structured parking, these units are eligible to 95% of AMI (Article IV Affordable Housing).

households, one fraction affordable to low income, and one fraction affordable to very low-income households. This unique solution will result in a better economic mix for each inclusionary development which may lead to a more diverse development overall.

This solution could be difficult to implement, however especially in small developments, as developers wrestle with fractions of units. Both the San Francisco and Denver ordinances have solved the question of what to do with fractions of units and require a developer to build an additional unit if the left over fraction is higher than .5 (Article IV Affordable Housing; Ordinance No. 101-07). San Diego in this case, requires the developer to pay the equivalent of the fraction in in-lieu fees into the affordable housing fund (Ordinance No. 0-2003-135). The method used by Denver and San Diego creates additional units, and when combined with the directive to build a fraction of inclusionary units as affordable to each targeted income level would most clearly benefit the need in New Orleans for truly affordable housing at a range of income levels.

Incentives

One way to ensure the feasibility of inclusionary development is to offer developer incentives. The amount and type of incentives offered is often determined by the strength of the local housing market, and some cities have found that developers require little or no incentives to build inclusionary units (Brunick, Goldberg, Levine, 2003). The model ordinance on the other hand recommends several incentives including: density bonus; conversion of a percentage of detached single-family units into attached single-family units; increased density bonus for the development of affordable units above the minimum; refund of conditional use fees, environmental review fees (on the inclusionary units), or municipal fees such as sewer and water impact and connection fees; expedited processing; financial assistance; and reduced parking

requirements. Which incentives, and how many are best for New Orleans will have to be decided by the housing task force, but a look at other ordinances is needed to understand incentive options.

Density Bonus

Denver offers a density bonus of 10% for both for-sale and rental units if the developer is building units on-site (Article IV Affordable Housing). Despite the popularity of density bonuses in inclusionary ordinances nationwide (Porter, 2004), neither San Francisco nor San Diego offers this incentive. This likely speaks to the continued strength of housing the market in these cities (Brunick, Goldberg, Levine, 2003). Given, however, that New Orleans has so much damaged housing in need of repair or replacement a density bonus of 15% or 20% may be appropriate for the first few years of implementation. This higher density bonus will ensure that the maximum number of affordable units can be constructed. A density bonus of 15% or higher is in place in many inclusionary ordinances including Burlington, Cambridge, Chula Vista, Fairfax County and Montgomery County among others (Porter, 2004).

The allowance to convert a percentage of detached single-family units to attached is unique among these ordinances and may be a good way to ensure that the inclusionary ordinance can be utilized at lower density levels (H.R. No. 123). The model ordinance provides for additional benefits to developers who exceed the minimum requirement, which is a good provision, but Denver's ordinance also provides benefits for developers who are not subject to the ordinance but volunteer to provide affordable units. These developers are held to the same standards as those mandated by the program and can apply for the same benefits but will likely produce less than 30 units.

Developers meeting inclusionary requirements in Denver also qualify for expedited processing which ensures that upon completion of the site plan review the developer will be granted a review period not longer than 180 days (Article IV Affordable Housing). As mentioned in Chapter three, Denver also offers a cash subsidy of \$5,500 for each of the first half of the total affordable units built and \$10,000 per unit for units affordable to 60% of AMI for a total reimbursement of up to \$250,000 per development per year (Article IV Affordable Housing). One developer cannot be reimbursed more than \$250,000 per development per year (Article IV Affordable Housing). The ability to provide this cash subsidy depends solely on the amount of money present in the “special revenue fund” (Article IV Affordable Housing p. 6). This incentive may prove a powerful catalyst to encourage developers in New Orleans to begin building but the ability to pay this subsidy must be self-sustaining, from in-lieu fees and other sources internal to the program, in order to be viable. As in Denver, it must also be made clear that if the fund is empty this incentive will not be offered. It is probable that the large number of inclusionary units built in Denver are do in part to the presence of this fund and, more importantly, the subsidy that it allows.

Denver has also been creative with their reduced parking requirements. That city’s ordinance provides for a 20% reduction in total parking requirements but for every ten parking spaces saved the developer is required to build one additional inclusionary unit. At least one additional unit must be built in order to use this provision (Article IV Affordable Housing). The ordinance does not specify to which income levels these extra units should be affordable but by requiring additional units through the granting of incentives Denver increases the number of units built per development.

The only incentives San Francisco offers is a refund of fees for conditional use permits, environmental review, and building permits covering the portion of inclusionary units. It may be advisable for New Orleans to limit the refund of fees to this type of shorter list, rather than the lengthy list of refunds recommended in the model ordinance, mainly due to the extent of damage inflicted on the sewerage and water systems in the city as a result of Katrina. The repair and rehabilitation costs required for this system to support increased housing development will likely require developer assistance in the form of fee payments going forward.

San Diego does not offer any incentives to developers required to produce affordable units despite the fact that this ordinance was produced in close concert with the Builder's Industry Association (Akinfosile, Cohen, and Lawrence 2006). Brunick, Goldberg, and Levine (2003) report that a private firm concluded, "the city opted not to offer cost off-sets, such as fee waivers or density bonuses, because developers can easily cover the cost of affordable units through the sale of market-rate units" (p. 11).

The housing task force should determine whether incentives are appropriate for New Orleans, and if so what kind and how many. It is likely, as exhibited by a region wide lack of development despite the allocation of millions in additional low-income housing tax credits, that the recommendation will be to offer many incentives in the hopes of spurring development. GCR and the Louisiana Housing Finance Authority (2008) report that of 8,850 units proposed to be funded with GOZone LIHTCs in Orleans Parish only 207 units have been placed in service. This slow delivery is not unique to New Orleans, or this type of LIHTC. Statewide out of 17,348 units proposed to be funded with 9% LIHTCs only 1,118 units have been placed in service as of February 2008.

Requirements for resale

Inclusionary zoning demands the cooperation of developers but also of homeowners who purchase inclusionary units. Each of the ordinances reviewed contains unique requirements for resale including the length of the deed restriction, resale value, and provisions for equity earned by the seller among others. The inclusionary ordinances for both Denver and San Diego provide that the first resale after the deed restricted term ends, 10 years for Denver and 15 years for San Diego, shall act as the final term of sale. The unit shall be sold at the end of the deed restriction are sold at fair market value and released from any inclusionary requirements after this sale (Article IV Affordable Housing; Ordinance No. 0-2003-135). Denver's ordinance requires an owner wishing to sell an inclusionary unit to contact the office of housing; the City then has 30 days to purchase the unit. San Diego's ordinance also provides for first right of refusal for the city when an owner seeks to sell an inclusionary unit.

In answer to the criticism that inclusionary zoning allows lower income households to purchase a home but does not allow those homeowners to gain the same equity opportunities available to other homeowners (Tombari, 2005), both cities have devised a formula that addresses the question of equity for the homeowner. Tombari (2005), writing for the National Association of Homebuilders, states that inclusionary zoning robs participating homeowners of equity because it requires these owners to pay equity back into the program upon resale. The counter argument finds that it would be unethical for the program to assist homeowners with a purchase and then allow that owner to reap full profit upon resale without giving back to the program to ensure that other families will enjoy a similar benefit (Padilla, 1995). The compromised result is that many cities have derived a formula that gives some portion of the

profit from resale of the unit back to the owner and some portion goes into an affordable housing fund for the development of new units (Porter, 2004).

Denver employs a detailed formula, which requires that the owner pay “one half of the excess of the total resale price over the sum of...” the prior purchase price plus a cost of living increase plus any capital improvements and lastly including a reasonable sales commission (Article IV Affordable Housing p. 9). The ordinance next states that if the amount left from the calculation of this formula is less than \$20,000 then it shall be adjusted so that the owner makes \$10,000 or the entire amount of the excess of the sale, “which ever is less” (Article IV Affordable Housing p. 9). The other half of the excess from the resale goes into the affordable housing fund.

San Diego, on the other hand, demands that “100% of the difference between the appraised value at the close of escrow and the sales price” be deposited into the “Inclusionary Housing Fund” (Ordinance No. 0-2003-135 p.13). This provision may seem unduly strict but the ordinance then includes Table 142-13B, listed here as Table 4, which lays out as a percentage, the amount of equity gained by a household each year. For example, a household that chooses to resell after less than a year will receive 15% of the share in equity in that property, selling after five years earns you 39% share and selling after 15 years earns the seller 100% of the equity in the property (Ordinance No. 0-2003-135 Table 142-13B).

In a break from this type of resale restriction the San Francisco ordinance requires much more of a seller. This ordinance requires that the Mayor’s Office of Housing (MOH) have final approval of all sales. Further, these sales are not conducted on the open market but MOH sets a price affordable to the median income level of the previous tenant (Ordinance No. 101-07).

MOH controls the pricing because, in the 2006 ordinance revisions, units sold after 2006 are now

restricted “for the life of the project.” Units sold before this date are freed from inclusionary restrictions after 50 years, but any re-sale of the unit within 50 years restarts the inclusionary restriction clock (Ordinance No. 101-07).

Table 6: Length of ownership and equity

Length of Ownership at the Time of Resale, Refinance, or Transfer	Share of Equity to Household
Months 0-12	15%
Year 2	21
Year 3	27
Year 4	33
Year 5	39
Year 6	45
Year 7	51
Year 8	57
Year 9	63
Year 10	69
Year 11	75
Year 12	81
Year 13	87
Year 14	93
Year 15 of after	100%

Source: Author reproduction of Table 142-13B from San Diego Ordinance No. 0-2003-135

This ordinance states there is no guarantee of increased equity from the resale of these units but in a concession to the property owner any proceeds do belong to the owner. The City

has the first option to purchase these units but if it does not, the owner must follow the detailed marketing procedures outlined in the procedures manual. San Diego also requires sellers to follow a specific marketing regimen and is outlined in that procedures manual. Also, unlike Denver or San Diego, San Francisco holds a lottery of qualified buyers but if the unit does not sell within six months MOH may increase the income limit of the buyer by 20% but the price of the unit cannot be raised (Ordinance No. 101-07).

The model ordinance suggests that resale restrictions be handled more like San Francisco than Denver and San Diego. It suggests that the resale price be calculated according to HUD standards for affordability, which suggests a method where the unit is not offered at FMV but is offered at the current price affordable to the income level originally assigned to the unit (H.R. No. 123). Also like San Francisco, if a unit is sold before the deed restriction ends it will start over with the new owner (H.R. No. 123). This is an important rule that will help preserve the stock of affordable housing. The model ordinance also recommends that the agency have first right of refusal on resale units for a set period of time.

The provision for equity, however, is based on San Diego's model of shared equity as determined by the length of time an owner has lived in the unit (Table 142-13B) and including improvements made (Ordinance No. 0-2003-135). The model ordinance recommends that the equity added by capital improvements made be determined as a percentage of the fair market value at the time of resale subtracted from the fair market value at the time of purchase (H.R. No. 123). Ideally, this equation will account for capital improvements made by the seller.

The housing task force for New Orleans will probably find that a provision detailing marketing standards is also necessary, as well as a table outlining the percentage of equity earned for each year of occupancy. A provision which addresses length of time on the market should

also be included if the unit is not being offered for FMV. The housing task force should determine the length of time that will activate such a provision and what measures should be taken. San Francisco's solution, to increase the income level of the buyer until the unit is available and not the price of the unit, should be considered.

Determining qualified buyers

In order to sell an inclusionary unit the buyer must be qualified. Inclusionary programs have different suggestions for determining qualified buyers, and the model ordinance is not specific on this point, but does require that the parish or designated entity provide qualification for homebuyer status (H.R. No. 123). There are many ways to determine buyer qualifications, some cities opt to structure their programs through waiting lists, additional screening (beyond income eligibility) or through a lottery system as in the case of San Francisco. The Housing Commission in San Diego determines eligibility by way of an application; the buyer must own no property and meet the specified income qualifications (Ordinance No. 0-2003-135). The prospective renter or owner applies directly to the landlord or seller and gets on that waiting list (Ordinance No. 0-2003-135). San Francisco requires that, in addition to income eligibility, an applicant must be a first time homebuyer and at least one member of the household must live or work in San Francisco prior to applying (Ordinance No. 101-07). Denver's housing office receives applications and deems eligibility. In Denver, prospective buyers or renters contact landlords directly, but the ordinance requires that the landlord first verify that the applicant is eligible for the property through completion of a compliance report (Article IV Affordable Housing). The housing task force should determine the best method for New Orleans.

Providing for very low-income households

A perennial concern of inclusionary zoning is that it primarily produces workforce housing, 80% to 120% of AMI, and leaves the hard to house, 50% of AMI and under, out in the cold. The model legislation does not offer specific recommendations for providing housing to the lowest income categories of 50% AMI and below. It does recommend that housing for this group be provided in partnership “with a housing authority, a redevelopment authority, a qualified nonprofit entity, or a Section 8 voucher program” (H.R. No. 123 p. 9). Housing affordable to households earning below 50% AMI can be difficult for developers to provide without some form of subsidy because the cost of materials and labor remains the same but the return on investment is necessarily reduced (Padilla, 1995). To address this reality San Francisco’s ordinance allows a developer to use tax-free bonds to partially fund construction as long as the developer sets aside 20% of the on-site units or 25% of off-site as affordable to 50% or less of AMI (Ordinance No. 101-07).

Denver addresses the long term need for affordable housing in its ordinance by offering all for-sale inclusionary units first to federal, state, or local agencies or qualified nonprofits to be sold or rented to households eligible for governmental housing assistance (Article IV Affordable Housing). Denver also funnels extra revenue from the special revenue fund to build affordable housing in targeted low and very low income neighborhoods known as “focus neighborhoods” (Article IV Affordable Housing p. 2). This strategy works in opposition to federal mobility programs focused on moving households from areas of high poverty to areas of low poverty but in a city with finite growth limits targeted funding to improve pockets of poverty is also a necessary undertaking.

Another tactic for providing housing to the lowest income tiers was mentioned in chapter two. Montgomery County, Maryland allows the housing authority to purchase one third of the affordable units in each housing development. The housing authority then manages these units for use by lower income residents (Department of Housing and Community Affairs). Due to the Housing Authority of New Orleans' long bout with federal receivership and lack of a plan to improve management of the agency or its housing stock, it may not be advisable to increase HANO's duties. The New Orleans Redevelopment Authority (NORA), in partnership with the City and with a detailed cooperative endeavor agreement, may be able to accept the challenge of owning and managing a small number of inclusionary units; it may also be suitable for NORA to pass these units on to a trusted non-profit for management.

In post-Katrina's market saturated with low-income housing tax credits, an approach like that of San Francisco-- offering tax-free municipal bonds-- could work to make the construction of lower income units more economically feasible for developers. It is likely that a combination of efforts will be needed to address the shrinking stock of very low income housing as public housing units are demolished and fewer of these units are rebuilt. The provision in the model ordinance to include units affordable to all income levels in every inclusionary development, however, will help off set this balance while at the same time furthering the goals of deconcentrating poverty and creating mixed income neighborhoods.

Affordable housing standards

Design

As discussed in chapter three the design and layout of inclusionary units is important to the success of the overall development. Like the other ordinances reviewed, the model ordinance includes detailed recommendations for the design of inclusionary units. Each ordinance

reviewed requires scattered site units and construction quality equal to that of the market rate units, including equal quality utility hook ups. Each ordinance reviewed requires comparable exterior design to the market rate units but allows for a smaller unit square footage (Article IV Affordable Housing; Ordinance No. 101-07; Ordinance No. 0-2003-135; H.R. No. 123). The San Francisco ordinance however, does require minimum room sizes and further mandates that the number of bedrooms be paired to the size of the household. The San Francisco ordinance also contains the provision that inclusionary and market rate units must be of the same tenure. The model ordinance does not require this, but does mandate that the number of bedrooms mirror those offered in the market rate units (H.R. No. 123).

Timing

For the same reasons the design of inclusionary units must be comparable to market rate units, the timing of construction for inclusionary units should be legislated to avoid these units being built all at once and singled out as inclusionary. Construction concurrent with market rate units will avoid NIMBYISM and also avoid the possibility of a developer running out of funding before the inclusionary units are constructed (Kautz, 2002; Padilla, 1995).

San Francisco's ordinance requires that on-site affordable units be ready at the same time as the market rate units but the model ordinance further requires that the affordable units be ready at or before the market rate units possibly to ensure that these units will be built. The model ordinance also includes a provision for phased construction, wherein affordable units may be built in proportion to market rate units (H.R. No. 123). This "may" ought to become a "shall," wherever feasible, to ensure affordable units are constructed along side market rate units in phased developments and hence any inadvertent negative impacts caused by staggered timing can be avoided.

The timing of construction for inclusionary units should be included as one component of the inclusionary housing plan recommended by the model ordinance. The timing and design components discussed thus far pertain to units built on-site, but developers are not always required to build inclusionary units. Most ordinances contain a provision to allow developers to pay into a housing fund in-lieu of building the required units. These fees paid are often termed in-lieu fees.

In-lieu fees

Each ordinance reviewed in this chapter makes some provision for the acceptance of a payment in-lieu of the construction of inclusionary units. In each case these payments are collected in an affordable housing fund and used to construct inclusionary housing at a different site and at a later time. Because this housing will be built separate from the site of the original development, San Francisco calculates the fee owed by tallying what the cost would be if the developer were to build the required number of off-site units, thereby ensuring that the maximum number of units will be charged (Ordinance No. 101-07).

Both San Francisco and Denver require the developer to build, or pay for, another full unit if the remaining fraction can be round up. Denver will allow a developer to pay cash instead of building this extra unit, but the in-lieu payment must be half of the cost of building the “extra” inclusionary unit in this case (Article IV Affordable Housing). San Diego requires the developer to pay an in-lieu fee equal to the fraction of a unit in these cases, not build a new unit. Like many cities, San Diego has arrived at a very precise formula for calculating the in-lieu fees required of developers.

This formula for determining in-lieu fees in San Diego is to multiply the cost per square foot by the total gross floor area for the total number of units in the development (Ordinance No.

0-2003-135). This cost per square foot is determined when the application for building permits is filed. Cost per square foot increases with a higher number of units and increases in three-year increments (Ordinance No. 0-2003-135). For example, ordinance table 142-13C shows that projects with more than ten units are charged \$1.00 a square foot for the first year, \$1.75 the second year, and \$2.50 in the third year; projects of less than ten units are charged \$.50 a square foot, \$.875, and \$1.25 respectively. Many argue that this cost per square foot is too low and effectively lets developers pay a nominal fee to avoid constructing inclusionary housing (Akinfosile, Cohen, and Lawrence, 2006).

Table 7: In-lieu fees, large projects

Projects of 10 or more units

Year one	\$1.00/sq. foot
Year two	\$1.75/sq. foot
Year three	\$2.50/sq.foot

Table 8: In-lieu fees, small projects

Projects of less than 10 units

Year one	\$0.50/sq.foot
Year two	\$0.875/sq.foot
Year three	\$1.25/sq.foot

Source: Author reproduction of Tables 142-13C and 142-12D from San Diego Ordinance No. 0-2003-135

According to the New York Times, residents of San Diego found that, following the devastating fires in 2007, residential construction costs can be closer to \$350 to \$500 a square foot (Moore, 2007). Certainly inclusionary housing should not be on par with custom built construction therefore this estimate could be lowered to a relatively more conservative \$150 and

\$200 a square foot, but it is still hard to imagine that a \$1.00 a square foot in-lieu fee is going to build any units. Akinfosile, Cohen, and Lawrence (2006) argue that indeed such low fees cannot and will not cover the costs and maintain the allowance for in-lieu fees should be done away with leaving developers with no choice but construction. The rock bottom fees are most likely a result of Building Industry Association (BIA) close collaboration with the City to prepare the inclusionary ordinance (Akinfosile, Cohen, and Lawrence, 2006).

Despite this close partnership, however, BIA sued the city in 2004 declaring that the ordinance did not offer a reasonable path for a developer to receive a waiver (McLaughlin, 2006). McLaughlin (2006), however, quotes Sherm Harmer of the Building Industry Association (BIA) as saying that the real impetus for the BIA initiated lawsuit was over the timing of the in-lieu fees. In San Diego, in-lieu fees were calculated upon the issuance of a building permit but BIA argued that the intention of the ordinance as passed required in-lieu fees to be calculated upon completion of an application for development (Inclusionary Zoning Compliance Clarification, 2006). Calculating in-lieu fees at the issuance of a building permit could, in theory, result in substantially higher costs for construction of affordable units.

Perhaps to better address this original grievance, rather than waiver language, and to avoid extended court proceedings, BIA and the City entered into settlement talks. The settlement was agreed to in July of 2006 and safeguards \$9 million in in-lieu fees already collected by the city, but moves the date that future in-lieu fees are assessed up from the issuance of the building permit to the time when the application for development is deemed complete (Weisberg, 2006). This change will save developers, and cost the city, approximately \$20 million in lost in-lieu fees (Weisberg, 2006).

Rather than low in-lieu fees that require substantial development to begin to add up, the model inclusionary zoning ordinance contains recommendations for a strong in-lieu provision that should be adopted in an ordinance for New Orleans. The minimum payment must be at least the cost of constructing the unit minus the affordable rent or sale price for the unit (H.R. No. 123). The model ordinance recommends that a body, such as the housing task force, evaluate and adjust the fee annually, a provision that San Francisco also requires. But the model ordinance falters by requiring that an in-lieu payment be rendered within 10 days of the issuance of any building permit. If payment is not received the building permits are to be considered void but a suggestion from San Francisco's ordinance reveals a better success rate will likely be achieved if these permits are not issued until the developer has notified the issuing department in writing that all in-lieu payments have been rendered in full (Ordinance No. 101-07). The developer has 30 days to send this notice and if he or she fails they must present evidence of payment from the finance office to the issuing department (Ordinance No. 101-07). The onus is on the developer in this case to pay in a timely manner before permits are issued and to notify the office that they are in compliance. This procedure should certainly be adopted in New Orleans to increase the potential for compliance.

Alternatives

Off site

The payment of in-lieu fees is one way a developer can meet an inclusionary requirement without the construction of on-site affordable units. An alternative way is for a developer to elect to build off site units-- that is units constructed at a site other than the original development. Each of the ordinances examined here attach additional requirements to the allowance for construction of off site units in order to ensure that this option does not become the dominant

inclusionary model, thereby undermining the goal of creating mixed income communities. San Francisco requires that developers who choose to build units off site build 20% of the total number of project units as inclusionary (Ordinance No. 101-07). This is a 5% increase from the on-site requirement, but if the original building is over 120 feet in height, the developer is required to build 17% of the total number of units as off site affordable units. This ordinance requires that these units be ready for move in at the same time as the market rate units and must be within one mile of the market rate development (Ordinance No. 101-07).

Off site rental units are required to be permanently affordable by the San Francisco ordinance and off site for sale housing must be affordable to families earning 80% or below of AMI (Ordinance No. 101-07). This ordinance also requires these units to have comparable exterior design features and the same number of bedrooms as the market rate units in the original development (Ordinance No. 101-07).

The purpose of this provision is likely to ensure that building units off site is not viewed as an easier and cheaper option than building inclusionary on-site units. Off site units have the same square footage requirements and must follow the same marketing procedures as on-site units (Ordinance No. 101-07). Shaw (2006) contends that some view the requirements attached to off site as effectively limiting the number of family friendly units that can be constructed using the inclusionary program. He argues that the requirement to build inclusionary units within one mile of the original site excludes neighborhoods that are more family friendly. Shaw maintains that developers tend to choose singles or couples without children to live in the myriad condo towers being developed and sees these sites as not child friendly places.

It is likely that the requirement to build inclusionary units within one mile of the market rate development is designed to avoid the concentration and segregation of affordable units. The

model ordinance for Louisiana, however, may provide a better solution through its requirement that off site units only be built if the proposed area has a greater need for affordable housing than the market rate site (H.R. No. 123). These off site units also cannot be constructed in a census tract with over 15% poverty (H.R. No. 123). This poverty restriction should shield against the concentration of poverty while allowing neighborhoods not benefiting from the construction of market rate units to benefit from the construction of new affordable housing, thereby potentially spreading the benefits of well constructed affordable housing throughout the city.

Land banking

Another alternative to building on site inclusionary units is land banking. This provision allows the developer to donate land for the future construction of affordable housing instead of paying an in-lieu fee or building off site units. The model ordinance states that this land should be worth as much, or more than, the in-lieu fee and cannot be in a census tract with a poverty level above 15%. The other ordinances reviewed here do not explicitly allow land banking, which may be indicative of the difficulties inherent in turning vacant land into affordable housing, or could be indicative of the scarcity of vacant land in these cities. Municipalities are not developers and may find that developing dedicated land is too complicated to be handled effectively by the city or a partner nonprofit (Porter, 2006). If a highly competent nonprofit can be easily located in the area land banking could be pursued as a viable alternative to on-site construction in New Orleans, but this option requires defining how the land is to be awarded and to whom.

Preservation of units

In a move similar to Denver's regulation which includes rehabilitation of more than 50% of an existing structure as triggering the inclusionary ordinance the model ordinance allows for

the rehabilitation of existing units, calling this the preservation of units. These preserved units can be on site or off site (H.R. No. 123). The ordinance suggests that if off site units are selected for preservation more units should be preserved than required for on-site (H.R. No. 123). Preserved units will also remain permanently affordable (H.R. No. 123). The housing task force should decide whether the threshold should be the same for rehabilitation of existing units as for new construction projects. This provision offers an important alternative that could be used to spur much needed infill development throughout New Orleans, while preserving the historic housing stock. It is important, however, that an ordinance for New Orleans clearly state the amount of rehabilitation activity that will merit the benefits of inclusionary zoning. In addition to Denver, New York's voluntary ordinance applies to substantial rehabilitation (Ross, 2003).

Compliance

In order to ensure developer compliance, the model ordinance requires the developer to submit a plan detailing how the inclusionary units will be incorporated into the development. Upon approval, this plan is folded into an inclusionary housing agreement, which is similar to the covenant required in Denver and the procedure manuals used in San Francisco and San Diego. Like Denver's covenant, the inclusionary housing agreement includes unit tenure, location, quantity, the income bracket served, as well as, incentives given and disclosure of any public funds (H.R. No. 123; Article IV Affordable Housing). Like the procedure manuals used in San Francisco and San Diego, the agreement is recommended to include stipulations for how the units will be monitored in the future to ensure continued affordability (H.R. No. 123). These agreements are to contain all the pertinent information about the development and the restrictions placed on property therein (H.R. No. 123).

Compliance must also be verified after construction to ensure that the units constructed are occupied and the occupants are eligible. San Francisco includes a no vacancy clause that should be included in an ordinance for New Orleans. This clause ensures that units stay occupied and actively contribute to the housing solution. The clause states that if a unit, either for-sale or for rent, goes vacant for more than 60 days the office of housing must be notified (Ordinance No. 101-07). In the case of for-sale units this ordinance also requires detailed marketing procedures, such as acceptable listing places and minimum listing periods to ensure compliance (Ordinance No. 101-07). The model ordinance, like San Francisco, requires annual monitoring by the agency to confirm occupancy and tenant eligibility. This annual monitoring should be required for an ordinance adopted in New Orleans to ensure ordinance compliance is maintained.

Owner occupied

The model ordinance requires that for-sale units be sold at an affordable price, and as mentioned above, many ordinances, such as San Francisco's, define affordability for homeownership as 33% of monthly income, as opposed to the HUD standard of 30%. The higher percentage of monthly income for homeownership accounts for costs over the monthly mortgage payment such as, insurance, and needed repairs. The housing task force should review the cost of insurance, average home repairs, and other typical home costs to determine what percentage of monthly income is affordable for the New Orleans region to devote to monthly housing costs. The task force will also have to determine which income levels can best afford to own a home in New Orleans. It may be that 80% of AMI is not enough to affordably support a mortgage in the region due to recent increases in insurance and other costs.

Renter occupied

According to the model ordinance, the owner of the rental unit must verify income for a prospective tenant initially and on an annual basis. That information must be submitted to the agency administering the program. Unlike any of the other ordinances reviewed, the model ordinance suggests, but does not mandate, that the Section 8 waiting list be used to fill vacant rental units. If this list is not used then the owner can fill the unit by finding an eligible candidate (H.R. No. 123). By using the Section 8 waiting list it may be possible to house the most vulnerable, and poorest, portions of the population first, but this approach requires adequate federal funding for this voucher program. The model ordinance also ties rental increases to a proportional increase in the median household income (H.R. No. 123). The housing task force should closely monitor this relationship to determine if the population benefiting from inclusionary housing is also seeing the benefits of increased wages.

Adjustments and waivers

Each inclusionary ordinance must contain language that allows a developer to argue that the ordinance bears no relationship to a particular development. The model ordinance contains the following language to achieve this purpose, “the requirements of the Ordinance may be adjusted or waived if the developer demonstrates to the [agency] that there is no reasonable relationship between the impact of a proposed residential development and the requirements of this Ordinance, or that applying the requirements of this Ordinance would take property in violation of the United States Constitution” (p. 15). The possibility for a waiver protects the model ordinance from a charge that it is a “taking” of property for public use without just compensation; the taking of property without just compensation is precluded by the fifth

amendment (Mandelker, 2005). Without this language an ordinance is vulnerable to court proceedings, as revealed by the BIA suit against the city of San Diego.

The BIA lawsuit claimed that procedure for obtaining a waiver was too cumbersome, even though BIA's true grievance was over the procedure for in-lieu fees (McLaughlin, 2006). The presiding judge over this case agreed that the city's ordinance put too many hurdles in path of developers seeking a waiver, and found the ordinance unconstitutional on these grounds (McLaughlin, 2006). The judge informed the city of the language that should be added to bring the ordinance into compliance and it was added. Each of the inclusionary ordinances reviewed contains this important waiver provision but the model ordinance seeks to limit its practical usefulness.

The model ordinance requires that any developer seeking a waiver do so when getting first project approval. The model ordinance requires that four factors of inclusionary zoning be considered when a party seeks a waiver; 1) that the developer already has the choice between construction of units or paying an in-lieu fee; 2) that incentives will be offered to off set the cost of providing inclusionary housing; 3) that the units required must be sturdy, fit with the design but also affordable to the developer to build; and 4) that other housing subsidies will likely be available to the developer for construction of the required housing (H.R. No. 123). These caveats to the waiver provision allow the planning commission to weigh the benefits available to a developer against a request for a waiver to better determine when this important adjustment should be allowed.

Development review process

As one of the last steps before construction of inclusionary units begins, the development review process begins with a meeting between the developer and the administering agency,

which is to occur before the preliminary application is complete (H.R. No. 123). Upon issuance of a building permit the developer must inform the agency of how many affordable units are proposed (H.R. No. 123).

The San Francisco ordinance requires a more proactive role for the agency by necessitating that the city's planning department contact a developer within thirty days of the approval for a building permit to inform the developer of how many affordable units are required. Informing the developer of the ordinance requirements before receiving a planned number of inclusionary units may put the administering agency in a better position to avoid developer backlash. The ordinance adopted by New Orleans should not wait for developers to create a plan with too few units but should inform them of the required number upon approval of a building permit.

During the development review process the agency has the opportunity to purchase all inclusionary units in a development (H.R. No. 123). If the agency chooses to purchase all, or a portion, of the affordable units in a development it must close on the sale before the certificate of occupancy is issued (H.R. No. 123). Some ordinances, such as the Montgomery County ordinance, only allow a percentage of inclusionary units to be purchased by the city and some, like San Diego, do not even mention the possibility. Similar to the model ordinance, Denver gives "governmental entities and nonprofit organizations" first right of refusal for sale or lease to households receiving public assistance (Article IV Affordable Housing p. 8). Denver's ordinance does not clarify how many units can be sold to these entities however.

The housing task force must determine, based in part on the capacity of the agency overseeing the implementation of the ordinance, whether the agency should be given the option of purchasing all affordable housing units in a development or only a portion. The task force

must also determine how long the agency should be given to make this decision and close to the sale. If the administering agency has sufficient staff levels and adequate funding to market, maintain and manage these units then purchasing significant numbers may work well, however it could be difficult for a city agency with other prescribed duties to take on an additional duty of this magnitude.

The final section of the model ordinance is called “Administration of affordability in perpetuity” this section begins by recommending that inclusionary units be made permanently affordable (H.R. No. 123 p.17). San Francisco has executed this recommendation with their ordinance, and as of 2006, every inclusionary unit will maintain affordability “for the life of the project” (Ordinance No. 101-07 p. 16). It may be a bold move to recommend perpetual affordability at the outset of an ordinance, and the housing task force may rather set a deed restriction of 50 years and revisit this recommendation after the first few years of success.

Conclusion

The model ordinance contains regulations comparable in strength to each of the city ordinances reviewed -- San Francisco, Denver and San Diego-- which have produced inclusionary units at different rates of success. Indeed the model ordinance includes several regulations over and above these city ordinances; most notably an innovative strategy for realizing truly economically integrated communities which requires a developer to devote a fraction of the inclusionary housing units constructed to moderate, low and very low income households in each development (H.R. No. 123). Each of the city ordinances reviewed, however, offer different perspectives for achieving affordable housing through inclusionary zoning. For example, Denver offers cash subsidies for developers as one incentive, San

Francisco offers only a few fee waivers and San Diego offers no incentives (Article IV Affordable Housing; Ordinance No. 101-07; Ordinance No. 0-2003-135).

Overall, the model ordinance is an excellent tool to enable localities throughout the state to adopt strong, mandatory inclusionary zoning ordinances, but this tool must be adapted to fit each place. By comparing the model ordinance to three successful city inclusionary ordinances this chapter seeks to build on the lessons learned in these communities and adapt the appropriate lessons to an ordinance for New Orleans. As the model ordinance recommends, however, a housing task force must be convened to fully examine the local housing market to determine the exact shape of the inclusionary zoning ordinance for New Orleans. It will be beneficial, however, for this housing task force to examine the merits of regulations contained in other city ordinances and use these, where appropriate, to supplement the sturdy foundation laid by this model ordinance.

Conclusion

This thesis defines inclusionary zoning, explores its strengths and weaknesses through the literature, and investigates why the Louisiana legislature chose to support this particular method for supplying affordable housing. In addition, this thesis compares the model ordinance, passed by the Louisiana legislature in 2007, to inclusionary ordinances in San Francisco, Denver, and San Diego to determine strengths and weaknesses of each ordinance to ensure that New Orleans can adopt an informed mandatory ordinance.

Weaknesses

Inclusionary zoning is an important tool to harnesses the power of the local housing market to produce affordable units along side market rate units. However, if the local housing market is experiencing a downturn, with some exceptions, it will not produce significant amounts of affordable housing. Even in strong markets many areas employing inclusionary zoning also find that it is easier to mandate developers to build housing affordable to those earning 60% of AMI and above than for lower income households. Generally each ordinance has a special provision for producing some units affordable to 50% AMI and even 30% and below, frequently by allowing the local public housing authority or a qualified non-profit to purchase a percentage of units to be made available to lower incomes. But these two weaknesses, that inclusionary zoning is tied to the market place and may not produce units affordable to those lowest income levels, means that inclusionary zoning is only part of the solution for providing affordable housing in an area.

Strengths

One of the main strengths of inclusionary zoning is that when the market is producing housing it ensures that a portion of that housing is affordable. Equally as important, this

affordable housing is mixed into developments with market rate housing potentially allowing lower-income family's access to low poverty neighborhoods, quality school systems and other amenities. Most ordinances also require inclusionary units to be of the same quality as market rate units potentially lessening any stigma associated with affordable housing.

Need in New Orleans

To be effective inclusionary zoning is a tool must be carefully tailored to each community to ensure that its strengths outweigh its weaknesses. The model ordinance recommends an inclusionary housing task force be convened to undertake this local housing market research which can frequently take two years to complete. This task force must examine the local housing market to answer three main questions:

- 1) How large should a development be to trigger the inclusionary ordinance?
- 2) How many units should be set-aside as affordable in a development?
- 3) What incentives and how many are appropriate to offer developers as cost offsets for the construction of affordable units?

In answering these questions the housing task force should examine the unique challenges presented by post-Katrina New Orleans, including a historic pattern of relatively low-density development and the need for an emphasis on in-fill development. The housing task force should build on the strong foundation laid by the model ordinance by accepting several key provision including:

- build off site units in census tracts with less than 15% poverty
- include units affordable to very low-, low- and moderate-income households in *each* inclusionary development
- allow conversion of detached single family units

- allow a density bonus and reduced parking requirements as incentives
- consider a permanent deed restriction on inclusionary units
- provide for a self sustaining inclusionary housing fund

In addition, several provisions from ordinances reviewed should be considered including:

- San Diego's earned equity provision
- Denver's substantial rehabilitation credit for inclusionary benefits
- both San Diego and San Francisco's strong housing task force model
- San Francisco's resale provisions
- Denver and San Francisco's qualifiers for buildings over three stories

A housing task force composed of City and non-city housing experts must begin to review these issues and gain support for an effective ordinance soon in order to begin to re-establish the affordable housing stock lost in hurricane Katrina. A strong mandatory inclusionary zoning ordinance should be passed before any potential construction boom begins in earnest so that the maximum number of inclusionary units can be produced. Finally, inclusionary zoning is not a panacea that will solve the affordable housing crisis in New Orleans by itself, but when used in conjunction with existing federal housing programs, including the section eight program, project-based housing choice vouchers, and federally subsidized second mortgages, it becomes another valuable tool to produce affordable housing.

Further research

In conducting this research several ideas for future research surfaced including studying the effects of inclusionary ordinances passed at the State level. A few potential research questions include:

- How long do model ordinances passed at the State level typically take to start affecting change at the local level?
- To what extent does the local housing market play a role in how quickly or slowly inclusionary ordinances get passed?
- How effective have state model ordinances been at spurring localities to pass mandatory inclusionary ordinances?

Exploring these questions can help determine the boundaries for success with implementing ordinances throughout Louisiana.

Another area for further research is to examine Brunick's (2004) assertion that a low threshold and a high set-aside produce more affordable units than a high threshold and a low set-aside. Denver's example, and likely others, does not support this theory; therefore, a detailed study that controls for variations in the local housing market and in local inclusionary ordinances is needed to test this theory.

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